



MISSISSIPPI CODE 1972
Annotated

Crimes

Title 97

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VOLUME 21

TITLE 97. CRIMES

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME TWENTY-ONE

CRIMES

§§ 97-1-1 to 97-45-31

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2006 REGULAR LEGISLATIVE SESSIONS



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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2006 Replacement Volume 21 of the Mississippi Code of 1972 Annotated represents material appearing in both the original 1973 bound volume and the 2000 Replacement Volume 21, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2006 Regular Legislative Sessions.

This volume contains the text of Title 97, of the Mississippi Code of 1972 Annotated, as amended through the 2006 Regular Legislative Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates up to April 13, 2006, and decisions of the appropriate federal courts with decision dates up to April 6, 2006. These cases will be printed in the following reporters:

- Southern Reporter, 2nd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 2nd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 5th Series
- American Law Reports, Federal Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

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PUBLISHER'S FOREWORD

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

August 2006

LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
- Advance Sheets
- Amendment Notes
- Analyses
- Attorney General Opinions
- Code Status
- Comparable Legislation from other States
- Court Rules
- Cross References
- Editor's Notes
- Effective Dates
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- Placement of Notes
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- Research and Practice References
- Source Notes
- Statute Headings
- Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

The text of Chapter 394 is printed in Volume 1, on the pages following the Publisher's Foreword. In addition, Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooper-

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ation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

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FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note

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will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indentation scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute section or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

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RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Fifth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

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CHAPTER 1

Conspiracy, Accessories and Attempts

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§ 97-1-1. Conspiracy.

If two (2) or more persons conspire either:

- (a) To commit a crime; or
- (b) Falsely and maliciously to indict another for a crime, or to procure to be complained of or arrested for a crime; or
- (c) Falsely to institute or maintain an action or suit of any kind; or
- (d) To cheat and defraud another out of property by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property or thing by false pretense; or
- (e) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use of employment thereof; or
- (f) To commit any act injurious to the public health, to public morals, trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws; or
- (g) To overthrow or violate the laws of this state through force, violence, threats, intimidation, or otherwise; or
- (h) To accomplish any unlawful purpose, or a lawful purpose by any unlawful means; such persons, and each of them, shall be guilty of a felony and upon conviction may be punished by a fine of not more than five thousand dollars (\$5,000.00) or by imprisonment for not more than five (5) years, or by both.

Provided, that where the crime conspired to be committed is capital murder or murder as defined by law or is a violation of Section 41-29-139(b)(1) or Section 41-29-139(c)(2)(D), Mississippi Code of 1972, being provisions of the Uniform Controlled Substances Law, the offense shall be punishable by a fine of not more than five hundred thousand dollars (\$500,000.00) or by imprisonment for not more than twenty (20) years, or by both.

Provided, that where the crime conspired to be committed is a misdemeanor, then upon conviction said crime shall be punished as a misdemeanor as provided by law.

SOURCES: Codes, 1892, § 1006; Laws, 1906, § 1084; Hemingway's 1917, § 810; Laws, 1930, § 830; Laws, 1942, § 2056; Laws, 1954, Ex. ch. 20; Laws, 1968, ch. 343, § 1; Laws, 1981, ch. 488, § 1, eff from and after passage (approved April 15, 1981).

Cross References — Conspiracy under Mississippi Code of Military Justice, see §§ 33-13-461 et seq.

Conspiracy to obtain payment or allowance by false or fraudulent Medicaid claim, see § 43-13-211.

Disqualification of persons convicted of conspiracy to commit crime to hold office in labor organizations, etc., see § 71-1-49.

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1. In general; validity.

By its very nature, “conspiracy” is joint or group offense requiring concert of free will and, furthermore, conspiracy requires union of minds of conspirators. *Franklin v. State*, 676 So. 2d 287 (Miss. 1996).

A defendant’s convictions for both murder-for-hire capital murder under § 97-19(2)(d) and conspiracy to commit capital murder under this section violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in § 97-19(2)(d) completely encompasses the agreement or conspiracy to commit capital murder. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

This section, in conjunction with § 83-19-31 and former § 83-19-73 [see now

§ 83-19-31], is not void for vagueness due to the lack of written accounting procedures to be used to determine the minimum capital and surplus requirements of an insurance company. *Gardner v. State*, 531 So. 2d 805 (Miss. 1988).

In a prosecution for conspiracy to sell heroin, the trial court properly overruled defendant’s plea in bar based on the two year statute of limitations, where defendant was shown to be a conspirator in a drug-selling ring, and where the proof showed that a co-conspirator, tried jointly with defendant, had illegally sold heroin to a narcotics agent within the two-year span prior to the indictment of defendant; once a defendant is established as being a conspirator, he remains a part of the conspiracy until he has extricated himself therefrom by communicating his abandonment in a manner reasonably expected to reach his co-conspirators. *Norman v. State*, 381 So. 2d 1024 (Miss. 1980).

When two or more persons are confederated for purpose of murdering another, and in furtherance of such common design such person is killed by one of the conspirators, the killing is the act of each regardless of which inflicted the mortal wound. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950).

2. —First Amendment considerations.

First Amendment precluded imposition of liability on participants in economic boycott against merchants in locality for all damages resulting from boycott, even though some of them engaged in violence and threats of violence, and even though such violence and threats contributed to success of boycott, because boycott was

otherwise nonviolent, politically motivated, and designed to force governmental and economic change and to effectuate rights guaranteed by Constitution itself; however, First Amendment did not bar recovery from those who engaged in violence or threats of violence for losses proximately caused by their unlawful conduct. *NAACP v. Claiborne Hdwe. Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), reh'g denied, 459 U.S. 898, 103 S. Ct. 199, 74 L. Ed. 2d 160 (1982).

3. Elements; generally.

Conspiracy to commit armed robbery required only the agreement among two or more people to commit the crime, while armed robbery required the use of a deadly weapon which placed an individual in fear of immediate injury. Actual robbery required the establishment of several different facts than the agreement to commit the act; thus, the offenses were two separate crimes and defendant was not subjected to double jeopardy by convictions for both. *Stovall v. State*, 873 So. 2d 1056 (Miss. Ct. App. 2004).

This section does not require that all persons charged in the conspiracy be convicted for the conviction of one of the conspirators to be valid. *Newell v. State*, 754 So. 2d 1261 (Miss. Ct. App. 1999).

Crime of conspiracy to possess more than one kilogram of marijuana was complete upon agreement to exchange money for marijuana. *Morgan v. State*, 703 So. 2d 832 (Miss. 1997), reh'g withdrawn 703 So. 2d 864.

For there to be "conspiracy," there must be recognition on part of conspirators that they are entering into common plan and knowingly intend to further its common purpose; conspiracy agreement need not be formal or express, but may be inferred from circumstances, particularly by declarations, acts, and conduct of alleged conspirators. *Franklin v. State*, 676 So. 2d 287 (Miss. 1996).

If there is an agreement, then knowledge of that agreement follows. The agreement need not be formal or express but may be inferred from the circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. *Ford v. State*, 546 So. 2d 686 (Miss. 1989).

The crime of conspiracy is committed when 2 or more persons combine to accomplish an unlawful purpose. Each conspirator must recognize that he is entering into a common plan with the other and each must intend to further a common and unlawful purpose. *Taylor v. State*, 536 So. 2d 1326 (Miss. 1988).

In order for an individual to be a co-conspirator, there must be a recognition on his part that he is entering into some type of common plan, and knowingly intends to further its common purpose. *Watson v. State*, 521 So. 2d 1290 (Miss. 1988).

To constitute an individual a co-conspirator, there must be a recognition on his part that he is entering into some kind of common plan, and knowingly intends to further its common purpose. *McDonald v. State*, 454 So. 2d 488 (Miss. 1984).

It is elementary that neither association with conspirators nor knowledge of illegal activity constitutes proof of participation in a conspiracy. *McDonald v. State*, 454 So. 2d 488 (Miss. 1984).

At least 2 persons must agree for a conspiracy to exist. *Moore v. State*, 290 So. 2d 603 (Miss. 1974).

A conspiracy to commit a crime is a complete offense, separate and distinct from, and does not become merged in, the commission of the crime contemplated by the conspiracy. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488 (1944).

4. —Overt act requirement.

The offense is complete without showing an overt act in furtherance of the conspiracy. *Davis v. State*, 485 So. 2d 1055 (Miss. 1986).

Neither at common law nor under this section is an overt act pursuant to the conspiracy necessary for the completion of the crime. *Moore v. State*, 290 So. 2d 603 (Miss. 1974).

Neither at common law nor under this section [Code 1942, § 2056] is an overt act pursuant to a conspiracy necessary for the completion of the crime. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488 (1944).

5. Relation to underlying crime.

Because the offenses of possession under Miss. Code Ann. § 41-29-313 and conspiracy were considered separate criminal violations separately punishable, no dou-

ble jeopardy principle was violated. *Hunt v. State*, 863 So. 2d 990 (Miss. Ct. App. 2004).

Although a substantive offense and a conspiracy to commit are 2 separate offenses, where there is a common nucleus of operative facts existing in both indictments, and where the ultimate fact has been determined in a prior acquittal of the substantive offense by a final judgment, a conspiracy trial is barred thereafter under the constitutional double jeopardy provision. *Griffin v. State*, 545 So. 2d 729 (Miss. 1989).

The prosecution will not be permitted to convict an accused under the guise of a conspiracy charge where it could not proceed on, and convict for, the completed act, because of the entrapment defense. *Barnes v. State*, 493 So. 2d 313 (Miss. 1986).

Conspiracy is a complete offense in itself, distinct from the commission of the crime contemplated by the conspiracy, and does not become merged with that crime. *Davis v. State*, 485 So. 2d 1055 (Miss. 1986).

One who "conspires" with himself or with another who by law is precluded from coconspirator status is not guilty of crime of conspiracy in Mississippi; person who hires middleman to secure services of third person to commit murder, and middleman, may be convicted of conspiracy on basis of agreement with each other even though third person hired to actually carry out murder is in fact police confidential informant lacking coconspirator status. *James v. State*, 481 So. 2d 805 (Miss. 1985).

Where one of 2 persons who conspired to do an illegal act is an officer who acted in the discharge of his duties, or is an informer for the state who entered into the conspiracy for the purpose of informing on the other party, such other person cannot be convicted of conspiracy. *Moore v. State*, 290 So. 2d 603 (Miss. 1974).

Since a conspiracy to commit a crime is different from the crime that is the object of the conspiracy, the first necessarily involves joint action while the other does not. *Moore v. State*, 290 So. 2d 603 (Miss. 1974).

6. Relation to accessory before, after, fact.

Use of the word "conspiracy" to label

certain criminal conduct does not preclude use of the verb "to conspire" and the noun "conspiracy" to connote the sort of participation and involvement in the planning of a crime which is at least in part requisite to being guilty as an accessory before the fact. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Although defendant may very well have been an accessory after the fact under § 97-1-5, the state never made a jury issue that he was engaged in a conspiracy under this section, where he had been trying to extricate his brother and a very good friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495 (Miss. 1984).

7. Entrapment.

Defendant who was charged with drug offenses following reverse sting operation wherein narcotics officers sold drugs owned by State was not entrapped as matter of law, as drug conspiracy in which defendant was allegedly involved was complete upon an agreement, between defendant and unindicted coconspirator, prior to involvement by law enforcement. *Morgan v. State*, 703 So. 2d 832 (Miss. 1997), reh'g withdrawn 703 So. 2d 864.

Adverse sale or reverse undercover operation, in which narcotics officers attempted to sell or furnish marijuana owned by the state to defendant and his colleagues, constituted entrapment, since the predisposition to commit the crime was instigated by the narcotics officers, and the defense of entrapment could be interposed to the charge of conspiracy to possess marijuana without the defendant taking the stand to testify. *Barnes v. State*, 493 So. 2d 313 (Miss. 1986).

The prosecution will not be permitted to convict an accused under the guise of a conspiracy charge where it could not proceed on, and convict for, the completed act, because of the entrapment defense. *Barnes v. State*, 493 So. 2d 313 (Miss. 1986).

8. Indictment.

Conspiracy count of the indictment was fatally defective where no crime was charged; in an assault case, the victim had to be identified in some manner as an essential fact describing the crime. *Sand-*

erson v. State, 881 So. 2d 878 (Miss. Ct. App. 2004).

It is not necessary that an indictment charging conspiracy include the penalty sections of the code applicable to the underlying crime in order to trigger the conspiracy provisions of this section, and to properly charge a felony. *Gardner v. State*, 531 So. 2d 805 (Miss. 1988).

Allegation of an overt act pursuant to a conspiracy, in a conspiracy indictment, does not convert the indictment into one for the commission of the crime contemplated by the conspiracy, even though the overt act charged is commission of the crime contemplated by it. *Martin v. State*, 197 Miss. 96, 19 So. 2d 488 (1944).

An indictment charging two defendants with defrauding and conspiring to defraud the state out of the title to tax forfeited public lands by illegally purchasing such lands for a corporation in violation of the public policy of the state as exemplified by Code of 1930, § 6027, while not charging an offense under Code of 1930, § 833, was sufficient to charge a misdemeanor under this section [Code 1942, § 2056], the word “feloniously” in the indictment being mere surplusage. *State v. Russell*, 185 Miss. 13, 187 So. 540 (1939).

An indictment charging the defendant with defrauding and conspiring to defraud the state out of tax forfeited public lands by illegally purchasing such lands for a corporation in violation of § 6027 of the Code of 1930, did not charge an offense under this section [Code 1942, § 2056], the words “shall conspire to defraud the state of Mississippi, or any department or political subdivision thereof, in any manner, or for any purpose,” under the rule of *ejusdem generis* limited their application to the specific acts made offenses under the statute which did not include that charged in the indictment. *State v. Russell*, 185 Miss. 13, 187 So. 540 (1939).

9. Evidence.

Defendants’ conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more

probable or less probable than without the evidence. *Farris v. State*, 906 So. 2d 113 (Miss. Ct. App. 2004).

Where the victim claimed that defendant and his accomplice held her down, beat her in the face, and raped her, the trial court properly convicted defendant of two counts of sexual battery and one count of conspiracy to batter. *Norris v. State*, 893 So. 2d 1071 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father’s convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Defendant picked up drugs at a house, defendant in truck was stopped by the trooper, the trooper discovered the cocaine under the seat, and the truck belonged to defendant; thus, the evidence showed that defendant constructively possessed the drugs, that defendant was guilty of conspiracy to possess cocaine and of possession of cocaine with intent to sell, and that the trial court did not err in denying defendant’s motion for judgment notwithstanding the verdict or motion for new trial. *Smith v. State*, 839 So. 2d 489 (Miss. 2003).

10. —Admissibility.

Evidence of an alleged assault on a police officer which occurred during a chase across state lines subsequent to the robbery of a store, was admissible in the ensuing prosecution for robbery and conspiracy to commit robbery, even though the assault charge was dismissed for lack of jurisdiction, since the assault was so interrelated with the events at the store that it constituted a single occurrence.

Jones v. State, 567 So. 2d 1189 (Miss. 1990).

Statements made by co-conspirators after the objectives of the conspiracy have either succeeded or failed are inadmissible. *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. *Mitchell v. State*, 495 So. 2d 5 (Miss. 1986).

Threats made by conspirator out of presence of accused inadmissible before conspiracy is established. *Rich v. State*, 124 Miss. 272, 86 So. 770 (1921).

11. —Circumstantial.

Circumstantial evidence is sufficient to establish the existence of a conspiracy. *Watson v. State*, 722 So. 2d 475 (Miss. 1998).

Existence of conspiracy, and defendant's membership in it, may be proved entirely by circumstantial evidence. *Franklin v. State*, 676 So. 2d 287 (Miss. 1996).

The trial judge is given great discretion in receiving circumstantial evidence where a defendant is on trial for conspiracy. *Peoples v. State*, 501 So. 2d 424 (Miss. 1987).

Conspiracy may be shown by circumstantial evidence. *Pickett v. State*, 139 Miss. 529, 104 So. 358 (1925).

Criminal conspiracy may be proved by the acts of parties, or by circumstances as well as by their agreement. *Osborne v. State*, 99 Miss. 410, 55 So. 52 (1911).

12. —Hearsay.

Statements made by a coconspirator of a party during the course and in furtherance of the conspiracy are not hearsay, but are factual elements of the criminal offense and not mere statements. *Ponthieux v. State*, 532 So. 2d 1239 (Miss. 1988).

13. —Proof of subsequent offense.

Subsequent offense may be proved, to show criminal knowledge or intent. *King v. State*, 123 Miss. 532, 86 So. 339 (1920).

14. — Sufficiency.

Where defendant's accomplice cooperated with police and stated in a recorded conversation that defendant had come to Mississippi "to pick up drugs," the evidence was sufficient to support defendant's conviction for conspiracy to distribute marijuana. Police found twenty-seven pounds of marijuana that had been transferred to defendant's vehicle. *Walker v. State*, 911 So. 2d 998 (Miss. Ct. App. 2005).

Where defendant and a conspirator hid their car, attempted to remove tires from a vehicle in a car lot at two o'clock in the morning, and tried to escape when confronted by authorities, the evidence supported his conviction for conspiracy to commit grand larceny. A jury could reasonably infer that defendant lacked consent to remove the tires; the State was not required to present direct testimony that defendant lacked consent. *Brownlee v. State*, 912 So. 2d 1000 (Miss. Ct. App. 2005).

Court properly denied defendant's motion for a judgment notwithstanding the verdict after he was convicted of conspiracy to commit armed robbery because there was nothing to indicate an insufficiency of evidence for fair-minded jurors to convict him of conspiracy pursuant to Miss. Code Ann. § 97-1-1(a)-(h). One witness offered direct testimony as to having seen defendant place a stocking over his face before the commission of the crime; store clerk also identified defendant as one of her assailants. *Young v. State*, 910 So. 2d 26 (Miss. Ct. App. 2005).

There was sufficient evidence to support defendant's conviction under Miss. Code Ann. § 41-29-313 and for conspiracy given that defendant had purchased an unusu-

ally large number of pseudoephedrine packages, defendant attempted to conceal the packages from police, and defendant admitted that defendant was requested to purchase the packages by another individual in return for cash when defendant knew that the individual had been involved in the manufacture of methamphetamine. *Hunt v. State*, 863 So. 2d 990 (Miss. Ct. App. 2004).

Although a witness was unable to testify about the correct color of a get-away car, there was sufficient evidence to support convictions for armed robbery and conspiracy to commit armed robbery based on the identification of witnesses and the testimony of another perpetrator. *Quinn v. State*, 873 So. 2d 1033 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Defendant and the first co-defendant entered the car, the first co-defendant took the victim's money at gunpoint which was divided equally, a second co-defendant then shot and killed the victim with the gun defendant had brought, and defendant and the first co-defendant testified that they had planned the robbery, thus, the evidence was sufficient to support defendant's convictions for conspiracy to commit robbery with a deadly weapon, robbery with a deadly weapon, and manslaughter. *Harrington v. State*, 859 So. 2d 1054 (Miss. Ct. App. 2003).

Defendant picked up drugs at a house, defendant in truck was stopped by the trooper, the trooper discovered the cocaine under the seat, and the truck belonged to defendant; thus, the evidence showed that defendant constructively possessed the drugs, that defendant was guilty of conspiracy to possess cocaine and of possession of cocaine with intent to sell, and that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or motion for new trial. *Smith v. State*, 839 So. 2d 489 (Miss. 2003).

Evidence that the defendant gave a gun to another man who had said he wanted to shoot the victim, told the man the victim was outside, was in the alley with the man who shot the victim when the victim was shot, was seen running from the alley with the other man after the shooting

while they both carried guns, and asked the other man "Did you get him?" was sufficient to support a conviction for conspiracy to commit murder. *Brown v. State*, 796 So. 2d 223 (Miss. 2001).

Evidence was sufficient to establish a conspiracy to commit murder where a witness testified that (1) before the shooting, while he, the defendant, and a coconspirator were together, the coconspirator asked the defendant, "Are you going to do that?" and the defendant responded, "Yeah, I'm fixing to do that," and (2) after the shooting, the coconspirator asked "did you do that?" and the defendant responded "Yeah, I got that m*****f*****." *Ellis v. State*, 778 So. 2d 114 (Miss. 2000).

Evidence was sufficient to establish a conspiracy to sell cocaine where (1) a confidential informant testified that upon entering the coconspirator's residence, he was directed to a bedroom, where he found the defendant and the coconspirator, (2) the coconspirator then asked the informant what he wanted, and the informant responded that he wanted to purchase two rocks of crack cocaine, (3) the defendant then retrieved a matchbox and directed the coconspirator to "serve" him, (4) the informant then purchased two rocks of cocaine for \$25, and (5) a police officer listened to the transaction over a radio transmitter with which the informant had been equipped and testified to the events. *Hervey v. State*, 764 So. 2d 457 (Miss. Ct. App. 2000).

Testimony of a co-conspirator was not too late to establish the conspiracy where there was sufficient prior evidence of the existence of a conspiracy based on the testimony of the victims, the arresting officer's investigation, and defendant's own statement. *Applewhite v. State*, 753 So. 2d 1039 (Miss. 2000).

Conviction reversed where evidence was insufficient to show a recognition on the part of the two sets of conspirators that they were entering into a common plan, knowingly intending to further its common purpose. *Lee v. State*, 756 So. 2d 744 (Miss. 1999).

Evidence was sufficient to establish a conspiracy to defraud a conservatorship where (1) the defendant and others received what appeared to be an excessive

and unreasonable amount of money from the conservatorship, (2) the defendant's decisions with regard to expenditures for security were not warranted, especially as paying family and friends \$25 per hour for questionable security was not justified, and (3) an attorney drafted and submitted petitions and orders for the defendant's unjustifiable expenditures, and a chancellor with whom the defendant had a close personal relationship placed his stamp of approval and the appearance of legality on these conservatorship expenditures by signing the orders. *Morgan v. State*, 741 So. 2d 246 (Miss. 1999).

Evidence was insufficient to support a conviction for conspiracy to sell a controlled substance arising from the introduction by the defendant's alleged coconspirator of a confidential informant to the defendant and negotiations for a sale of marijuana since one cannot be convicted of conspiring with a confidential informant and since there simply was no evidence that the defendant knew that his alleged coconspirator would bring potential customers to him in order to facilitate the sale of illegal drugs. *McDougle v. State*, 721 So. 2d 660 (Miss. Ct. App. 1998).

As long as the defendant was furnishing the capital for the acquisition of illegal drugs and the drugs were being purchased at her specific direction or request, she came into constructive possession of the drugs at the time of purchase and was the "owner" of the drugs for purposes of analysis of whether she conspired to commit a crime. *Martin v. State*, 726 So. 2d 1210 (Miss. Ct. App. 1998).

Evidence was insufficient to support a conviction for conspiracy to sell a controlled substance where a witness admitted that he knew that a third party wanted to buy marijuana and that the defendant was in the business of selling marijuana, but there was no evidence that the defendant knew that the witness would bring potential customers to him in order to facilitate a sale of marijuana. *McDougle v. State*, 721 So. 2d 660 (Miss. Ct. App. 1998).

Defendant's convictions for sale of controlled substance and conspiracy to sell controlled substance were supported by

evidence that defendant sold two rocks of crack cocaine to undercover informant and that defendant conspired with relative to sell, and did sell, two rocks of crack cocaine to undercover officer next day. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Sole evidence of conspiracy, that juvenile defendants went with other boys to "mess with" victim, was insufficient to support their convictions for conspiracy to commit murder; during period defendants and others threw rocks at victim and kicked him, one of boys in group left and returned with gun, with which he shot victim, and he thereafter pointed gun at one of defendants and another boy because "he knew [they were] gon' to tell it." *Franklin v. State*, 676 So. 2d 287 (Miss. 1996).

The evidence was insufficient to support a conviction for conspiracy to sell cocaine where the defendant directed the buyer to the seller's house, accompanied the buyer to the door, knocked on the door, told the seller that they wanted to purchase cocaine, and remained with the buyer and seller while the sale took place, but there was no evidence that the seller knew that the defendant would bring the buyer to his home; although an agreement to sell cocaine could possibly be inferred, there was insufficient evidence of the alleged conspirators' recognition that they were "entering into a common plan and knowingly intended to further its common purpose." *Johnson v. State*, 642 So. 2d 924 (Miss. 1994).

The uncorroborated testimony of an alleged accomplice was insufficient to support a conviction for conspiracy to manufacture marijuana where the accomplice contradicted himself concerning payments allegedly made to him by the defendant, and another witness' testimony substantially impeached that of the accomplice; although the other witness had reasons for bias and a fair-minded juror could reject his testimony as unconvincing, it could not be discarded so completely as to eliminate reasonable doubt, particularly when combined with the accomplice's self-contradictory statements. *Flanagan v. State*, 605 So. 2d 753 (Miss. 1992).

Evidence that a police officer, while standing outside an apartment door, overheard a conversation between 3 people inside the apartment concerning a sale of cocaine, was insufficient to support a conviction for conspiracy to distribute the cocaine where the statements overheard by the officer were not identified as coming from any particular person. *Mickel v. State*, 602 So. 2d 1160 (Miss. 1992).

The evidence was insufficient to support a conviction of conspiracy with the intent to distribute cocaine where the only evidence of an agreement were statements made by unidentified occupants of an apartment—"pass me the pipe," "we have got to get this stuff sold-I need the money," and "there is plenty more where that came from"—which were heard by a police detective just before he entered the apartment, since this evidence did not prove that the defendant himself was engaged in a conspiracy to distribute cocaine, so that only surmise of a criminal conspiracy existed. *Thomas v. State*, 591 So. 2d 837 (Miss. 1991).

The evidence was sufficient to support a conviction of conspiracy to commit perjury with respect to the death of an infant at the defendant's apartment, where there was testimony that the defendant stated that he didn't want the police to know that he and a friend had been at the apartment, the defendant's daughter, who also resided at the apartment, did not reveal to the police that the defendant had been at the apartment, the daughter stated that she had agreed to stick to that story and she continued in that agreement when she testified before the grand jury, the other resident of the apartment testified that the defendant did not want the police to know that he and a friend had been at the apartment, she did not tell the police that they had been there, and she understood that she and the others had an agreement not to mention that the defendant and his friend had been at the apartment after the baby's death had been discovered. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

The evidence was insufficient to support a finding that the defendant conspired with her sister to sell cocaine where the only evidence regarding the sister showed

that she was present at the time the police searched a trailer she owned and found residues of cocaine, she screamed when the police entered the trailer, she claimed that money found during the search was hers, and a broken test tube with cocaine residue was found in her purse; none of this evidence established an agreement, nor did it imply an agreement, since evidence that the defendant sold cocaine and that her sister may have possessed cocaine for personal use left too much to the realm of speculation and conjecture. *Clayton v. State*, 582 So. 2d 1019 (Miss. 1991).

The evidence was insufficient to support a conspiracy conviction stemming from attempts to influence jurors, where the only evidence which suggested that the defendant was a member of the conspiracy was that she accompanied her husband when he discussed the conspiracy with a coconspirator, and it was possible that the phraseology used was so general that a disinterested or unknowledgeable bystander would not have understood specifically what they were talking about. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

The evidence was sufficient to support convictions of conspiracy and bribery stemming from attempts to influence jurors, where the secretary for one of the defendant's attorneys testified that the defendant did some of the talking when he and his father asked her to type up a list containing the jurors' names and that the defendant took the list from her and made photocopies of it, a witness testified that the defendant drove his father to the witness' home where the father discussed the scheme to bribe a juror while the defendant listened, a juror testified that during the trial the defendant and his father entered the store where she worked, though they left without speaking to her, and an investigator testified that he discovered the photocopies of the jury list under the seat of the defendant's truck. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

The evidence was sufficient to support a conviction for conspiracy, in spite of the defendant's argument that the evidence failed to prove beyond a reasonable doubt that he and the alleged co-conspirator ever agreed to commit a crime or were

even acquainted and his suggestion that there was a lack of seriousness in his intentions, where the defendant made substantially incriminating statements to the sheriff, the record included a tape recording of the defendant's conversations with a friend who was allegedly engaged to kill the victim, and the alleged co-conspirator appeared at the time suggested by the plan to find the victim's body. *Mitchell v. State*, 572 So. 2d 865 (Miss. 1990).

The evidence was insufficient to support a verdict for conspiracy to commit robbery at a convenience store because there was neither proof of common design nor understood purpose to commit a robbery where the evidence showed only that there were 4 people riding in a car, the owner of the car testified that he stopped at the convenience store in order to let one man buy beer and to let the defendant use the rest room, and he testified that there were no conversations among the 4 before stopping at the store. *Jones v. State*, 567 So. 2d 1189 (Miss. 1990).

Defendant's conviction of conspiracy to murder her husband was supported by evidence showing that up to 2 days before her husband disappeared she had been living with an alleged coconspirator; that she had kept letters written to her by the alleged coconspirator stating that he wished the husband could be taken out of the picture; that a couple days before the husband's death she gave to the alleged coconspirator a gun her husband had bought for her, and had not questioned the coconspirator about the gun after her husband's disappearance; and on the night when the husband was last seen alive, she had called the husband and told him that her car had stalled at a place not far from where the husband's body was found 2 days later. *Peoples v. State*, 501 So. 2d 424 (Miss. 1987).

Defendant's conviction of conspiracy to possess heroin was sustained by evidence showing that she had traveled 2,000 miles from San Diego, California to Jackson, Mississippi with codefendant, that a telephone call to her parents' home notified co-defendant of the arrival of the heroin, that she waited in the car while co-defendant picked up heroin, and that her purse

contained a substance used as cutting agent for heroin. *Davis v. State*, 485 So. 2d 1055 (Miss. 1986).

14.5. — Sufficiency conspiracy.

State's theory of the case was that defendant and the driver of the car that pulled into the victim's driveway had engaged in a prior conspiracy to steal the victim's truck rims, but there was no evidence of a "union of the minds" of defendant and the driver because the evidence showed that (1) when the car pulled into the driveway, defendant ran and hid behind the house and, clearly, if the two parties had been acting in concert defendant would have recognized his co-conspirator and not hid; (2) defendant left on foot and not in the car, even though the car was still in the driveway; and (3) although the rims were removed from the truck, defendant made no attempt to put them into the car that was in the driveway; thus, although the appearance of the car in the victim's driveway was somewhat puzzling, a finding that its appearance was due to the furtherance of a conspiracy to steal the rims off of the truck would be an impermissible stretch. Therefore, the evidence was insufficient to support defendant's conviction for conspiracy to commit grand larceny. *Smith v. State*, 881 So. 2d 908 (Miss. Ct. App. 2004).

15. —Other.

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Conviction of conspiracy was not supported by evidence which, although rais-

ing strong suspicions that defendant and others were illegally involved in drug related activities, failed to show that they had intended or agreed to sell, barter, transfer, and distribute marijuana. *McCray v. State*, 486 So. 2d 1247 (Miss. 1986).

16. Practice and procedure; trial.

Trial court had jurisdiction over conspiracy charge, although defendant allegedly agreed with coconspirator to rob victim while they were in Louisiana, where victim was robbed in Mississippi. *Taylor v. State*, 682 So. 2d 359 (Miss. 1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. *House v. State*, 645 So. 2d 931 (Miss. 1994).

At trial of charge of conspiracy to distribute cocaine, a series of questions posed by the prosecutor on cross-examination of defendant as to his involvement with selling cocaine did not require the trial court to grant a mistrial on its own motion, where the prosecutor stayed within the latitude allowed for cross-examination and the trial was conducted in conformity with the law. *Temple v. State*, 498 So. 2d 379 (Miss. 1986).

In an action to enjoin enforcement of the statute, the court, in lieu of injunctive relief, declared the rights of complainants to the use of public facilities. *Clark v.*

Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951, 84 S. Ct. 440, 11 L. Ed. 2d 312 (1963).

In an action for an injunction restraining defendants from enforcing or executing subsection (1) of Code 1942, § 2046.5, subsection (7) of this section [Code 1942, § 2056] and Code 1942, § 4065.3 against the plaintiffs by preventing them from using public recreational facilities on an integrated and equal basis solely on the ground of race and color, the federal three-judge statutory court would be dissolved and the case left for decision of a single federal district judge, where it appeared that what plaintiffs actually sought was to attack a pattern or practice rather than the constitutional validity of a statute or actions under it. *Clark v. Thompson*, 204 F. Supp. 30 (S.D. Miss. 1962).

17. —Jury instructions.

In a prosecution for conspiracy to commit grand larceny involving the stealing of a portable generator, a requested instruction, which stated that before the defendant could be found guilty of conspiracy, the evidence had to show that the defendants "did willfully, unlawfully and feloniously conspire, confederate and agree together and with each other to unlawfully commit grand larceny by stealing a generator ..." was properly denied since it misstated the law in that it stated that the defendant must have agreed to steal the generator by a more formal agreement than is required. *Rose v. State*, 556 So. 2d 728 (Miss. 1990).

On trial of felony charge of conspiring to distribute more than one kilogram of marijuana, giving of instructions which would allow the jury to find defendants guilty based on acts in furtherance of the conspiracy without requiring a separate finding that they knowingly became a part of the agreement to commit the crime, while erroneous, did not require reversal, where defendants failed to object, and the deficiency of the instructions was cured by other instructions given. *Gray v. State*, 487 So. 2d 1304 (Miss. 1986).

Giving of conspiracy instruction which allows jury to convict alleged conspirator upon finding that conspirator has conspired only with person legally precluded

from coconspirator status, rather than with coconspirator, is reversible error. *James v. State*, 481 So. 2d 805 (Miss. 1985).

Where evidence also shows an assault and battery, an instruction permitting a conviction thereon is error. *King v. State*, 123 Miss. 532, 86 So. 339 (1920).

18. Penalties.

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Sentences of 20 years for conspiracy to sell controlled substance and 30 years on each of two counts of sale of controlled substance, all to run consecutively, did not constitute cruel and unusual punishment, given defendant's extensive juvenile record that began when he was ten years old. *Herring v. State*, 691 So. 2d 948 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

No minimum sentence exists for crime of conspiracy. *Simpson v. State*, 678 So. 2d 712 (Miss. 1996).

Defendant could not be sentenced to greater penalty than 5 years and/or \$5,000 fine as allowed under general conspiracy statutory provision, and could not be sentenced for conspiracy as first-offender to sell greater than one ounce but less than one kilogram of marijuana, despite defendant's involvement in sale of more than one ounce but less than one kilogram of marijuana, where indictment

as to charged conspiracy was silent as to quantity of marijuana involved. *Clubb v. State*, 672 So. 2d 1201 (Miss. 1996).

Section 41-29-139(a)(1) is merely the provision that defines the prohibitive acts and § 41-29-139(b)(1) is the sentencing provision for subsection (a); the penalty section for a violation of section (a)(1) is in section (b)(1). The discrepancy in the code section is due to the fact that the conspiracy statute section dealing with enhanced sentencing for controlled substances—this section—directly refers to the sentencing provision under § 41-29-139. Thus, a sentence of 20 years imprisonment with 5 years suspended and a fine of \$10,658.50 did not exceed that provided for in this section where the defendant was convicted of conspiracy to possess cocaine with intent to sell, barter, transfer or distribute, since this section provides for a fine not to exceed \$500,000 and/or imprisonment for not more than 20 years where the crime conspired to be committed is a violation of § 41-29-139(b)(1). *Lane v. State*, 562 So. 2d 1235 (Miss. 1990).

Trial court's imposition of 10 year prison sentence and a \$10,000 fine on a defendant convicted of conspiracy to sell cocaine, who contended that he had had an opportunity to plead guilty to the charge for which he was convicted, and in return receive a recommendation for a 3 year sentence with no fine, was not a proscribed enhancement of sentence because defendant exercised his right to a jury trial where the record reflected that the trial judge, who was unaware of the guilty plea negotiation, remained circumspect and unbiased. *Temple v. State*, 498 So. 2d 379 (Miss. 1986).

19. Sentencing.

Appellate court affirmed the denial of an inmate's motion for post-conviction relief on the grounds that her sentences were excessive as the sentences imposed for her conviction for Miss. Code Ann. § 97-1-1 were within the statutory range. *Lee v. State*, 918 So. 2d 87 (Miss. Ct. App. 2006).

Where defendant was convicted for conspiracy to commit grand larceny based on evidence that he and a conspirator attempted to remove tires from a vehicle in

a car lot at two o'clock in the morning, the trial court properly sentenced defendant to five years, with three suspended. His sentence was clearly within statutory limits and not disproportionate to the crimes for which he was convicted. *Brownlee v. State*, 912 So. 2d 1000 (Miss. Ct. App. 2005).

Where appellant pled guilty to the armed robbery of a fast food restaurant, and his accomplice pled guilty to conspiracy to commit armed robbery for driving the "getaway car," the trial court did not err in sentencing appellant to seven years while his accomplice only received an effective sentence of one year. The men performed different tasks in the crime. *Edmond v. State*, 906 So. 2d 798 (Miss. Ct. App. 2004).

Maximum sentence allowed by law for conspiracy to manufacture methamphetamine is 20 years in prison and a fine of \$ 500,000. Hence, defendant's sentence of

20 years in prison, with 12 years suspended and five years of post-release supervision, upon his plea of guilty to conspiracy to manufacture methamphetamine, did not exceed the statutory minimum punishment. *Sweat v. State*, 910 So. 2d 12 (Miss. Ct. App. 2004).

Defendant's sentence after pleading guilty to one count of sale of a controlled substance and one count of conspiracy was proper where his sentence was only one-fifth of the maximum permitted, Miss. Code Ann. §§ 41-29-139(b)(1), 97-1-1(h); further, he failed to object to the sentence imposed upon him by the trial court and was attempting to attack his conspiracy and sale convictions in one post-conviction filing that was not permitted, Miss. Code Ann. § 99-39-9(2), therefore, his claim was not properly presented and was procedurally barred. *McMinn v. State*, 867 So. 2d 268 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR. Criminal conspiracy between spouses. 46 A.L.R.2d 1275.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

When does statute of limitations begin to run against civil action or criminal prosecution for conspiracy. 62 A.L.R.2d 1369.

Criminal conspiracies as to gambling. 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who was not in state at time of substantive criminal act, for offense committed pursuant to conspiracy. 5 A.L.R.3d 887.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators. 46 A.L.R.3d 1148.

Criminal conspiracy between spouses. 74 A.L.R.3d 838.

When statute of limitations begins to run on charge of obstructing justice or of conspiring to do so. 77 A.L.R.3d 725.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 A.L.R.3d 245.

Right of defendants in prosecution for criminal conspiracy to separate trials. 82 A.L.R.3d 366.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 A.L.R.4th 192.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

Criminality of act of directing to, or recommending, source from which illegal drugs may be purchased. 34 A.L.R.5th 125.

Am Jur. 16 Am. Jur. 2d, Conspiracy §§ 1, 2, 3, 5.

7 Am. Jur. Pl & Pr Forms (Rev), Conspiracy, Forms 1 et seq. (general); Forms 11 et seq. (particular conspiracies).

8 Am. Jur. Proof of Facts 2d, Withdrawal from or Abandonment of Criminal Enterprise, §§ 6 et seq. (proof of defendant's withdrawal from and abandonment of criminal enterprise).

49 Am. Jur. Proof of Facts 2d 473, Civil Conspiracy to Deny First-Party Insurance Benefits.

50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

20 Am. Jur. Trials, handling the defense in a conspiracy prosecution, §§ 1 et seq.

CJS. 15A C.J.S., Conspiracy §§ 96, 97, 100.

Practice References. Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-1-3. Accessories before the fact.

Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (6); 1857, ch. 64, art. 2; 1871, § 2484; 1880, § 2698; 1892, § 950; Laws, 1906, § 1026; Hemingway's 1917, § 751; Laws, 1930, § 769; Laws, 1942, § 1995.

Cross References — Requirements of certain contracts being in writing, see § 15-3-1.

Person acting as agent in effecting sale of liquor, see § 97-31-29.

JUDICIAL DECISIONS

1. In general.
2. Misdemeanors.
3. Participation.
4. Defenses.
5. Evidence.
6. Instructions.
7. Conviction.

1. In general.

Whether defendant was classified as an accessory before the fact or an aider and abettor to the gunman was irrelevant where his role was tantamount to that of the principal; therefore, there was no error in the sentence that was given based on his guilty plea for murder. Walton v. State, 752 So. 2d 452 (Miss. Ct. App. 1999).

Defendant's role in murder was the same as role of principal, whether he was accessory before the fact or accomplice, aiding and abetting principal. Pleasant v. State, 701 So. 2d 799 (Miss. 1997).

Adequate, credible, and substantial evidence supported defendant's capital mur-

der conviction; there was substantial, credible evidence defendants intended to rob convenience store, even if jury found there was not enough evidence to prove underlying crime of armed robbery, jury was instructed on lesser-included offense of simple murder, and defendant could be convicted as a principal whether characterized as accessory before the fact or accomplice. Pleasant v. State, 701 So. 2d 799 (Miss. 1997).

Accessory to any felony before the fact is a principal and may be convicted as principal in indictment charging him or her as principal. Hoops v. State, 681 So. 2d 521 (Miss. 1996).

The primary distinction between an accessory-before-the-fact and an aider and abettor is the actual or constructive presence of the party. If a person was actually or constructively present at the offense, due to his or her participation he or she is an aider and abettor. If he or she was not present, he or she is an accessory-before-

the-fact. *Sayles v. State*, 552 So. 2d 1383 (Miss. 1989).

One of the critical distinctions between being an accessory before and after the fact is whether the felony is complete at the time assistance is rendered. One is an accessory before the fact when assistance is rendered the principal before the felony is completed in order to help the principal in the commission or completion of the offense; this would include entering into a pre-arranged plan for escape of the principals. An accessory before the fact necessarily participates in the design of the felony while an accessory after the fact is a person assisting one, who has completed the commission of a felony, to avoid being apprehended, arrested, convicted, etc. *Gangl v. State*, 539 So. 2d 132 (Miss. 1989).

The requirements of this section, were not incorporated into former § 23-9-703 but, instead, former § 23-9-703 created a separate offense of vote fraud. *Van Buren v. State*, 498 So. 2d 1224 (Miss. 1986).

A defendant who was not indicted for aiding and abetting the crime of vote fraud but, rather, was indicted for vote fraud for aiding, abetting or assisting or causing a named voter to violate the provisions of former § 23-9-605(2), was indicted as a principal. *Van Buren v. State*, 498 So. 2d 1224 (Miss. 1986).

Status as either accessory before fact or principal to crime is distinction without difference. *State v. Peoples*, 481 So. 2d 1069 (Miss. 1986).

In a prosecution for sale of marijuana, the trial court properly permitted the state to try the case as a "conspiracy" without stating that word in the indictment, where it was clear from the indictment that all three indictees were indicted as principals in the offense, within the meaning of this section, and where it was clear from the record that there was sufficient evidence to convict all three co-indictees as principals in the crime. *Sanders v. State*, 439 So. 2d 1271 (Miss. 1983).

In a prosecution for false pretenses, the trial court properly refused to quash the indictment, despite defendant's contention that the indictment charged only conspiracy, a crime not excepted from the two year statute of limitations, and that the

prosecution was thus barred; conspiracy is a complete offense in itself and does not merge with the underlying crime, and the fact that a conspiracy is committed along with the crime does not change the nature of the offense nor lessen exposure to punishment. Furthermore, the prosecution was not time barred even though defendant was charged with being an accessory only, which is a separate crime not excepted from the statute, since an accessory before the fact to an excepted felony is treated as a principal. *Harrigill v. State*, 381 So. 2d 619 (Miss. 1980), cert. denied, 446 U.S. 939, 100 S. Ct. 2159, 64 L. Ed. 2d 792 (1980).

A man who agreed to purchase goods which others intended to steal, who supplied a tractor to be used during the theft, who was not present during the commission of the crime, but who received stolen goods, could be convicted both as an accessory before the fact and as a receiver of stolen property. *Knowles v. State*, 341 So. 2d 913 (Miss. 1977).

Where three teenagers were actively engaged in committing the felony of stealing guns, and where their sole purpose at the time of the accidental shooting of one of them was to finish the job by hiding the guns, the three were jointly and collectively engaged in the commission of a criminal act and all had to bear equal responsibility for what happened, so that the injured one could not recover in damages from the other two, each being a principal to the act. *Parkinson v. Williamson*, 262 So. 2d 777 (Miss. 1972).

To convict under this section [Code 1942, § 1995] it is necessary to prove beyond reasonable doubt that the alleged crime has actually been committed and that accused aided and abetted its commission. *Smith v. State*, 237 Miss. 498, 115 So. 2d 318 (1959).

In prosecution for grand larceny of articles which accused alleged to have been given them by wife of victim so that they could assist her in eloping, whether it was crime for wife to steal from husband held immaterial, since accused if they assisted in theft were principals and not accessories, regardless of whether other person was responsible. *Tatum v. State*, 171 Miss. 336, 157 So. 892 (1934).

What constitutes "aiding and abetting" in commission of crime stated. *Crawford v. State*, 133 Miss. 147, 97 So. 534 (1923).

Party actually committing felony must be proved guilty before evidence of guilt of accessories admissible. *Osborne v. State*, 99 Miss. 410, 55 So. 52 (1911).

One aiding and abetting offense is indictable as principal. *Kittrell v. State*, 89 Miss. 666, 42 So. 609 (1907).

One who aids, assists and encourages a murder is a principal and not an accessory, and his guilt in no wise depends upon the guilt or innocence, the conviction or acquittal of any other alleged participant in the crime. *Dean v. State*, 85 Miss. 40, 37 So. 501 (1904).

2. Misdemeanors.

In misdemeanors, all who aid, incite, participate or abet the commission of such crime, as well as those who perpetrate the crime are guilty as principals and it is not necessary that a person convicted of such misdemeanor be present at the commission of the crime. *State v. Labella*, 232 So. 2d 354 (Miss. 1970).

There are no accessories in misdemeanors, but all who aid in and incite their commission are principals. *Johns v. State*, 78 Miss. 663, 29 So. 401 (1900); *State v. Treweilder*, 103 Miss. 859, 60 So. 1015 (1913), error overruled, 60 So. 1039 (Miss. 1913).

3. Participation.

Where the victim testified that defendant directed the victim's attackers away from the victim's brother-in-law and towards the victim and that after the attack the victim heard, one of the attackers ask defendant for payment, there was sufficient evidence to find that defendant was an accessory before the fact under Miss. Code Ann. § 97-1-3. *Brown v. State*, 864 So. 2d 1009 (Miss. Ct. App. 2004).

Defendant was indicted as a principal on a charge of capital murder where defendant provided the gun and discussed robbing the taxi driver before the fact, and as an indicted principal, defendant faced the same possible punishment as the person who did the actual killing; had defendant gone to trial on the capital murder charge, defendant would have faced the potential imposition of a death penalty.

Bolton v. State, 831 So. 2d 1184 (Miss. Ct. App. 2002).

Defendant who willingly participated in a bank robbery by driving the robbers to the bank, waiting outside while the robbery was committed, and serving as the get-away driver was properly sentenced for armed robbery pursuant to defendant's guilty plea and did not have to be sentenced as an accessory. *McCuiston v. State*, 791 So. 2d 315 (Miss. Ct. App. 2001).

One who is an accessory before the fact or one who aids and abets necessarily enters into an agreement that an unlawful act will be done; he participates in the design of the crime. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Defendant was properly convicted of selling more than one kilogram of marijuana to an undercover agent, even though he did not personally deliver the marijuana to the agent, where the proof showed his participation as an accessory before the fact, thus rendering him subject to indictment and punishment as a principal. *McGowan v. State*, 375 So. 2d 987 (Miss. 1979).

Appellant was properly convicted of rape where the evidence showed that while he did not himself commit the sex act, he was armed with a gun and was effectively instrumental in forcing the prosecutrix to submit to the advances of another and thereby aided, assisted and abetted the commission of the rape. *Pilcher v. State*, 296 So. 2d 682 (Miss. 1974), cert. denied, 420 U.S. 938, 95 S. Ct. 1149, 43 L. Ed. 2d 415 (1975).

Where the evidence proved a combination or conspiracy entered into by the defendant and others to commit armed robbery, and the victim was thereafter shot to death by a codefendant at a time when all conspirators were present and each was doing his or her assigned part in the conspiracy to rob, the defendant became an accessory to armed robbery before the fact, and under the specific provisions of Code 1942, § 1995 was deemed and considered a principal so that every essential element of the crime of murder listed in Code 1942, § 2215 was proved by the state against the defendant. *Alexander v. State*, 250 So. 2d 629 (Miss. 1971).

A defendant who was shown by testimony to have induced another to forge the name of the payee on a check, was not entitled to acquittal of the forgery charged in the indictment on the theory that the indictment did not inform the defendant that he was being tried as an accessory before the fact of forgery, since, as an accessory before the fact, the defendant was considered a principal under Code 1942, § 1995. *Bell v. State*, 255 So. 2d 325 (Miss. 1971).

One who instigates a theft of specific property on his behalf, though not present, is liable as a principal. *James v. State*, 248 Miss. 777, 160 So. 2d 695 (1964).

One who was present and initiated the pointing of a gun at another was a principal. *Hathorn v. State*, 246 Miss. 135, 149 So. 2d 845 (1963).

A father pursued by a patrolman because of driving without lights is properly convicted of negligent manslaughter where he instructed his 16-year-old son to drive as fast as possible and not stop, and the car struck another. *Griffin v. State*, 242 Miss. 376, 135 So. 2d 198 (1961).

One may be convicted as accessory to a burglary at which he was not present, if he was party to a design to commit it. *Kennard v. State*, 242 Miss. 691, 128 So. 2d 572 (1961), cert. denied, 368 U.S. 869, 82 S. Ct. 111, 7 L. Ed. 2d 66 (1961).

Aiding and abetting involves some participation in the criminal act and this may be evidenced by some word, act or deed. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

Where the accused was present at the taking and participated in the asportation and where he was in the company of his co-indictees practically all the night of the larceny, he was an accessory. *Hollis v. State*, 221 Miss. 677, 74 So. 2d 747 (1954).

Where two or more persons act in concert to accomplish the common purpose of robbery, the act of one in taking the property is the act of all. *Noble v. State*, 221 Miss. 339, 72 So. 2d 687 (1954).

In order to be guilty of robbery, one need not necessarily be present at the commission of the crime, and persons absent from the scene of the robbery may be liable to prosecution therefore if they were parti-

iceps criminis before or after the commission of robbery. *Noble v. State*, 221 Miss. 339, 72 So. 2d 687 (1954).

Where the indictment charged burglary but the evidence, chiefly circumstantial, indicated that the defendant was at least an accessory, the defendant was liable as principal. *Wages v. State*, 210 Miss. 187, 49 So. 2d 246 (1950).

One who drives his car to seed house door, after midnight, and assists in loading fertilizer in car after two other persons have unlocked door, entered seed house and brought fertilizer to door, is actually present, aiding, abetting, and participating in theft of fertilizer and is principally guilty of larceny and not of receiving stolen property. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272 (1949).

A taxicab driver who, without knowledge of the larcenous intent of his passengers, drove them to the scene of their burglary and drove them away after being advised of their true completed mission was not an accessory before the fact. *Mullen v. State*, 202 Miss. 795, 32 So. 2d 874 (1947).

Under statutes, assistance rendered principal before felony is completed to avoid arrest therefor makes person rendering assistance an "accessory before and not after the fact." *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Accessory before fact to robbery is indictable and punishable as principal in county wherein robbery was consummated, though not in such county at time. *Watson v. State*, 166 Miss. 194, 146 So. 122 (1933).

Each person present consenting to and doing any act leading to commission of crime is principal. *Moore v. State*, 91 Miss. 250, 44 So. 817, 124 Am. St. R. 652 (1907).

4. Defenses.

A defendant was not immune from prosecution under § 97-3-99 for a sexual battery on his wife committed by another person, even though he may have been immune from prosecution had he alone committed the battery; § 97-3-99 did not give the defendant immunity since the sexual battery was committed by someone else and the defendant had aided and abetted its commission. *Davis v. State*, 611 So. 2d 906 (Miss. 1992).

5. Evidence.

Defendant's claim that the State had failed to prove that he had acted as an aider and abetter was without merit where the law was clear that any person who was present at the commission of a criminal offense and aided, counseled, or encouraged another in the commission of that offense was an aider and a better and was equally guilty with the principal offender; the State presented evidence that defendant was present during the commission of the crime and actively assisted codefendant in the commission of the crime. *Schankin v. State*, 910 So. 2d 1113 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

A murder defendant's actions met the requirements for aiding and abetting, and therefore her conviction for murder would be affirmed, where she was present when her boyfriend shot the victim, she arranged for the victim to be at the location of the killing, she testified that she suspected trouble when she saw her boyfriend arrive with a gun, she admitted that she did nothing while her boyfriend stood talking with the victim for approximately 30 minutes, and there was testimony that she knew of the plan to kill the victim. *Swinford v. State*, 653 So. 2d 912 (Miss. 1995).

The evidence was insufficient to support a conviction for armed robbery as an accessory before the fact where none of the witnesses who testified at trial saw the defendant prior to or during the armed robbery, the first time anyone saw the defendant was approximately 20 minutes after the commission of the armed robbery, and there was no evidence showing that the defendant was aware of his companions' activities prior to the actual commission of the armed robbery and no reasonable inference from other evidence to show any such knowledge by the defendant. *Gangl v. State*, 612 So. 2d 333 (Miss. 1992).

The evidence was sufficient to support a conviction of the defendant for aiding and abetting his brother in the sale of cocaine, despite the defendant's defense that he had no idea what was happening though he was present during the sale, where the defendant drove his brother to meet a

confidential informant and 2 undercover narcotics agents for the purpose of making the sale of cocaine, the defendant then drove his brother to another location where he remained with the informant and the two agents while his brother went to get the cocaine, and the defendant was present when his brother returned and completed the sale. *Gowdy v. State*, 592 So. 2d 29 (Miss. 1991).

The evidence was sufficient to support a conviction of accessory before the fact of sale of cocaine where the defendant approached a vehicle that an undercover agent and an informant were driving, and told them that they were late and the cocaine had been "sent back," but to wait and someone would "take care" of them. It was not necessary for the prosecution to prove that the defendant exercised dominion and control over the cocaine or that he personally profited from its sale. *Turner v. State*, 573 So. 2d 1340 (Miss. 1990), post-conviction relief denied, 673 So. 2d 382 (Miss. 1996).

Jury verdict finding defendant guilty of armed robbery as an accessory before the fact was amply supported by testimony of state's principal witness, the person who actually assaulted and wrestled jewels from the victim, that defendant masterminded the crime, which testimony was corroborated by another witness, and by testimony of the defendant placing himself with the co-defendants before the fact and with the stolen jewels on the evening of the crime. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Evidence that defendant was aware of possibility that future sale of narcotics would be made is insufficient to render defendant criminally accountable as principal in sale of substance. *Clemons v. State*, 482 So. 2d 1102 (Miss. 1985).

Evidence in the record that established that the defendant participated in the advance planning of the robbery of the victim, furnished codefendant the knife used in the murder, and that, after the victim had been killed, he took charge of dividing the "take" and assisted in disposing of the body, was sufficient to support a conviction under this section. *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984).

Although defendant may very well have been an accessory after the fact under

§ 97-1-5, the state never made a jury issue that he was engaged in a conspiracy under § 97-1-1, where he had been trying to extricate his brother and a very good friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495 (Miss. 1984).

Evidence that the defendant in a prosecution for robbery of a jewelry store had accompanied the principal when he robbed the store and that, upon the return of an employee to the store, the defendant had stated "there she is", established the defendant's participation as a full-fledged accessory in the crime despite her contention that she had not exhibited a pistol, made any threats, or participated in tying up the employees. *Sanders v. State*, 403 So. 2d 1288 (Miss. 1981).

Within the purview of this section defendant was at least an accessory before the fact to murder and as such was subject to indictment and punishment as a principal where defendant had given two confessions, revealing that he had been drinking alcoholic beverages at the time of the murder, admitting going in the murder victim's house, and giving conflicting statements as to whether anyone else had accompanied him and as to whether or not he had shot the victims. *Lee v. State*, 338 So. 2d 395 (Miss. 1976).

In a prosecution for murder growing out of a shootout between police officers and the defendant and others, evidence that the defendant had an opportunity to give himself up but chose not to do so and that he fired upon the officers was sufficient to bring defendant within the purview of this section [Code 1972, § 97-1-3]. *James v. State*, 307 So. 2d 549 (Miss. 1975), cert. denied, 423 U.S. 848, 96 S. Ct. 88, 46 L. Ed. 2d 70 (1975).

In a prosecution for setting fire to a field, where the defendant was tried as a principal on a theory that he was an accessory before the fact, but the only evidence of his participation in the crime consisted in the fact that he was observed sitting with another in an automobile stopped adjacent to a field which two other men were in the act of firing, and when someone gave an order to put out the fire, the two young men returned to defendant's car and he drove away, such

evidence, while sufficient for submission of the case to the jury, left the defendant's guilt in such serious doubt that he would be granted a new trial. *Russell v. Ralston Purina Co.*, 234 So. 2d 50 (Miss. 1970).

Where it was shown that the defendant was an accessory before the fact, and as such, a principal, evidence as to the act of his companion at the time the victim was shot was admissible against the defendant in a prosecution for intentionally pointing and aiming a pistol and wounding the victim. *Blackwell v. State*, 231 So. 2d 790 (Miss. 1970), cert. denied, 400 U.S. 848, 91 S. Ct. 43, 27 L. Ed. 2d 86 (1970).

Where an accused admitted that he drove three companions in his automobile to a service station, and then drove the car away after the companions broke into the station and took several cartons of cigarettes and other items, the evidence was sufficient to support his conviction of burglary, since any person acting with others in the commission of a crime and aiding and abetting therein is responsible as a principal for the offense. *Bass v. State*, 231 So. 2d 495 (Miss. 1970).

6. Instructions.

Where defendant was charged as a principal in a drug charge and the evidence showed that defendant had acted as an accessory before the fact, a jury instruction for accessory was properly given under Miss. Code Ann. § 97-1-3, even though defendant was not charged as an accessory. *Pratt v. State*, 870 So. 2d 1241 (Miss. Ct. App. 2004).

Jury instruction stating that "each person present at the time of, or consenting to and encouraging, aiding or assisting in any material manner in the commission of a crime, or knowingly and wilfully doing any act which is an ingredient in the crime, is ... a principal" did not deem mere knowledge or unknowing assistance sufficient to find one guilty; phrase "knowingly and wilfully" contemplated that accused acted with knowledge and deliberation, and assistance in commission of crime had to be major. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

A jury instruction on accessory before the fact was inadequate where it did not instruct the jury to find beyond a reasonable doubt that the crime was actually

committed, but only instructed the jury to determine whether the defendant was an accessory before the fact, leaving them to assume that the occurrence of the crime was an established fact. *Wilson v. State*, 592 So. 2d 993 (Miss. 1991).

In a prosecution for accessory before the fact of sale of cocaine, an instruction was sufficient to advise the jury that, before it could find the defendant guilty as an accessory before the fact, it also had to find the fact, where the instruction stated that the jury was required to find that the defendant arranged for the sale of cocaine "and that this occurred in Lauderdale County, Mississippi"; although the quoted language intended to address the point of venue, it sufficiently informed the jury that, before convicting, it was required to find that the sale had occurred in fact. *Turner v. State*, 573 So. 2d 1340 (Miss. 1990), post-conviction relief denied, 673 So. 2d 382 (Miss. 1996).

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental state. The cumulative effect of the instruction was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

In a prosecution for being an accessory before the fact of armed robbery, use of terms usually associated with "conspiracy" in one of the state's instructions was not fatal, especially where any alleged deficiency in the matter of advising the jury of the concepts of aiding and abetting and specific intent was cured by 2 other instructions, as the reviewing court does not examine jury instructions in isolation

but, rather, reads all instructions as a whole to determine whether the jury has been correctly instructed. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Use of the word "conspiracy" to label certain criminal conduct does not preclude use of the verb "to conspire" and the noun "conspiracy" to connote the sort of participation and involvement in the planning of a crime which is at least in part requisite to being guilty as an accessory before the fact. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Where there was testimony showing that three persons including the accused, acted in concert in committing a robbery, each was responsible and accountable for the wrongful actions of the other two, including the use of a knife during the armed robbery by one of the codefendants, and the trial court was justified in refusing an unarmed robbery instruction requested by the defendant, who did not himself use a knife during the incident. *Ivey v. State*, 232 So. 2d 368 (Miss. 1970).

In a prosecution for intentionally pointing and aiming a pistol and wounding the victim, an instruction was proper which permitted the jury to convict the defendant if they should find that he himself fired the shot that wounded the victim, or if the shot was fired by the defendant's companion at that time, where the defendant was an accessory before the fact and, as such, a principal. *Blackwell v. State*, 231 So. 2d 790 (Miss. 1970), cert. denied, 400 U.S. 848, 91 S. Ct. 43, 27 L. Ed. 2d 86 (1970).

Where the accused was prosecuted under an indictment charging him, jointly with two others, with murder, accused's tendered instruction that since he was charged by the indictment with the killing of the deceased with malice aforethought with a certain gun, unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, since it was not supported by the evidence and was contrary to the provisions of this section Code 1942, § 1995. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, state's instruc-

tion that if one of the others murdered the deceased, and accused, without being forced or coerced, transported the others in his automobile to where they obtained rifles, knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

In a prosecution for grand larceny an instruction to the jury that if the woman and the accused conspired together to steal money and then, pursuant to said conspiracy or agreement, the woman stole the money, then the accused was guilty of grand larceny, was proper. *Shedd v. State*, 228 Miss. 381, 87 So. 2d 898 (1956), cert. denied, 352 U.S. 944, 77 S. Ct. 262, 1 L. Ed. 2d 237 (1956).

In murder prosecution instruction for state that if jury believe from evidence beyond reasonable doubt that defendant did wilfully, unlawfully, feloniously and of his malice aforethought shoot deceased with pistol at time deceased received wounds that caused his death, jury should find defendant guilty even though jury believed that another person was at same time shooting at deceased and jury do not know which person fired shot or shots that actually killed deceased is not objectionable as assuming a conspiracy when evidence shows that defendant was a principal since he was present, aiding and abetting others and evidence is adequate to show defendant guilty individually. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949); *Porter v. State*, 39 So. 2d 307 (Miss. 1949).

An instruction in a prosecution for unlawful possession of whiskey, which based defendant's responsibility upon the relation of master and servant did not misapply the civil doctrine of respondeat superior, but properly recognized that in criminal cases such relationship may constitute both as principals. *Grantham v. State*, 190 Miss. 887, 2 So. 2d 150 (1941).

Refusal of peremptory instruction and of instruction ignoring law authorizing punishment of persons who are accessories to felony was not error, where evidence showed defendant furnished still used in unlawful manufacture of liquor. *Bailey v. State*, 143 Miss. 210, 108 So. 497 (1926).

Defendant not present could only be convicted as accessory before the fact; instruction should define accessory before the fact. *Williams v. State*, 128 Miss. 271, 90 So. 886 (1922).

7. Conviction.

In a prosecution for armed robbery, the defendant was properly convicted as a principal where he had aided and abetted the person who actually robbed the bank in question. *Anderson v. State*, 397 So. 2d 81 (Miss. 1981).

Where the defendants falsely represented to seller of paint that they were working for a certain person and wanted paint purchased charged to his account, the defendants by implication falsely represented that they were authorized to have the paint so charged and where after receiving the paint they deposited it as a security for a loan thereby establishing an intent to defraud, this was sufficient to support conviction of obtaining property by false pretenses. *Fortenberry v. State*, 213 Miss. 116, 56 So. 2d 56 (1952).

One who steals property, or who is accessory before fact to grand larceny cannot be convicted of receiving, concealing, or aiding in concealing, the property stolen. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272 (1949).

Accused indicted as principal may be convicted as accessory before fact. *Goss v. State*, 205 Miss. 177, 38 So. 2d 700 (1949).

Accessory before the fact may be convicted of higher degree than was party who actually committed the felony, if latter, on trial of former, is shown guilty of higher degree. *Fleming v. State*, 142 Miss. 872, 108 So. 143 (1926).

RESEARCH REFERENCES

ALR. Who other than actor if liable for manslaughter. 95 A.L.R.2d 175.

Criminality of act of directing to, or recommending, source from which illicit

drugs may be purchased. 42 A.L.R.3d 1072.

Offense of aiding and abetting illegal possession of drugs or narcotics. 47 A.L.R.3d 1239.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 A.L.R.4th 972.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Criminality of act of directing to, or recommending, source from which illegal drugs may be purchased. 34 A.L.R.5th 125.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so. 52 A.L.R. Fed. 769.

Am Jur. 21 Am. Jur. 2d, Criminal Law §§ 204, 208.

CJS. 22 C.J.S., Criminal Law §§ 137-139.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-1-5. Accessories after the fact.

Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony, on conviction thereof shall be imprisoned in the penitentiary not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both; and in prosecution for such offenses it shall not be necessary to aver in the indictment or to prove on the trial that the principal has been convicted or tried.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (7); 1857, ch. 64, art. 3; 1871, § 2485; 1880, § 2699; 1892, § 951; Laws, 1906, § 1027; Hemingway's 1917, § 752; Laws, 1930, § 770; Laws, 1942, § 1996.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Evidence; generally.
3. —Sufficiency.
4. Instructions.

1. In general.

Where there was a conflict between the sentencing order and the commitment order, the sentencing order that stated that the inmate was to serve three years in prison and two years on supervised release controlled; thus, the five year sen-

tence was valid under Miss. Code Ann. § 97-1-5 for his conviction of accessory after the fact to murder. *Fuller v. State*, 914 So. 2d 1230 (Miss. Ct. App. 2005).

The indictment for accessory-after-the-fact properly charged defendant with the completed crime for which she was convicted, rather than an attempted crime, because the indictment tracked the language of Miss. Code Ann. § 97-1-5 and the use of the language "in an attempt to assist" her son described the mental state

required for a conviction of accessory-after-the fact, which was that the defendant acted with "intent to enable" a felon to escape or avoid arrest, trial, conviction or punishment as provided in § 97-1-5. There was overwhelming evidence that defendant's son had committed a felony, that defendant knew her son was wanted by authorities, and that defendant aided her son in evading justice by harboring him and concealing him from law enforcement. *Young v. State*, 908 So. 2d 819 (Miss. Ct. App. 2005).

One cannot be both a principal in the crime and an accessory after the fact. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

One of the critical distinctions between being an accessory before and after the fact is whether the felony is complete at the time assistance is rendered. One is an accessory before the fact when assistance is rendered the principal before the felony is completed in order to help the principal in the commission or completion of the offense; this would include entering into a pre-arranged plan for escape of the principals. An accessory before the fact necessarily participates in the design of the felony while an accessory after the fact is a person assisting one, who has completed the commission of a felony, to avoid being apprehended, arrested, convicted, etc. *Gangl v. State*, 539 So. 2d 132 (Miss. 1989).

Under this section, the state must prove (1) that a completed felony has been committed; (2) that the accused concealed, received, relieved, aided or assisted a felon, knowing that such person had committed a felony; and (3) that such aid or assistance was rendered with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment after the commission of such felony. *Redevelopment Auth. v. Sewell*, 290 So. 2d 924 (Miss. 1974).

When one is accused of aiding a felon after the commission of a felony, such felon should be identified, either by name or in some other manner, so the accused might know with certainty the person he is charged with aiding or assisting, and such identity should be set forth in the indictment and proved. *Redevelopment*

Auth. v. Sewell, 290 So. 2d 924 (Miss. 1974).

Owner of automobile who loaned his automobile to killer and his brother in county of owner's residence, adjoining county in which killing took place, was not subject to prosecution as an accessory after the fact in county in which killing occurred because killer and his brother, who drove the automobile, thereafter drove through such county on the way to the killer's home, where, although defendant was aware of the crime, he had no connection therewith, and killer's brother, in driving the automobile, was not the agent of the owner. *Washington v. State*, 196 Miss. 293, 17 So. 2d 203 (1944).

A person cannot be both a principal and an accessory after the fact. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Assistance rendered principal before felony is completed to avoid arrest therefor makes person rendering assistance an "accessory before and not after the fact." *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

One indicted as a participant in or accessory before the fact to a murder cannot be convicted as an accessory after the fact. *Harper v. State*, 83 Miss. 402, 35 So. 572 (1904).

2. Evidence; generally.

Defendant pointed out that he had not taken the victim's money, rather, that it was a co-defendant who took it, and that the State's evidence did not introduce him on the scene of the robbery until after it had been completed by his co-defendant. He also argued that the State had failed to prove that the victim had been kidnapped before he was killed, and therefore, the State had failed to prove the corpus delicti of kidnapping; however, considering all of the evidence in the light most favorable to the State, the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict with respect to the accessory to armed robbery and kidnapping charges, as defendant assisted his co-defendant by holding a gun on the victim's friend and prevented that friend from assisting the victim or escaping to obtain assistance before the victim was transferred to another location and then repeatedly shot by his co-defendant.

Parks v. State, 884 So. 2d 738 (Miss. 2004).

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Indictment charging making of lewd suggestion by defendant to victim and violent making of attack or assault upon victim properly charges attempted rape under § 97-3-65, rather than assault with intent to rape under § 97-3-71, where indictment accurately tracks § 97-3-65 by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under § 97-3-65 and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Although defendant may very well have been an accessory after the fact under this section, the state never made a jury issue that he was engaged in a conspiracy under § 97-1-1, where he had been trying to extricate his brother and a very good friend when he violated the law by possessing and transporting marijuana. *Kennedy v. State*, 454 So. 2d 495 (Miss. 1984).

In a prosecution for conspiracy to sell heroin, the trial court properly overruled defendant's plea in bar based on the two year statute of limitations, where defen-

dant was shown to be a conspirator in a drug-selling ring, and where the proof showed that a co-conspirator, tried jointly with defendant, had illegally sold heroin to a narcotics agent within the two-year span prior to the indictment of defendant; once a defendant is established as being a conspirator, he remains a part of the conspiracy until he has extricated himself therefrom by communicating his abandonment in a manner reasonably expected to reach his co-conspirators. *Norman v. State*, 381 So. 2d 1024 (Miss. 1980).

Evidence that defendant was himself a principal in the felonious killing of the woman was not admissible. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Evidence that defendant procured pistol with which woman was killed without knowledge or consent of its owner and gave it to murderer, and that defendant, with knowledge that murderer had killed woman, surreptitiously returned pistol to the place from which he had procured it, was competent as bearing on defendant's knowledge that murderer had killed woman with the pistol. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Evidence that defendant knew when he gave pistol to murderer that murderer intended to kill woman with pistol was admissible. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Admission of defendant's confession that he concealed pistol was not error, in view of evidence as to concealment of pistol. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Admission of evidence as to defendant's burning of overalls worn by murderer at time of killing was not error. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Proof of murder by alleged principal as original proposition, was not error, notwithstanding defendant's admission of murder by alleged principal. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Evidence that defendant at first denied any knowledge of murder when questioned by police shortly thereafter, and that he subsequently admitted that he was present and saw the murder, was not admissible where defendant was charged with the homicide at time of questioning. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

3. —Sufficiency.

Evidence was sufficient to support defendant's conviction for accessory-after-the-fact of the crime of possession of marijuana with intent to distribute pursuant to Miss. Code Ann. § 97-1-5 where the evidence showed that defendant failed to call police as she had been instructed if her son, who was wanted on a marijuana conviction, returned to her home, and she failed to answer the door when police came back to the house and found defendant's son inside. There was overwhelming evidence that defendant's son had committed a felony, that defendant knew her son was wanted by authorities, and that defendant aided her son in evading justice by harboring him and concealing him from law enforcement. *Young v. State*, 908 So. 2d 819 (Miss. Ct. App. 2005).

Because the evidence showed that defendant accompanied others in retrieving stolen property and disposing of it, there was sufficient evidence to support defendant's conviction of accessory after the fact to burglary. *Martin v. State*, 834 So. 2d 727 (Miss. Ct. App. 2003).

The evidence was sufficient to support a conviction of accessory after the fact of robbery where the defendant was a part of the robbery plans in the beginning, she kept and provided the get-away automobile after the bank was robbed but before the active robbers had completed their flight, and she gave orders to her confederates after all of them were apprehended. *Harrell v. State*, 583 So. 2d 963 (Miss. 1991).

A jury would have been warranted in finding the defendant guilty as an accessory after the fact to burglary or larceny, but not as a principal to burglary, where the defendant was present at the time of the burglary of a store but neither assisted nor encouraged the perpetrator of the burglary by any word or act to commit the crime. *Smith v. State*, 523 So. 2d 1028 (Miss. 1988).

Evidence was sufficient to support guilty verdict of accessory after the fact of larceny where defendant assisted in disposition of items of personal property taken in course of burglary. *Buckley v. State*, 511 So. 2d 1354 (Miss. 1987).

Facts and circumstances known to accused at time of his arrest while aiding in

transportation of stolen tires, were insufficient to support conclusion that he knew a felony had been committed or that he was assisting the felon (whoever he might have been) dispose of tires. *Redevelopment Auth. v. Sewell*, 290 So. 2d 924 (Miss. 1974).

State must prove that the alleged principal feloniously killed the woman and that thereafter the defendant, with actual knowledge thereof, committed specific acts with intent thereby to enable the alleged principal to escape or to avoid arrest, trial, conviction, or punishment. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

Whether murder by alleged principal should be proved as original proposition in prosecution for statutory offense of being accessory after the fact to a murder, wherein defendant admitted murder by alleged principal, rested in trial court's sound discretion, which would not be interfered with in absence of manifest abuse. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

4. Instructions.

In a capital murder case, the trial court did not err in refusing defendant's requested jury instruction concerning accessory after the fact as the evidence clearly demonstrated defendant's involvement prior to the crime, that she was the mastermind of the plot to kill her husband, that she gave incriminating statements to law enforcement that described her conversations with a co-conspirator and others regarding having her husband killed, and her son's statement revealed that defendant told him where his father had hidden the pistol that was used to kill him. *Byrom v. State*, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

In a prosecution for capital murder, the trial court properly refused to instruct the jury regarding accessory after the fact where the defendant's two coperpetrators both testified that the defendant took part in designing the attempted robbery and escape and one of them placed the defendant as the "getaway" driver, and the only contrary evidence was the defendant's own in which he claimed that he was never involved in planning any crime and

that he never assisted either coperpetrator afterwards in any way. *Mangum v. State*, 762 So. 2d 337 (Miss. 2000).

An indispensable element of the crime of concealing, receiving, or relieving a felon, or aiding or assisting a felon, with the intent to enable such felon to escape or to avoid arrest, trial, conviction, or punishment after the commission of a felony, is guilty knowledge on the part of the one charged with the crime. *Matula v. State*, 220 So. 2d 833 (Miss. 1969).

From the mere fact that the defendant traveled with the perpetrator of an attempted burglary, it could not be inferred that the defendant had committed the offense of feloniously concealing, receiv-

ing, or relieving a felon, or aiding or assisting him in the attempted burglary with the intent to enable such felon to escape or to avoid indictment, trial, conviction, or punishment. *Matula v. State*, 220 So. 2d 833 (Miss. 1969).

In prosecution for statutory offense of being an accessory after the fact to the murder of a woman, instruction that principal in commission of felony cannot thereafter become an accessory after the fact, and that defendant could not be convicted of being an accessory after the fact if he himself murdered woman or assisted another so to do, should have been granted. *Crosby v. State*, 179 Miss. 149, 175 So. 180 (1937).

RESEARCH REFERENCES

ALR. Offense of aiding and abetting illegal possession of drugs or narcotics. 47 A.L.R.3d 1239.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 A.L.R.4th 972.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases. 76 A.L.R.4th 812.

Am Jur. 21 Am. Jur. 2d, Criminal Law §§ 204, 209.

CJS. 22 C.J.S., Criminal Law §§ 140-142.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-1-6. Directing or causing felony to be committed by person under age of seventeen years.

In addition to any other penalty and provision of law, any person over the age of seventeen (17) who shall direct or cause any person under the age of seventeen (17) to commit any crime which would be a felony if committed by an adult shall be guilty of a felony and upon conviction shall be fined not more than Ten Thousand Dollars (\$10,000.00) or imprisoned for not more than twenty (20) years, or both.

SOURCES: Laws, 1994, ch. 595, § 7, eff from and after July 1, 1994.

JUDICIAL DECISIONS

1. Evidence sufficient to sustain conviction.

The evidence was sufficient to support the defendant's conviction under the statute where one of his coperpetrators, who

was under 17 years of age, testified that the defendant planned the crime and that he would not have committed the crime if the defendant had not planned it, and where the evidence showed that the

coperpetrator actually assisted in the crime. *Mamon v. State*, 724 So. 2d 878 (Miss. 1998).

§ 97-1-7. Attempt to commit offense; punishment.

Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no provision is made by law for the punishment of such offense, be punished as follows: If the offense attempted to be committed be capital, such offense shall be punished by imprisonment in the penitentiary not exceeding ten years; if the offense attempted be punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 8 (3); 1857, ch. 64, art. 20; 1871, § 2809; 1880, § 2713; 1892, § 973; Laws, 1906, § 1049; Hemingway's 1917, § 777; Laws, 1930, § 793; Laws, 1942, § 2017.

Cross References — Arrests without warrant, see § 99-3-7.

An insane person charged with crime, see § 99-13-3.

Conviction of attempt as constituent of offense charged, see § 99-19-15.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Particular offenses.
4. —Burglary.
5. —Embezzlement.
6. —False pretenses.
7. —Homicide.
8. —Sexual offenses.
9. —Evidence.
10. —Miscellaneous.
11. Sentence.

1. In general.

Defendant was not entitled to instruction on abandonment as a defense to a charge of attempted carjacking where defendant ceased effort to steal a sports utility vehicle only after defendant's efforts to unlock the vehicle's doors were thwarted by a passenger sitting inside the vehicle. *Kizart v. State*, 795 So. 2d 582 (Miss. Ct. App. 2001).

Generally, attempt to commit a crime is an indictable offense, which is separate

and distinct from the crime itself. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

In general, this section requires a showing of 3 elements: (1) an attempt to commit a particular crime, (2) a direct ineffectual act done toward its commission, and (3) the failure to consummate its commission. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

In order to prove abandonment as a defense to the crime of attempt, the defendant must prove that he voluntarily abandoned his intent and did not have his intent frustrated by the resistance of the victim or the intervention of a third party. *Pruitt v. State*, 528 So. 2d 828 (Miss. 1988).

The 3 elements of an attempt to commit a specific crime are an intent to commit the crime, a direct ineffectual act done towards its commission, and the failure to consummate its commission. *Edwards v. State*, 500 So. 2d 967 (Miss. 1986).

An attempt is an offense separate from the completed offense and it is indictable

and punishable as such. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

An attempt to commit a crime is an indictable offense separate and distinct from the crime itself, and failure to commit the target crime is an essential element of an attempt; accordingly, it was error to prosecute defendant on the charge of attempted armed robbery where there was conclusive proof that the robbery had been consummated. *Mason v. State*, 430 So. 2d 857 (Miss. 1983).

Mere acts of preparation do not constitute an attempt; there must be some overt act which goes beyond mere preparation or planning. *Smith v. State*, 279 So. 2d 652 (Miss. 1973).

The gravamen of the offense of an attempt to commit a crime is fixed by the statutory requirement that the defendant must do an overt act toward the commission thereof and be prevented from its consummation. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876 (1947).

Under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance will constitute an attempt. *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928).

In prosecution for attempt to commit offense, state must charge and prove overt act. *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928).

Necessary elements constituting crime are, intent to commit, and overt act. *Miller v. State*, 130 Miss. 730, 95 So. 83 (1923).

The rule that the act attempted must be a possibility has no application where it merely becomes impossible for the crime to be committed. *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908).

2. Indictment.

Miss. Code Ann. § 41-29-313 made possession of precursor chemicals unlawful, and Miss. Code Ann. § 97-1-7 (the attempt statute), and Miss. Code Ann. § 41-29-313, when viewed together, gave the elements of the crime of attempted possession of precursor drugs or chemicals. Thus, where defendant was charged with

attempted possession of precursor chemicals, his argument that the trial court had erred in allowing him to plead guilty to a nonexistent statute of attempted possession of precursor chemicals was rejected. *Green v. State*, 880 So. 2d 377 (Miss. Ct. App. 2004).

Indictment had to set out with certainty the specific conduct that the State asserted to be the overt act undertaken by the defendant in order to indict for an attempt; the indictment was rendered void where it did not contain a plain, concise and definite written statement of the essential facts constituting the offense charged because of its failure to set out with any certainty defendant's overt act intended to aid the felon's escape. *White v. State*, 851 So. 2d 400 (Miss. Ct. App. 2003).

Since the principal offenses of welfare fraud as defined in Mississippi Code § 97-19-71 include attempts, an indictment for a principal welfare fraud offense is in no way defective because it employs the word "attempt," and the state is not limited at trial to proof only of the attempt. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

Indictment charging attempted child abuse may be amended to reflect code section under which defendant is charged and need not use precise words of statute. *Watson v. State*, 483 So. 2d 1326 (Miss. 1986).

Prior to adoption of Uniform Criminal Rules of Circuit Court Practice, an indictment charging that defendant "did unlawfully, wilfully, feloniously and forcibly attempt to rape and ravage...a female above the age of 12 years, without the consent and against the will of..." was insufficient; the defect was not waived by defendant's failure to demur, and his conviction was reversed. *Maxie v. State*, 330 So. 2d 277 (Miss. 1976).

An indictment which charged the defendant with intent to murder, designating the intended victim as well as charging overt acts of arming himself with a rifle and transporting himself to a point where he expected to find the victim, charged an intent to commit an offense, as well as an overt act toward its commission, and was not demurrable. *Ford v. State*, 218 So. 2d 731 (Miss. 1969).

In an indictment charging the accused with the crime of attempting to commit false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, a statement that certain named individuals involved in the scheme bought insurance contracts to indemnify themselves from loss arising out of automobile accidents sufficiently described the insurance policies by designation and type and thereby indicated their purport within the meaning of Code 1942, § 2453. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

Indictment properly charged the offense of an attempt to commit the crime of sodomy. *Taurasi v. State*, 233 Miss. 330, 102 So. 2d 120 (1958).

An indictment for attempted rape is subject to demurrer where the alleged overt act described could have applied equally to other crimes. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876 (1947).

Indictment charging attempt to obtain money by false pretenses held to charge member of board of supervisors as well as road contractor with false pretenses. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517 (1928).

Indictment charging attempt to obtain money by false pretenses by virtue of contract with county held fatally defective because not setting forth contract. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517 (1928).

Allegation that alleged false account by contractor was prepared, signed and approved and filed with board of supervisors, charged overt act. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517 (1928).

Chastity of female not element of defense and need not be alleged in prosecution for attempt to rape female of previous chaste character; separate offense from assault to rape female not of previous chaste character. *Watkins v. State*, 134 Miss. 211, 98 So. 537 (1923); *Hicks v. State*, 130 Miss. 411, 94 So. 218 (1922).

Accused entitled to have particulars alleged to constitute overt act of crime stated in the indictment. *Stapleton v. State*, 130 Miss. 737, 95 So. 86 (1923).

It is sufficient to charge an attempt to commit a crime, coupled with an act to-

wards it, falling short of the thing intended. *State v. Wade*, 102 Miss. 711, 59 So. 880 (1912).

3. Particular offenses.

Where defendant confessed that he attacked the victim when she would not lend him money, and then searched the house for money after the victim was dead, sufficient evidence existed, at a minimum, to support a finding of attempted armed robbery, which under Miss. Code Ann. § 97-3-79, supported a conviction for armed robbery. *Carr v. State*, 880 So. 2d 1079 (Miss. Ct. App. 2004).

Victim's father testified that he had paid between \$ 3,000 and \$ 4,000 for the truck rims; although this was not direct testimony as to the value of the rims, it circumstantially provided a basis for the jury to infer that the rims were worth at least \$ 250; defendant's conviction for attempt to commit grand larceny was therefore appropriate and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. *Smith v. State*, 881 So. 2d 908 (Miss. Ct. App. 2004).

Evidence that defendants broke into a hotel room, assaulted one of the occupants with a gun, but aborted their plans after encountering unexpected resistance, was sufficient to establish that they possessed the requisite intent to commit an armed robbery; a victim's watch was found on the floor, and the jury could have found that defendants removed the watch with the intent to take it. *Broomfield v. State*, 878 So. 2d 207 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. Jan. 28, 2003).

4. —Burglary.

Indictment for attempted burglary must set forth an overt act toward the

commission of the offense and where indictment fails to set forth such, indictment is defective. *Durr v. State*, 446 So. 2d 1016 (Miss. 1984).

The overt act of the defendant in moving a display stand and placing it in a position so that he could obtain access to the roof of a drug store was in furtherance of a design and constitutes an attempt to commit burglary under the provisions of this section [Code 1942, § 2017]. *Hendrix v. State*, 206 So. 2d 328 (Miss. 1968).

Attempted burglary of a store building is a felony. *McCullum v. State*, 197 So. 2d 252 (Miss. 1967).

In prosecution for attempt to commit burglary with intent to steal, drunkenness of accused, while no defense, remained a factor in adjudging whether there was present a definite intent to steal. *Bullock v. State*, 195 Miss. 340, 15 So. 2d 285 (1943).

"Intent" to commit burglary implies purpose only, while "attempt" to do so implies both purpose and actual effort to carry such purpose into effect. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

Conviction of attempt to commit burglary will be sustained, if method employed was calculated to carry out such unlawful purpose, though not most sensible or usual method. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

Intent to commit burglary was essential, indispensable element of crime charged by indictment for attempting to break and enter dwelling house by breaking or forcing window thereof, with intent to take, steal, and carry away personal property therein. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

Mere fact that one charged with attempt to commit burglary rattled window of dwelling "like he was trying to get in" raised no presumption that he intended to commit such crime. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

Design to effect entrance into dwelling unlawfully may be shown by circumstances in trial for attempt to commit burglary. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

An act may be sufficient in and of itself to warrant jury in finding that one charged with attempt to commit burglary

intended to commit such crime. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

Evidence, in trial for attempt to commit burglary, that defendant rattled window of dwelling house "like he was trying to get in" and falsely stated that cook thereat had told him to bring some eggs there, held insufficient to sustain conviction. *Jones v. State*, 172 Miss. 597, 161 So. 143 (1935).

5. —Embezzlement.

The crime of attempted embezzlement is not established where the evidence fails to show an overt act on the part of the defendant to commit the crime charged before he abandoned his alleged purpose. *Kern v. Noble*, 206 So. 2d 200 (Miss. 1968).

6. —False pretenses.

Evidence, including the testimony of eight accomplices who testified for the state, sustained the conviction of an attorney for an attempt to commit the crime of false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, after having obtained hospitalization insurance on the participants and liability insurance on the offending vehicle. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

Attempt to commit false pretenses is indictable offense. *State v. Fitzgerald*, 151 Miss. 229, 117 So. 517 (1928).

7. —Homicide.

Evidence was sufficient to support a conviction for attempted murder where (1) the defendant tracked his targets, traveled the substantial distance necessary to furnish himself direct access to the victims, and procured the very weapon and abundant ammunition with which to accomplish his deadly mission, and (2) when the victims confronted him as to his purpose for being in Mississippi, he threatened to use the weapon to kill them. *Morris v. State*, 745 So. 2d 862 (Miss. Ct. App. 1999).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evi-

dence. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

Evidence sustained conviction of attempted murder where defendant had the intent to murder his intended victim, and had committed overt acts toward the consummation of the crime by attempting to forceably enter the victim's home after arming himself with a deadly weapon, and was prevented from carrying out his intent to murder only because his intended victim shot him first. *Ledet v. State*, 286 So. 2d 817 (Miss. 1973).

An instruction to the jury in a prosecution for murder that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681 (1956).

Where it was reported to officers that a man of certain description had attempted to steal an automobile and defendant answered the description and the officers had good ground to believe that a felony had been committed and the defendant was person who committed the crime, and consequently arrested the defendant without warrant and searched him, the evidence obtained incident to the search was admissible in prosecution for murder. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517 (1953), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367 (1953), reh'g denied, 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404 (1953).

An indictment charging the defendant with an assault "with the intent and in the attempt to kill and murder," and the proof in the record charged an offense with intent to kill and murder under Code 1930, § 787 (Code 1942, § 2011), and not an offense under this section [Code 1942, § 2017]. *Norwood v. State*, 182 Miss. 898, 183 So. 523 (1938).

The distinction between the mere attempt to commit the offense of murder, and the offense with assault with intent to kill and murder, is that in the attempt statute any attempt by overt act to do an act that would, if completed, amount to murder, regardless of the specific intent to kill a specific person, is made out by doing such acts as, if consummated, would amount to murder; such, for instance, as shooting in a public place where there are many people, without specific intent to kill any one of them or to kill anybody; the act being predicated upon recklessness and disregard of social duty, and fatally bent on mischief. *Norwood v. State*, 182 Miss. 898, 183 So. 523 (1938).

Where defendant attempted to procure R to kill a third party, and in furtherance of the purpose took a gun, loaded it, and started with R to the point where the killing was to occur, but was arrested, the act was an "attempt" within this section [Code 1942, § 2017]. *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908).

8. —Sexual offenses.

Indictment was sufficient to put defendant on notice that he was being charged with attempted rape, and the indictment specifically set forth the conduct which the State planned to use as evidence; defendant failed to complete the crime of rape because he was unable to get an erection, and consequently unable to penetrate the victim's vagina, so that the record supported a conviction of attempted rape. *Purnell v. State*, 878 So. 2d 124 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if "he was going to get him some sex," and when they arrived at a

hotel room, defendant announced to other men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987 (Miss. Ct. App. 2004).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. Jan. 28, 2003).

In a prosecution for attempted rape, the court's instruction to the jury on attempt was insufficient where it did not mention the requirement that the defendant be found either to have failed or was prevented from completing the act. *Armstead v. State*, 716 So. 2d 576 (Miss. 1998).

Instruction on attempted sexual battery that required jury to find, as overt act, defendant's attempt to place his penis into victim's anus, in combination with instruction that charged jury that "in order to prove an attempt to commit sexual penetration, the State must prove that the intended act was prevented from taking place by resistance or other means," fully and correctly charged jury on elements of the crime. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

Conviction for sexual battery and attempted sexual battery was supported by victim's testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim's testimony that defendant had threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

The elements required to prove attempted capital rape are: (1) a design and endeavor to rape one less than 14 years old by one at least 18 years old, (2) an overt act toward the commission of rape, and (3) failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220 (Miss. 1995).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220 (Miss. 1995).

At defendant's trial for attempted rape, admission, over defense's objections, of alleged victim's earring, and of testimony concerning earring, constituted reversible error where earring had not been made available to defense for inspection before trial under motion for discovery. *Thomas v. State*, 488 So. 2d 1343 (Miss. 1986).

Attempted sexual battery is a criminal offense by virtue of Mississippi Code § 97-1-7. *Gill v. State*, 485 So. 2d 1047 (Miss. 1986).

Person who attempts to perform anal intercourse on another person but is prevented from doing so when other person flees may be convicted of attempted unnatural intercourse. *Haymond v. State*, 478 So. 2d 297 (Miss. 1985).

In a prosecution for attempted rape of a female child under the age of 12 years, the trial court erred in conducting an in-chambers interrogation of a 9-year-old girl to determine her competency as a witness where defendants and their attorneys had not been informed of the examination and did not learn of it until the prosecution offered the child as a rebuttal witness and where the court had refused to allow this same child to testify in a similar case the previous week. *Allen v. State*, 384 So. 2d 605 (Miss. 1980).

An indictment on the charge of attempted rape, charging that defendant attempted to commit such offense by stalking, chasing and running after the female in question, to the extent of almost exhausting her, in a lonesome and secluded place in the country where no one else was present, was demurrable for failure sufficiently to fix the overt act in

connection with the crime charged, since under such indictment defendant's purpose could have equally been a number of other crimes. *State v. Lindsey*, 202 Miss. 896, 32 So. 2d 876 (1947).

Sentence of accused after indictment, trial, and conviction under the statute (Code 1942, § 2361) providing for punishment of one convicted of an assault with intent to forcibly ravish any female of previous chaste character, was not improper because accused could have been prosecuted and sentenced under this section [Code 1942, § 2017]. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211 (1947), suggestion of error overruled, 201 Miss. 434, 30 So. 2d 74 (1947), rev'd on other grounds, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Where an indictment charged the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, and was drawn under Code 1930, § 1125 (Code 1942, § 2361), it was error for the trial court to treat the indictment as if drawn under Code 1930, § 793, the attempt statute. *John v. State*, 191 Miss. 152, 2 So. 2d 800 (1941).

Refusal of instruction that burden was on state to prove that accused attempted to rape prosecutrix as charged held not error, because covered by instruction given at accused's request. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

In prosecution for attempt to rape, testimony respecting isolated act of sexual intercourse by prosecutrix held properly excluded as irrelevant. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Permitting witness to testify that soon after alleged attempted rape prosecutrix told witness that accused broke into her house held not reversible error. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Corroboration of prosecutrix held not required in prosecution for attempt to rape. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Instructions to convict for attempt to rape if jury believed from evidence beyond reasonable doubt that defendant committed act specified in instructions held not erroneous as confusing. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

9. — Evidence.

Defendant's convictions for attempted rape and statutory rape in violation of Miss. Code Ann. §§ 97-1-7 and 97-3-65(1)(b) were proper based on the victim's testimony and the corroboration of that testimony by defendant's wife, a physician and a psychologist. *Lee v. State*, 910 So. 2d 1123 (Miss. Ct. App. 2005).

Supreme Court of Mississippi overrules *Gibby v. State* and finds that when a defendant makes an overt act and a reasonable person would believe a deadly weapon is present, there is no requirement that the victim has to actually see the deadly weapon in order to convict for attempted armed robbery pursuant to Miss. Code Ann. § 97-3-79. Therefore, a victim is not required to have "definite knowledge" of a deadly weapon in the sense that the weapon must actually be seen by the victim's own eyes. *Dambrell v. State*, 903 So. 2d 681 (Miss. 2005).

Court of appeals erred in reversing defendant's conviction for armed robbery where although the cashier did not actually see the butcher knife before defendant fled, clearly, defendant intended to rob the store, had a deadly weapon, threw down the towel and knife that was in his possession and was only thwarted in his attempt to rob the store. The cashier gained possession of the knife once defendant discarded it and thus, it was clear that defendant had a weapon on entering the store. *Dambrell v. State*, 903 So. 2d 681 (Miss. 2005).

While the Mississippi attempt statute requires that the third element of attempted rape, failure to consummate, result from extraneous causes and not a voluntary cessation, the extraneous cause was met by the struggle over a gun between the defendant and the victim, the shooting of the victim, and the resulting death of the victim. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed attempted sexual battery, Miss. Code Ann. § 97-1-7, because the second victim testified that (1) defendant attempted to engage in sexual penetration

with the second victim by trying to insert defendant's penis into the second victim's mouth; (2) defendant was 24 or more months older than the second victim; and (3) the second victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. Jan. 28, 2003).

Evidence was sufficient to establish attempted sexual battery where (1) the nine-year-old victim was in a check-out line at a store with his mother when the mother sent him back to the appropriate aisle to get a box of cereal, (2) once the victim got to that aisle, the defendant approached him and asked, using the vernacular, if he could engage in fellatio on the victim, (3) simultaneously with the verbal request, the defendant pointed to his own genitals, (4) the victim refused, and the encounter ended, and (5) the defendant never touched the victim or made any effort to restrain him. *Ishee v. State*, — So. 2d —, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

A defendant's grabbing of the victim by the throat, threatening to beat her up if she did not remove her clothes, and announcing his intent to rape her, constituted an "overt act" for attempted rape. *Pruitt v. State*, 528 So. 2d 828 (Miss. 1988).

In a juvenile delinquency proceeding, evidence that the juvenile had a medium-sized pocketknife, forcibly took the victim behind a woodpile in the backyard, pushed her to the ground, and then voluntarily stopped the assault was insufficient to support a finding of guilty of attempted rape. In re R.T., 520 So. 2d 136 (Miss. 1988).

Lewd suggestion to victim coupled with physically grabbing victim and attempting to carry her away only to have her break free comes near enough to accomplishment of rape as to constitute crime of attempted rape. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Undisputed evidence that defendant propositioned victim in lewd manner, exposed himself, seized victim and attempted to drag her away with him, and that lack of success in defendant's attempt to rape victim resulted from victim's resistance, not defendant's abandonment of crime, is sufficient to support conviction

for attempted rape. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

In a prosecution for attempted sexual battery in violation of § 97-3-95, evidence was insufficient to sustain a conviction under this section, where the uncontradicted facts indicated that there was no penetration, as defined by § 97-3-97, the prosecution conceded that there was no attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim's admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So. 2d 1212 (Miss. 1983).

Evidence, including positive identification of the accused by two residents of the dwelling, was sufficient to sustain a conviction of burglariously breaking and entering a dwelling house with the intent to commit rape. *McDole v. State*, 229 Miss. 646, 91 So. 2d 738 (1957).

10. —Miscellaneous.

Defendant's conviction for attempted kidnapping in violation of Miss. Code Ann. § 97-3-53 and Miss. Code Ann. § 97-1-7 was proper where the evidence was sufficient to support the conviction. The evidence established that, among other things, defendant chased the victim down the street and grabbed her. *Carter v. State*, — So. 2d —, 2006 Miss. App. LEXIS 77 (Miss. Ct. App. Jan. 31, 2006).

Defendants' convictions for armed robbery were proper where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants nor a reasonable explanation for their actions; further, the testimony concerning the manner in which defendants entered the room, their subsequent conduct, the fact that they fled and resisted arrest, and that a reasonably supported inference existed that there was an attempt to take one of the victim's watch all sustained a finding by a reasonable minded jury that defendants committed armed robbery. *Broomfield v. State*, — So. 2d —, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003).

Although defendant received the maximum sentence on both counts of attempted robbery, there was no evidence that improper consideration infected the

court's decision, or that the maximum sentences were given in retribution for defendant's physical outbursts at sentencing. *Bolton v. State*, 752 So. 2d 480 (Miss. Ct. App. 1999).

Attempted suicide is unlawful under the statute making criminal attempts unlawful. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

The crime of attempted robbery is a crime of violence within the meaning of § 99-19-83. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

Evidence was sufficient to sustain conviction for attempted kidnapping where defendant had taken part in attempted kidnapping after failing to follow through with plan to rob grocery store, despite defendant's contention that he took no part in plan or effort to rob or kidnap grocery store customer. *Jenkins v. State*, 507 So. 2d 89 (Miss. 1987).

Notwithstanding that the state failed to prove that a deadly weapon was displayed at the time motel operator was sprayed with mace, defendant's conviction of an attempt to commit armed robbery of the motel operator was supported by evidence showing that defendant, along with others, planned the armed robbery, armed and transported themselves to the motel site, with the defendant and another hidden in the back seat of the automobile used in the commission of the crime, and by shooting at the motel operator to effectuate and escape. *Edwards v. State*, 500 So. 2d 967 (Miss. 1986).

Photographs of injuries of child are admissible, in prosecution of parent for attempted child abuse, on issue of whether fall resulting in injuries was accidental or result of parent's deliberate act. *Watson v. State*, 483 So. 2d 1326 (Miss. 1986).

Defendant's statement to associate to tell juror who had been summoned to hear defendant's upcoming murder trial "there might be a reward in the future," followed

by associate's refusal to convey the offer and actual failure to make such effort was not an overt act as required by Code 1942 § 2017, and conviction of attempting to make and offer a reward or gratuity to a juror, with the intent to influence the juror's verdict, would be reversed. *Smith v. State*, 279 So. 2d 652 (Miss. 1973).

Undisputed showing that the defendant used some force and a great deal of persuasion and maneuvering to get a nine-year-old female child to go with him, and persisted in his efforts to the extent of taking the child about two blocks in one direction from the place from where she had wanted to go, and then, when she had got away from him, he pursued her until she arrived at the door of the place where her mother was, was sufficient to sustain the charge of attempted kidnapping. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537 (1957).

Upon conviction of restaurant proprietor of attempt to sell diseased flesh of an animal for human consumption, under indictment bringing offense either under Code 1942, § 2336 or § 2338, but specifically referring to neither section, nor charging that defendant was a butcher or that his occupation might be classified as that of a butcher, sentence should be that imposed by § 2338, under the rule that when the facts which constitute a criminal offense may fall under either of two sections, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment, having regard for the rule that under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Firing into house in nighttime with knowledge that house was occupied and that persons were sleeping therein was done in commission of act evincing a reckless disregard for human life, and with intent to injure some person therein, and town marshal living in house had such probable cause to believe that person firing gun had committed felony as would warrant marshal in arresting person without warrant. *Lee v. State*, 179 Miss. 122, 174 So. 85 (1937).

Penalty for attempt to escape from county jail limited to year's imprisonment; every person lawfully imprisoned. *Floyd v. State*, 140 Miss. 884, 105 So. 765 (1925).

Verdict that defendant was preparing to make liquor not sufficient for conviction for attempt. *Wiggington v. State*, 136 Miss. 825, 101 So. 856 (1924).

11. Sentence.

Appellate court affirmed the denial of an inmate's motion for post-conviction relief on the grounds that her sentences

were excessive as the sentences imposed for her conviction for Miss. Code Ann. § 97-1-7 were within the statutory range. *Lee v. State*, 918 So. 2d 87 (Miss. Ct. App. 2006).

The defendant was properly sentenced to 30 years' imprisonment for attempted sexual battery, which is a noncapital crime, notwithstanding that the statute permits a maximum 10 years' imprisonment for an attempted capital crime. *Ishee v. State*, — So. 2d —, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

RESEARCH REFERENCES

ALR. Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

Attempt to commit assault as criminal offense. 79 A.L.R.2d 597.

Attempts to receive stolen property. 85 A.L.R.2d 259.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 A.L.R.3d 241.

Impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime. 37 A.L.R.3d 375.

What constitutes attempted murder. 54 A.L.R.3d 612.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 A.L.R.3d 842.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime. 41 A.L.R.4th 588.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

Am Jur. 21 Am. Jur. 2d, Criminal Law §§ 174 et seq.

8 Am. Jur. Proof of Facts 2d, Withdrawal from or Abandonment of Criminal Enterprise, §§ 6 et seq. (proof of defendant's withdrawal from and abandonment of criminal enterprise).

CJS. 22 C.J.S., Criminal Law §§ 114, 116-123.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-1-9. Attempt to commit offense; no conviction if offense completed.

A person shall not be convicted of an assault with intent to commit a crime, or of any other attempt to commit an offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault or in pursuance of such attempt.

SOURCES: Codes, 1857, ch. 64, art. 19; 1880, § 2712; 1892, § 974; Laws, 1906, § 1050; Hemingway's 1917, § 778; Laws, 1930, § 794; Laws, 1942, § 2018.

Cross References — Conviction of attempt as constituent of offense charged, see § 99-19-5.

JUDICIAL DECISIONS

1. In general.
2. Particular offenses.

1. In general.

Where the State's proof of penetration was insufficient for a sexual battery charge because the victim was severely retarded and unable to communicate by anything other than grunting or squealing sounds, it was not prohibited from charging defendant with attempt, as the State's proof of a completed penetration was not more persuasive than an objective analysis showed it to be. *Thomas v. State*, 824 So. 2d 648 (Miss. Ct. App. 2002).

Statute is inapplicable where it is doubtful that offense attempted was completed by accused, and state may in such case elect to prosecute for the attempt. *Holley v. State*, 175 Miss. 347, 166 So. 924 (1936).

Where crime was actually committed prosecution for an attempt is not proper. *Davis v. State*, 89 Miss. 21, 42 So. 542 (1907).

2. Particular offenses.

Where defendant was indicted for attempting to burglar a dwelling house, the trial court committed reversible error by allowing the State to amend the indictment to change the charge from "attempt to break and enter" to "break and enter." Defendant was clearly prejudiced because the defense that he had actually completed the crime was no longer available to him. *Spears v. State*, — So. 2d —, 2005 Miss. App. LEXIS 735 (Miss. Ct. App. Oct. 11, 2005).

Where the evidence positively established the completed act of sexual intercourse, it was error to prosecute and convict the appellant of assault with intent to ravish. *Young v. State*, 317 So. 2d 402 (Miss. 1975).

Failure to consummate the crime of robbery is an essential element of proof in a prosecution under an indictment charging assault and battery with intent to rob. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761 (1955).

If there had been doubt whether a crime of robbery was completed the state could have elected to prosecute for assault and battery with intent to rob, but this section [Code 1942, § 2018] does not cover a case wherein it is doubtful that the offense attempted was actually completed by the accused. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761 (1955).

Where defendant had been indicted, tried and convicted of a crime of assault and battery with intent to rob and the proof showed that the defendant actually completed the robbery, conviction would be reversed and the defendant held for further grand jury action. *Thompson v. State*, 226 Miss. 93, 83 So. 2d 761 (1955).

Conviction for attempted robbery of defendant indicted on charge of attempted burglary would be reversed, where proof introduced by state showed that offense was completed, since prosecution for attempt is improper under statute where crime is actually committed. *Williams v. State*, 178 Miss. 899, 174 So. 47 (1937).

Where deceased was killed by shot fired by third party after defendant had fractured deceased's skull and there was no evidence that fracture would have caused death, defendant could be prosecuted for assault with intent to kill. *Holley v. State*, 175 Miss. 347, 166 So. 924 (1936).

This section [Code 1942, § 2018] applied to crime of forgery, it being held there could be no conviction for forgery under the facts of the case. *Wilson v. State*, 85 Miss. 687, 38 So. 46 (1905).

RESEARCH REFERENCES

ALR. Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime. 41 A.L.R.4th 588.

Am Jur. 21 Am. Jur. 2d, Criminal Law §§ 174 et seq.

CJS. 22 C.J.S., Criminal Law §§ 114, 116-123.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender). Mississippi Penal Code Annotated (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

CHAPTER 3

Crimes Against the Person

SEC.

- 97-3-1. Abduction for purposes of marriage.
- 97-3-3. Abortion; causing abortion or miscarriage.
- 97-3-4. Failed abortion; unlawful for physician to intentionally allow or cause living child to die; care of living child mandated; penalties.
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- 97-3-54.3. Anti-Human Trafficking Act; aiding, abetting, or conspiring to violate anti-human trafficking provisions.
- 97-3-54.4. Anti-Human Trafficking Act; definitions.
- 97-3-55. Libel; penalty.
- 97-3-57. Libel; truth as defense.
- 97-3-59. Mayhem.
- 97-3-61. Poisoning with intent to kill or injure.
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- 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

- 97-3-67. Repealed.
- 97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined.
- 97-3-69. Rape; "chaste character" presumed; uncorroborated testimony of victim insufficient.
- 97-3-70. Repealed.
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- 97-3-104. Crime of sexual activity between law enforcement or correctional personnel and prisoners; sanctions.
- 97-3-105. Hazing; initiation into organization.
- 97-3-107. Stalking.
- 97-3-109. Drive-by shooting; drive-by bombing.
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- 97-3-111. Forfeiture of vehicles used in drive-by shootings or bombings.
- 97-3-113. Mississippi Carjacking Act; short title.
- 97-3-115. Mississippi Carjacking Act; definitions.
- 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

§ 97-3-1. Abduction for purposes of marriage.

Every person who shall take any person over the age of fourteen (14) years unlawfully, against his or her will, and by force, menace, fraud, deceit, stratagem or duress, compel or induce him or her to marry such person or to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in the penitentiary not less than five (5) years and not more than fifteen (15) years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (24); 1857, ch. 64, art. 1; 1871, § 2483; 1880, § 2697; 1892, § 949; Laws, 1906, § 1025; Hemingway's 1917, § 750; Laws, 1930, § 768; Laws, 1942, § 1994; Laws, 1980, ch. 356, eff from and after passage (approved April 23, 1980).

Cross References — Statute of frauds as applicable to marriage contracts, see § 15-3-1.

Penal offenses which are crimes against municipalities, see § 21-13-19.

Kidnapping, see §§ 97-3-51, 97-3-53.

Statutory rape, see §§ 97-3-65 et seq.

Seduction of female child, see §§ 97-3-65, 97-3-95, 97-3-101, 97-5-23, and 97-29-55.

Enticing children for prostitution or marriage, see § 97-5-5.

Enticing children for employment, see § 97-5-7.

JUDICIAL DECISIONS

1. In general.

Evidence that defendants who unlawfully took female over age 14, against her will, to another city, so that one of defendants, or some other person, might have sexual intercourse with her, did not intend to bring such sexual intercourse about by force, menace, fraud, deceit, stratagem, or duress, did not warrant conviction of defendants for unlawfully forcing female

over age of 14 to be defiled against her will. *Tyler v. State*, 178 Miss. 340, 173 So. 413 (1937).

To constitute abduction the female must have been taken unlawfully against her will and by force, fraud, deceit, stratagem or duress have been compelled or induced to be defiled. *Lampton v. State*, 11 So. 656 (Miss. 1892).

RESEARCH REFERENCES

ALR. Kidnapping by fraud or false pretenses. 95 A.L.R.2d 450.

Am Jur. 1 Am. Jur. 2d, Abduction and Kidnapping §§ 1, 2.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 1.1 (complaint, peti-

tion, or declaration-false imprisonment imposed by private individual-sexual assault).

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

§ 97-3-3. Abortion; causing abortion or miscarriage.

(1) Any person wilfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:

(a) Where necessary for the preservation of the mother's life;

(b) Where pregnancy was caused by rape.

Said person shall, upon conviction, be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years; provided, however, if the death of the mother results therefrom, the person procuring, causing or attempting to procure or cause the illegal abortion or miscarriage shall be guilty of murder.

(2) No act prohibited in subsection (1) of this section shall be considered exempt under the provisions of subparagraph (a) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.

(3) The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this section.

(4) Nothing in this section shall be construed as conflicting with Section 41-41-73.

SOURCES: Codes, 1942, § 2223; Laws, 1952, ch. 260, §§ 1-3; Laws, 1966, ch. 358, § 1; Laws, 1997, ch. 350, § 3, eff from and after July 1, 1997.

Editor's Note — Laws, 1997, ch. 350, § 4, provides as follows:

"SECTION 4. If any provision, word, phrase or clause of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or applications of this act that can be given effect without the invalid provision, word, phrase, clause or application and to this end, the provisions, words, phrases and clauses of this act are declared to be severable."

Cross References — Penalty for murder, see § 97-3-21.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. Validity.
2. Construction and application.
- 3.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

I. UNDER CURRENT LAW.

1. Validity.

State's interest in protecting medical standards within its borders was sufficient to support criminal prosecution of non-physicians who perform abortions. *Spears v. Circuit Court, Ninth Judicial Dist.*, 517 F.2d 360 (5th Cir. 1975).

Section 1 of this act, as construed by the Mississippi Supreme Court in *Spears v. State*, 278 So. 2d 443, is not unconstitutionally overbroad, vague, or indefinite. *Spears v. Ellis*, 386 F. Supp. 653 (S.D. Miss. 1974), aff'd, 423 U.S. 802, 96 S. Ct. 9, 46 L. Ed. 2d 23 (1975).

Section (1) of Code 1942, § 2223 is constitutional with the exception of subsections (a) and (b). *Spears v. State*, 278 So. 2d 443 (Miss. 1973).

Code 1942, § 2223 as amended by Ch. 260, Laws of 1952, making the death of the mother resulting from an illegal abortion a murder is not violative of § 61 of the Mississippi Constitution for omitting to insert the provisions of Code 1942, §§ 2221, 2220, 2215 at length in the amendatory act, for the statute enacted by Ch. 260, Laws of 1952 is complete within itself, required no mention of the manslaughter statutes under which previous prosecution was maintained for the death of a mother as a result of an abortion, and such sections were amended by implica-

tion. *McCaskill v. State*, 227 So. 2d 847 (Miss. 1969).

2. Construction and application.

The state may not restrict the decision of a pregnant woman and her physician regarding abortion during the first stage of pregnancy. *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976), overruled on other grounds, *Oliverson v. West Valley City*, 1994 U.S. Dist. LEXIS 19383 (D. Utah Nov. 10, 1994).

The art of midwifery does not include the performance of abortions. *Spears v. Circuit Court, Ninth Judicial Dist.*, 517 F.2d 360 (5th Cir. 1975).

A state may not require that abortions, prior to the end of the first trimester, be performed only in hospitals. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

Prior to the end of the first trimester of pregnancy, an attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment, the patient's pregnancy should be terminated, and if such a decision is reached, the physician's judgment may be effectuated by an abortion free of interference by the state. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

From and after the end of the first trimester of pregnancy, a state may regu-

late the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

State regulation protective of fetal life after viability has both logical and biological justifications, and if a state is interested in protecting fetal life after viability, it may proscribe abortion during that period except when it is necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

Where conviction was based on § (1) of Code 1942, § 223 which prohibits all abortions unless performed by a duly licensed, practicing physician, an abortion performed by a nonphysician was a violation of this section. *Spears v. State*, 278 So. 2d 443 (Miss. 1973).

In a prosecution for attempted criminal abortion, where the female on whom the abortion was allegedly attempted was a hostile witness for the state, the state was entitled to prove that the witness had made prior inconsistent statements for the purpose of impeaching or discrediting her testimony, but such extra-judicial statements were not competent as substantial evidence of the facts to which they related. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345 (1964).

Where, in a prosecution for attempted criminal abortion, the accused was the only witness who testified on his behalf as to the facts and circumstances of the alleged crime, it was reversible error for the trial court to give an instruction which, in effect, authorized the jury to throw aside the accused's testimony as being unwor-

thy of belief because of the strong temptation on his part to swear falsely. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345 (1964).

In a prosecution for attempted criminal abortion, the trial judge erred in giving an instruction which might have given the jury the impression that, in making up their verdict, they were not to take into consideration the burden of proof and the presumption of innocence. *Hall v. State*, 250 Miss. 253, 165 So. 2d 345 (1964).

An indictment which charges all elements of the crime, including an averment that the abortion was not necessary for the preservation of the life of the mother, is not insufficient in omitting to add "upon the prior advice, in writing, of two reputable licensed physicians." *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449 (1960).

A defendant may not object to the admission of a confession of an abortion because of a deletion therefrom of admissions of the performance of other abortions. *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449 (1960).

In a prosecution under this section [Code 1942, § 2223] defendant has no right to cross-examine the prosecutrix as to the paternity of the child. *Phillips v. State*, 239 Miss. 399, 123 So. 2d 449 (1960).

3.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

Accused's guilt was for the jury in manslaughter prosecution for death of woman who died as a result of injuries inflicted by someone in attempting to produce an abortion, notwithstanding that injuries were inflicted in an inexcusably crude manner and the accused apparently was a physician or surgeon who had been practicing his profession for more than thirty-five years. *Johnson v. State*, 23 So. 2d 499 (Miss. 1945).

Indictment did not charge offense where it did not charge destruction was not advised by physician. *Ladnier v. State*, 155 Miss. 348, 124 So. 432 (1929).

Where accused performed an operation on a pregnant woman to procure a miscarriage, and the woman died in consequence thereof, he was guilty of manslaughter.

State v. Proctor, 102 Miss. 792, 59 So. 890 (1912).

An infant in the mother's womb was not a human being at common law and hence the use by a pregnant woman of sub-

stances or instruments to kill such a child is not within this section. [Code 1942, § 2223]. State v. Prude, 76 Miss. 543, 24 So. 871 (1899).

RESEARCH REFERENCES

ALR. Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused. 15 A.L.R.2d 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 A.L.R.2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Right of action for injury to or death of woman who consented to illegal abortion. 36 A.L.R.3d 630.

Right of minor to have abortion performed without parental consent. 42 A.L.R.3d 1406.

Woman's right to have abortion without consent of, or against objections of, child's father. 62 A.L.R.3d 1097.

Medical malpractice in performance of legal abortion. 69 A.L.R.4th 875.

Am Jur. 1 Am. Jur. 2d, Abortion and Birth Control §§ 1, 116, 117.

40 Am. Jur. 2d, Homicide §§ 8, 9.

1 Am. Jur. Pl & Pr Forms, Rev, Abortion, Form 3.1.

2 Am. Jur. Trials, Investigating Particular Crimes § 64 (abortion).

41 Am. Jur. Proof of Facts 2d 1, Trauma in Pregnancy.

49 Am. Jur. Proof of Facts 2d 125, Teratogenic Drugs.

Lawyers' Edition. Validity, under Federal Constitution, of abortion laws. 28 L. Ed. 2d 1053.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-4. Failed abortion; unlawful for physician to intentionally allow or cause living child to die; care of living child mandated; penalties.

(1) It shall be unlawful for any physician performing an abortion that results in the delivery of a living child to intentionally allow or cause the child to die.

(2) If the child is viable, such child shall be immediately provided appropriate medical care and comfort care necessary to sustain life. If the child is not viable, such child shall be provided comfort care. The provision of this section shall include, but not be limited to, a child born with physical or mental handicapping conditions which, in the opinion of the parent, the physician or other persons, diminishes the quality of the child's life, a child born alive during the course of an attempted abortion and a child not wanted by the parent.

(3) As used in this section the term "child" includes every infant member of the species homo sapiens who is born alive at any stage of development.

(4) Any person who violates this section shall be guilty of a felony and, upon conviction, be imprisoned for not less than one (1) year nor more than ten (10) years in the State Penitentiary and fined not more than Fifty Thousand Dollars (\$50,000.00) but not less than Twenty-five Thousand Dollars (\$25,000.00).

SOURCES: Laws, 2004, ch. 436, § 1, eff from and after July 1, 2004.

§ 97-3-5. Abortion; advertisement, sale or gift of drugs or instruments.

A person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend, or give away, or has in his possession with intent to sell, lend, or give away, or advertises or offers for sale, loan or distribution any instrument or article, or any drug or medicine, for causing unlawful abortion; or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such article or medicine can be purchased or obtained, or who manufactures any such article or medicine, is guilty of a misdemeanor, and, on conviction, shall be punished by fine not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200.00), and by imprisonment in the county jail not exceeding three (3) months.

SOURCES: Codes, 1892, § 1217; Laws, 1906, § 1293; Hemingway's 1917, § 1026; Laws, 1930, § 1057; Laws, 1942, § 2289; Laws, 1970, ch. 344, § 1, eff from and after passage (approved March 4, 1970).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Health and Human Service regulations limiting ability of Federal Title X fund recipients to engage to abortion related activities were permissible construction of Title X, did not impose viewpoint-discriminatory conditions on government subsidy so as to violate First Amendment free speech rights of either private health care organizations that received Title X funds, their staffs, or their patients, and did not violate women's rights under due process clause of Fifth Amendment. *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), overruled on other grounds, *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. S.D. 1995).

A state statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, unconstitutionally infringes upon the First Amendment rights of free speech and press of a newspaper editor who is prosecuted under that statute for publishing an advertisement of an out-of-state organization which offers services relating to obtaining legal abortions in the state where the organization is located. *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S., Obscenity §§ 13-15, 28.

§ 97-3-7. Simple assault; aggravated assault; domestic violence.

(1) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or both. However, a person convicted of simple assault (a) upon a statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker or family protection specialist or family protection worker employed by the Department of Human Services or another agency, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, or a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment, or (b) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by imprisonment for not more than five (5) years, or both.

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years. However, a person convicted of aggravated assault (a) upon a statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker employed by the Department of Human Services or another agency, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus

driver, or a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, family protection specialist, family protection worker, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment, or (b) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than thirty (30) years, or both.

(3) A person is guilty of simple domestic violence who commits simple assault as described in subsection (1) of this section against a family or household member who resides with the defendant or who formerly resided with the defendant, a current or former spouse, a person who has a current dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child and upon conviction, the defendant shall be punished as provided under subsection (1) of this section; however, upon a third or subsequent conviction of simple domestic violence, whether against the same or another victim and within five (5) years, the defendant shall be guilty of a felony and sentenced to a term of imprisonment not less than five (5) nor more than ten (10) years. In sentencing, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the victim, the residence of the perpetrator, or the residence where the offense occurred.

(4) A person is guilty of aggravated domestic violence who commits aggravated assault as described in subsection (2) of this section against a family or household member who resides with the defendant or who formerly resided with the defendant, or a current or former spouse, a person who has a current dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child and upon conviction, the defendant shall be punished as provided under subsection (2) of this section; however, upon a third or subsequent offense of aggravated domestic violence, whether against the same or another victim and within five (5) years, the defendant shall be guilty of a felony and sentenced to a term of imprisonment of not less than five (5) nor more than twenty (20) years. In sentencing, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the

victim, the residence of the perpetrator, or the residence where the offense occurred. Reasonable discipline of a child, such as spanking, is not an offense under this subsection (4).

(5) “Dating relationship” means a social relationship of a romantic or intimate nature.

(6) Every conviction of domestic violence may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

(7) In any conviction of assault as described in any subsection of this section which arises from an incident of domestic violence, the sentencing order shall include the designation “domestic violence.”

SOURCES: Codes, 1857, ch. 64, art. 18; 1871, § 2497; 1880, § 2711; 1892, § 967; Laws, 1906, § 1043; Hemingway’s 1917, § 771; Laws, 1930, § 787; Laws, 1942, § 2011; Laws, 1974, ch. 458, § 1; Laws, 1992, ch. 431, § 2; Laws, 1993, ch. 580, § 1; Laws, 1998, ch. 425, § 1; Laws, 1998, ch. 525, § 1; Laws, 1999, ch. 552, § 2; Laws, 2000, ch. 552, § 1; Laws, 2001, ch. 566, § 1; Laws, 2002, ch. 353, § 1; Laws, 2004, ch. 489, § 9; Laws, 2006, ch. 589, § 1; Laws, 2006, ch. 600, § 11, eff from and after July 1, 2006.

Joint Legislative Committee Note — Section 1 of ch. 425, Laws, 1998, effective July 1, 1998 (approved March 23, 1998), amended this section. Section 1 of ch. 525, Laws, 1998, effective July 1, 1998 (approved April 6, 1998), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 525, Laws, 1998, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 1 of ch. 589, Laws, 2006, effective from and after July 1, 2006 (approved April 21, 2006), amended this section. Section 11 of ch. 600, Laws, 2006, effective from and after July 1, 2006 (approved April 24, 2006), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 589, Laws, 2006, which contains language that specifically provides that it supercedes § 97-3-7 as amended by Laws, 2006, ch. 600.

Editor’s Note — Laws, 1974, ch. 458, § 3, which chapter amended this section, provides as follows:

“SECTION 3. Nothing in this act shall be construed to defeat or affect in any manner whatsoever the prosecution of any person, association, firm or corporation for the violation of any statute repealed or amended hereby which violation occurred prior to the effective date of this act.”

Amendment Notes — The 2004 amendment added “child protection specialist” following “social worker” throughout and made minor stylistic changes.

The first 2006 amendment (ch. 589) substituted “social worker or family protection specialist” for “social worker orchild protection specialist” and inserted “or family protection worker” throughout (1) and (2); and inserted “municipal” preceding “or youth court or a judge of the Court” in the second sentences of (1) and (2).

The second 2006 amendment (ch. 600) substituted “social worker or family protection specialist” for “social worker or child protection specialist” and inserted “or family protection worker” throughout (1) and (2).

Cross References — Employees of department of corrections having status of law enforcement officers under this section, see § 47-5-54.

Effect of conviction of assault with intent to kill as disqualification for holding office in labor union, etc., see § 71-1-49.

Homicide, see §§ 97-3-15 et seq.

Mayhem, see § 97-3-59.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Arrest of person without warrant for violation of this section, see § 99-3-7.

Insulting words being admissible in assault trials, see § 99-17-19.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

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27. Domestic violence aggravated assault.
28. Miscellaneous.

1. In general; definitions and distinctions.

Denial of the inmate's petition for post-conviction relief was proper where it was not necessary under Miss. Code Ann. § 97-3-7(2)(b) that the victim suffer "serious" bodily injury. Mere bodily injury was

sufficient as long it was caused with other means likely to produce death or serious bodily harm. *Miller v. State*, 919 So. 2d 1067 (Miss. Ct. App. 2005).

In a juvenile delinquency case, the petition did not give the trial judge the option of an attempt charge in a simple assault case, and the record was devoid of any questions or answers regarding injury caused at the hands of appellant juvenile when he touched the minor victim's private area; thus, the State failed to prove all the elements of simple assault as charged in the petition, specifically, proof of bodily injury, and appellant was improperly adjudicated a delinquent. In the *Interest of C.A.*, 872 So. 2d 705 (Miss. Ct. App. 2004).

Where a decedent pointed a loaded gun at officers in violation of Miss. Code Ann. § 97-3-7, refused to lower the gun, backed into his house, and initiated fire at the officers, an officer reasonably believed that his life and the lives of other officers at the scene were in imminent danger; hence, there was no violation of the decedent's Fourth Amendment rights when the officer followed the decedent into the latter's home, where the officer returned fire and mortally injured the decedent. *Elkins v. McKenzie*, 865 So. 2d 1065 (Miss. 2003).

Finding that a juvenile was a delinquent child after he was convicted of simple assault was proper where it was foreseeable that pushing a person down a hill and over a ledge could cause serious injuries; he acted recklessly and there was sufficient evidence for the trial judge, acting as the jury, to conclude that he was guilty of simple assault, Miss. Code Ann. § 97-3-7(1). In *re G. L. H.*, 843 So. 2d 109 (Miss. Ct. App. 2003).

Manslaughter indictment sufficiently alleged that defendant was engaged in the perpetration of a felony, namely aggravated assault pursuant to Miss. Code Ann. § 97-3-7(2), that had to be proved in order to show that defendant's participation in the crime of killing another human being without malice was manslaughter, as the indictment tracked the language of the aggravated assault statute and identified the person upon whom defendant committed the aggravated assault, the person who was killed while defendant committed that felony, and the date and place of the crimes committed. *Stevens v. State*, — So. 2d —, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Defendant's conviction for assault of a police officer was affirmed because substantial evidence showed that the victim suffered injury, and the jury rejected the contention that defendant was resisting an unlawful arrest. *Johnson v. State*, 754 So. 2d 576 (Miss. Ct. App. 2000).

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179 (Miss. 1997), overruled in part, *Carr v. Town of Shubutu*, 733 So. 2d 261 (Miss. 1999). But see *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999).

In aggravated assault prosecution arising from defendant's stabbing of two victims, evidence was insufficient to warrant lesser included offense instruction on simple assault; multiple stab wounds suffered by victims were serious and life threatening, and there was no evidence that defendant was merely negligent in handling knife. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

The mere pointing of a firearm does not constitute attempt under the aggravated assault statute, this section. *Gibson v. State*, 660 So. 2d 1268 (Miss. 1995).

In a prosecution for aggravated assault, the State was not required to prove that

the defendant acted "under circumstances manifesting extreme indifference to the value of human life" where the indictment charged only that the defendant "did unlawfully, feloniously, purposely and knowingly cause serious bodily injury" to the victim. *Hall v. State*, 644 So. 2d 1223 (Miss. 1994).

Subsection (1) of this section is not unconstitutionally vague on the ground that it does not define "bodily injury"; although there are no degrees of bodily injury stated in the statute, a minor injury is a "bodily injury" even though it may not be a traumatic injury. *Reining v. State*, 606 So. 2d 1098 (Miss. 1992).

Subsection (2) of this section is not unconstitutionally vague on the ground that it does not define the term "serious bodily harm," particularly when applied in a case involving brutal injuries; in more ambiguous cases, prosecutors and trial courts should refer to the definition of "serious bodily injury" set out in § 210.0 of the Model Penal Code. *Fleming v. State*, 604 So. 2d 280 (Miss. 1992).

It is not necessary under § 97-3-7(2)(b) for the State to prove that the victim suffered "serious" bodily injury; mere "bodily injury" is sufficient so long as it was caused with "other means likely to produce death or serious bodily harm." *Jackson v. State*, 594 So. 2d 20 (Miss. 1992).

While a juvenile's intentional touching and squeezing of a pregnant woman's derriere, without permission, amounted to a physical offense, this conduct did not constitute simple assault under § 97-3-7(1)(c) where there was no proof of fear of imminent serious bodily harm. Thus, the juvenile's adjudication of delinquency would be reversed based on the failure to prove an essential element of the crime of simple assault. *S.B. v. State*, 566 So. 2d 1276 (Miss. 1990).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evidence. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

A fireman who was engaged in rescuing individuals from a wrecked automobile

outside of the city and county in which he was employed was nevertheless a "fireman" within the meaning of this section, which sets forth the punishment for simple assault upon a fireman acting within the scope of his duty, since the fireman was authorized under § 21-25-5 to act outside his city boundary in "aiding in the rescue of persons" and was not limited to county lines. *Cagle v. State*, 536 So. 2d 3 (Miss. 1988).

Person who shoots 4 or 5 bullets at second person, hitting third person with 3 bullets, has committed aggravated assault with respect to third person notwithstanding lack of intent to shoot that person. *Davis v. State*, 476 So. 2d 608 (Miss. 1985).

Prosecution for aggravated assault on police officer is not barred by prior prosecution for aggravated assault on another police officer arising out of same incident. *Lee v. State*, 469 So. 2d 1225 (Miss. 1985).

A defendant who assaulted three police officers, on the same day and as a part of the same occurrence, was properly subjected to three separate charges of assault, in violation of subsection (1) of this section, and properly sentenced to three consecutive terms, pursuant to § 99-19-21, for the three resulting convictions. *Ball v. State*, 437 So. 2d 423 (Miss. 1983).

Defendant's act of pointing a loaded pistol at another came within statutory crime of aggravated assault where it manifested an extreme indifference to the value of human life. *Nelson v. State*, 361 So. 2d 343 (Miss. 1978).

Lands within the area designated as a reservation for the Choctaw Indians residing in central Mississippi were on the basis of the history of the relations between the Mississippi Choctaws and the United States, "Indian country," as defined in 18 USCS § 1151 and as used in the Major Crimes Act of 1885 (18 USCS § 1153); these federal statutes operate to vest exclusive jurisdiction in the federal courts and to preclude the exercise of state criminal jurisdiction over certain offenses committed on these lands, including aggravated assault, even though (1) the Choctaws in Mississippi were merely a remnant of a larger group of Indians, long ago removed from Mississippi, (2) federal

supervision over them had not been continuous, and (3) the Treaty at Dancing Rabbit Creek (7 Stat 333) extended state citizenship to Choctaws remaining in Mississippi. *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978), on remand, 587 F.2d 683 (5th Cir. 1979).

Under this section [Code 1042, § 2013] in order to find that the defendant did unlawfully and feloniously injure the victim, it is not necessary that the state show that the defendant intentionally or willfully discharged the firearm or intentionally or willfully injured the person whom he assaulted. *Barnes v. State*, 249 So. 2d 383 (Miss. 1971).

Many cases of assault and battery, such as a fist fight, are not covered by statute and depend on the common law. *Butler v. State*, 212 So. 2d 573 (Miss. 1968).

Where the accused, pursuant to a plan to kill a bus driver, attached dynamite to a bus in such a manner that it exploded upon the ignition being turned on, and the intended victim was horribly maimed thereby, the offense came within the purview of Code 1942, § 2143, rather than this section [Code 1942, § 2011]. *Rogers v. State*, 228 Miss. 873, 89 So. 2d 860 (1956).

The means or force must at least be capable of producing death. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549 (1944).

Battery with hands and feet may be a means or force "likely to produce death" within the purview of this section [Code 1942, § 2011], depending on the circumstances of each case. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549 (1944).

The word "likely" in the statute borrows meaning from both possibility and probability and stands midway between their respective connotations, and, as so defined, the responsibility for adjudging likelihood, in all cases save those speaking absurdity, remains with the jury, which may be left free to give due weight to the parties, the place, the means used, and the degree of force employed. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549 (1944).

"Assault" defined. *Blankenship v. State*, 130 Miss. 725, 95 So. 81 (1923).

Words "point" and "aim" are synonymous and charge but one offense. *Coleman v. State*, 94 Miss. 860, 48 So. 181 (1909).

Distinction is drawn between assault with intent to kill and murder and assault and battery with same intent. *Montgomery v. State*, 85 Miss. 330, 37 So. 835 (1904).

2. Intent; generally.

Defendant kicked the officer, dislocating the officer's jaw, and although no direct evidence was presented that defendant intended to injure the officer, a juror could reasonably infer the intent from the evidence, and the appellate court could not reverse the verdict because of insufficient evidence. *Brown v. State*, 852 So. 2d 607 (Miss. Ct. App. 2003).

Subsection (b) is written in the disjunctive, rather than the conjunctive, with regard to a defendant's intent, as it requires a showing that the defendant caused serious bodily injury "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." *Stegall v. State*, 765 So. 2d 606 (Miss. Ct. App. 2000).

The indictment of the defendant and instructions to the jury given in his trial erroneously turned on an improper interpretation of the elements of attempted aggravated assault where they both used language pertaining to reckless, rather than intentional, conduct. *Morris v. State*, 748 So. 2d 143 (Miss. 1999).

Indictment and jury instructions adequately covered issue of intent with respect to charge of aggravated assault by alleging that defendant caused injury "willfully." *Moore v. State*, 676 So. 2d 244 (Miss. 1996).

One does not have to possess ill will toward, or even know the identity of, a specific individual in order possess the requisite intent to commit an aggravated assault on that person. *Blanks v. State*, 542 So. 2d 222 (Miss. 1989).

Person who shoots 4 or 5 bullets at second person, hitting third person with 3 bullets, has committed aggravated assault with respect to third person notwithstanding lack of intent to shoot that person. *Davis v. State*, 476 So. 2d 608 (Miss. 1985).

Recklessness or negligence contemplated by this section for conviction of simple assault is in act itself and does not

refer to subjective intent of defendant who acts in reckless or negligent belief that he is acting in self defense. *Nobles v. State*, 464 So. 2d 1151 (Miss. 1985).

It is necessary for the state to prove intent on the part of the defendant to kill and murder the person named in the indictment. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904 (1965).

The rule of criminal law that where one crime is intended and by mistake another committed the unlawful intent to do one act is transposed to the other does not apply to the statutory crime of assault and battery with intent to kill. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904 (1965).

The intent of the accused is an essential ingredient of the charge of assault and battery with unlawful and felonious intent, with malice aforethought, to kill and murder. *Hydrick v. State*, 246 Miss. 448, 150 So. 2d 423 (1963).

The intent must exist at the time the injury was inflicted. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

A felonious intent is necessary to support the charge of assault with intent to kill and murder. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260 (1955).

The trial court properly limited the jury to a consideration of defendant's guilt of simple assault and battery in a prosecution under this section, where the element of intent was absent. *Markham v. State*, 209 Miss. 135, 46 So. 2d 88 (1950).

Test of defendant's guilt under this section is whether or not the accused intends to kill and murder at time he fires shot or otherwise inflicts wound, and if such intent then exists he is not to be exonerated of felonious charge by what he does or fails to do thereafter. *Cearry v. State*, 204 Miss. 299, 37 So. 2d 316 (1948).

Under this section [Code 1942, § 2011] both the nature of the means used and the quality of the purpose are essential elements of the crime charged; the weapon must be deadly, or the means likely to produce death, and the intent must be murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

It is intent with which an assault is committed that raises it from misdemeanor to a felony. *Toler v. State*, 143 Miss. 96, 108 So. 443 (1926).

3. —Sufficiency of.

Where defendant, in the process of being arrested for suspicion of driving while under the influence of intoxicants, swung at an officer with a closed fist and landed a "glancing blow," but the officer did not testify as to undergoing any injury or feeling pain, the Murrell standard was controlling and required new trial. *Reynolds v. State*, 818 So. 2d 1287 (Miss. Ct. App. 2002).

Evidence was insufficient to support a charge of attempt to rape where there was nothing in the record that would distinguish the intent of the defendant to rape his victim from any other particular intent where, during the entire assault, both the defendant and the victim were fully clothed and there was no evidence that the defendant removed or attempted to remove any of victim's clothes, nor was there evidence that the defendant fondled or caressed his victim or attempted to do so; the evidence merely depicted a somewhat aimless attack wherein the defendant grabbed his victim, pushed her to the floor and held her there. *Aikerson v. State*, 295 So. 2d 778 (Miss. 1974).

Argument that defendant did not intend to kill arresting officer because he shot only once, and, although he had the officer's loaded revolver, he left without killing the officer, and therefore this showed conclusively that he did not intend to kill the officer, was not well taken, inasmuch as the issue as to what the defendant intended at the time he fired the shot was a jury issue. *Torrence v. State*, 283 So. 2d 595 (Miss. 1973).

The evidence in a prosecution for assault and battery with intent to kill and murder, sufficiently created a jury question as to intent to kill, on the part of a defendant who struck the victim with a stick with such force as to knock the victim to the pavement, and who returned later and struck the victim again while he was unconscious. *Thompson v. State*, 258 So. 2d 448 (Miss. 1972).

Conviction of assault with intent to kill is not warranted by a showing merely of intent to do great bodily harm. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

The requisite intent is not present where intent to kill is conditioned on hap-

pening of an event which may within reason fail to take place, as in the case of a threat to kill if a debt is not paid. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

Evidence that four law enforcement officers under the authority of a search warrant for intoxicating liquor went to the accused's home on a dark night, and upon finding no one at home, gained entrance through a window, and remained therein from 10 o'clock until midnight, without showing any lights, and the accused, who had been advised that someone was in his home, with a companion shot out the windows of the home with a shot gun fired at a distance of 60 feet, using No. 8, or birdshot, was insufficient to support a finding that accused's intent and purpose was to kill and murder. *Smith v. State*, 233 Miss. 503, 102 So. 2d 699 (1958).

Intent is main ingredient of offense under this section, and where facts show that intent to kill was conditioned upon happening of some other event, which may, within reason, fail to take place, real intent to kill and murder does not come into existence. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778 (1948).

An intent to murder, the gist of this offense, was not shown where the deceased was shot by his own pistol which he had given to the defendant who apparently for effect drew the pistol during a crap game and it was discharged when one of the participants struck the defendant's arm. *Edgar v. State*, 202 Miss. 505, 32 So. 2d 441 (1947).

In assault committed by throwing a pair of pliers from a distance of ten feet, striking prosecuting witness upon the upper lip, the evidence, in view of the circumstances, including the parties, the occasion and the means used, was insufficient to support a finding beyond a reasonable doubt that accused's purpose was to kill and murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

The statute charging the crime with specific intent to kill and murder a specified person is made out only by proof sufficient to find that the specific intent to kill existed—the specific intent to kill being the gist of the offense, or that which raises it from a mere misdemeanor to a felony.

Intent to kill a specified person, accompanied by an overt act constituting an assault, is also, in a sense, an attempt to commit the crime; but there must be an intent accompanied by an overt act, to make out the offense under this section [Code 1942, § 2011]. *Norwood v. State*, 182 Miss. 898, 183 So. 523 (1938).

Intent to murder may not be inferred from leveling of gun, and the fact that defendant did not shoot, there being nothing to prevent, tends to negative existence of such intent. *Toler v. State*, 143 Miss. 96, 108 So. 443 (1926).

Intent to kill conditioned on happening of event insufficient, though condition unlawful. *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923).

Evidence of conditional threat to kill held insufficient to establish intent. *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923).

The intent must be actual, not conditional. *Hairston v. State*, 54 Miss. 689, 28 Am. R. 392 (1877).

4. Deadly weapon.

Evidence was sufficient to support defendant's conviction for aggravated assault—he inflicted the injuries to the victim with a deadly weapon. *Harris v. State*, 892 So. 2d 830 (Miss. Ct. App. 2004).

Where defendant argued that the State failed to prove that the baseball bat used in the attack of the victim was a deadly weapon sufficient to support a conviction of aggravated assault pursuant to Miss. Code Ann. § 97-3-7, the claim failed; the bat caused a compound fracture of the victim's leg, which indicated that the bat certainly could have done more damage even to the point of causing the victim's death. *Brown v. State*, 864 So. 2d 1009 (Miss. Ct. App. 2004).

Under the statute, it was unnecessary for the State to prove the victim suffered serious bodily injury, mere bodily injury was sufficient so long as it was caused with other means likely to produce serious bodily harm. *Vance v. State*, 803 So. 2d 1265 (Miss. Ct. App. 2002).

A bottle may be found to be a deadly weapon. *Gayle v. State*, 743 So. 2d 392 (Miss. Ct. App. 1999).

Evidence was sufficient to allow a jury to find that the defendant's use of his fist

was a means likely to produce death or serious bodily harm where (1) the force of the defendant's first blow knocked the victim out of his recliner and onto the fireplace hearth, and (2) the defendant was 19 years old at the time of the crime and struck a much older man in his own home. *Harrison v. State*, 724 So. 2d 978 (Ct. App. 1998).

While an assault under subsection (2)(b) of this section ordinarily involves the use of a weapon, a violent and aggravated assault committed with one's fists may constitute a crime under subsection (2)(b) of this section; it is not necessary under subsection (2)(b) of this section that the use of hands and fists constitute the use of a "deadly weapon," but, rather, it is enough if their use constitutes a "means likely to produce [either] death or serious bodily harm." *Jackson v. State*, 594 So. 2d 20 (Miss. 1992).

Whether closed fists constitute a "means likely to produce serious bodily harm" under subsection (2)(b) of this section involves a question of fact to be decided by the jury in light of the evidence; the responsibility for determining likelihood remains with the jury which may be left free to give due weight to the characteristics of the parties, the place, the manner in which hands and fists were used, and the degree of force employed. *Jackson v. State*, 594 So. 2d 20 (Miss. 1992).

The use of a .357 Magnum as a blunt instrument was sufficient to support an aggravated assault charge since the use of the gun as a blunt instrument could have been found by the jury to constitute use of a weapon which could cause bodily injury to another within the meaning of this section. *Griffin v. State*, 540 So. 2d 17 (Miss. 1989).

A reasonable person could determine that a pistol which misfired 3 times was a deadly weapon where there was no proof that the pistol was incapable of firing and the pistol was not available for inspection at trial. The fact that the pistol misfired 3 times does not preclude its capability to fire on the fourth attempt. *Davis v. State*, 530 So. 2d 694 (Miss. 1988).

A conviction for aggravated assault upon a state highway patrolman would be affirmed where, although the defendant

testified that the gun he had used was a blank starter pistol, the prosecution testimony and inferences to be drawn therefrom were that the gun, which was never found, looked like a real pistol, sounded like a pistol when fired, and had been used in a threatening manner, just as a deadly weapon would be used in similar circumstances, and where at no time prior to trial did the defendant state to any police officer that the weapon used had been a starter pistol. *Jackson v. State*, 404 So. 2d 543 (Miss. 1981).

A defendant was properly convicted of aggravated assault upon a law enforcement officer despite the fact that the gun used in the assault was not loaded. *Wilson v. State*, 395 So. 2d 957 (Miss. 1981).

While the use of feet and fists ordinarily would not constitute the use of a deadly weapon, they can constitute a deadly weapon if used with means of force likely to produce death. *Pulliam v. State*, 298 So. 2d 711 (Miss. 1974).

The question as to whether or not the instrument used is a deadly weapon the force used as likely to produce death are questions of fact for determination of the jury. *Shanklin v. State*, 290 So. 2d 625 (Miss. 1974).

Testimony introduced by the state was ample and from which jury properly determined that the iron pipe used by the defendant was a deadly weapon, and that the force and manner in which it was used proved the intent of the defendant to kill and murder his victim. *Shanklin v. State*, 290 So. 2d 625 (Miss. 1974).

Where a defendant held a gun that was incapable of being fired and made no attempt to use the gun as a club to strike the sheriff, and did not strike the sheriff with his hands or feet, he could not properly be convicted of assault and battery with intent to kill the sheriff. *Corley v. State*, 264 So. 2d 384 (Miss. 1972).

In itself, a "shoe clad foot" is not a deadly weapon in the conventional sense, but whether in a given case it is a means or force likely to produce death, within the meaning of the section [Code 1942, § 2011], is a matter for the jury's determination in the light of evidence as to how and in what manner it was employed. *Johnson v. State*, 230 So. 2d 810 (Miss. 1970).

One may not be convicted of assault with intent to kill because he advanced with a shotgun which was so jammed that it could not be fired. *Woodall v. State*, 234 Miss. 759, 107 So. 2d 598 (1958).

Since a handsaw is not enumerated as a deadly weapon in this section [Code 1942, § 2011], it was a question for the jury to determine whether a handsaw used in an assault upon another was a deadly weapon. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110 (1958).

What is a deadly weapon is a question of fact for the jury. *Batteast v. State*, 215 Miss. 337, 60 So. 2d 814 (1952).

Assailant is guilty only of an assault and battery, and not assault and battery with intent to kill and murder, when he deliberately uses a weapon, which is ordinarily capable of producing death, in such fashion as would not ordinarily be calculated to produce such result. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437 (1944).

Assailant who deliberately struck victim on temple with closed pocket-knife, although he had ample opportunity to open the knife and to use it in a manner to kill, is guilty only of assault and battery, and not assault and battery with intent to kill and murder. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437 (1944).

Under this section [Code 1942, § 2011] both the nature of the means used and the quality of the purpose are essential elements of the crime charged; the weapon must be deadly, or the means likely to produce death, and the intent must be murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

In assault committed by throwing a pair of pliers from a distance of ten feet, striking prosecuting witness upon the upper lip, the evidence, in view of the circumstances, including the parties, the occasion and the means used, was insufficient to support a finding beyond a reasonable doubt that accused's purpose was to kill and murder. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

5. Indictment or affidavit; generally.

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7 was proper where his actions plainly, clearly, and obviously would have qualified as aggravated assault under

§ 97-3-7(2)(a) or (b) because he used a deadly weapon and caused serious bodily injury through recklessness. While the indictment used phraseology from § 97-3-7(2)(a) and (b), that blending should not have been classified necessarily as a “defect.” *Johnson v. State*, 910 So. 2d 1174 (Miss. Ct. App. 2005).

Indictment properly stated the elements of the crime of aggravated assault, even though they were not in the order defendant would have preferred. The indictment in question read that “defendant. .. as part of a common plan or scheme or as part of the same transactions or occurrence did knowingly or purposely, attempt to cause bodily injury to a police officer with a deadly weapon, an automobile. *Stanley v. State*, 904 So. 2d 1127 (Miss. Ct. App. 2004).

When the grand jury returned an indictment under Miss. Code Ann. § 97-3-7(2)(b), requiring purposeful and willful and knowing actions, this stated the charge upon which defendant could be tried; when the proposed amendment was offered to allow the jury to convict under Miss. Code Ann. § 97-3-7(2)(a) to include recklessly causing serious bodily injury under circumstances manifesting extreme indifference to the value of human life, there was a change of substance, prejudicing defendant, and requiring a reversal, and remand, for a new trial. *McLarty v. State*, 842 So. 2d 590 (Miss. Ct. App. 2003).

Attempted assault falls within the meaning of assault, and in the context of defendant’s variance argument between the indictment and the proof, whether defendant’s indictment read “assault” or “attempted assault” made no difference as it was the same crime; moreover, the indictment cited Miss. Code Ann. § 97-3-7(1), the applicable statute. *Brown v. State*, 852 So. 2d 607 (Miss. Ct. App. 2003).

Where the defendant was indicted for aggravated assault under subsection (2) of this section, but neither paragraph (a) nor (b) was specified, the statutory language was wholly included by reference in the indictment and the indictment was not narrowly drawn to preclude the state from arguing a pool stick was used as a deadly

weapon. *Rushing v. State*, 1999 Miss. App. LEXIS 350 (Miss. Ct. App. June 22, 1999), subst. op., 753 So. 2d 1136 (Miss. Ct. App. 1999).

An indictment properly charged the defendant with simple assault under this section, even though the indictment contained the word “feloniously” which does not appear in the statute. *Reining v. State*, 606 So. 2d 1098 (Miss. 1992).

In a prosecution for aggravated assault under this section, the defendant’s conviction would be reversed where the grand jury returned the indictment under subsection (2)(b) of this section, which requires purposeful, willful and knowing actions, on the morning of the trial the State moved to amend the indictment to allow the jury to convict under subsection (2)(a) of this section, which requires only that the defendant recklessly cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and, though there was no order allowing the amendment, the jury instructions clearly reflected the new element which was not contained in the original indictment and it was apparently that part of the instruction upon which the jury returned its verdict. The proposed amendment was a change of substance, rather than form, and therefore the court had no power to amend the indictment without the concurrence of the grand jury. *Quick v. State*, 569 So. 2d 1197 (Miss. 1990).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same self-defense defense to the 2 charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. *Blanks v. State*, 542 So. 2d 222 (Miss. 1989).

A court committed reversible error in permitting the State to amend an indictment charging aggravated assault at the close of the State’s case, at a time when the defendant had indicated his desire to

file a motion for a directed verdict, from the charge "by shooting the [victim] in the head" to that of "a pistol, a means likely to produce serious bodily harm." Had the court not permitted the amendment of the indictment, the defendant would have been entitled to a directed verdict of not guilty on the aggravated assault charge of shooting the victim in the head with the pistol since the evidence was uncontradicted that the gun accidentally fired and that the victim was not wounded by the firing of the weapon. *Griffin v. State*, 540 So. 2d 17 (Miss. 1989).

Indictment labeled "aggravated assault" which charges that defendant caused "serious bodily injury" and that defendant beat victim in manner likely to cause "serious bodily injury" and which includes correct section number (subsection (2)(a) of this section) for aggravated assault sufficiently affords defendant and defendant's attorney notice in fact that defendant is being prosecuted for aggravated assault. *Harbin v. State*, 478 So. 2d 796 (Miss. 1985).

Though an indictment for simple assault contained some language from the portion of the statute defining aggravated assault, the indictment was not duplicitous where the language was not sufficient to charge any offense under the aggravated assault provisions and thus only one offense was charged. *Toliver v. State*, 337 So. 2d 1274 (Miss. 1976).

In a prosecution for resisting arrest, an indictment charging that the defendant assaulted a deputy sheriff, resisted the execution of legal process upon himself by the deputy sheriff, and shot the deputy sheriff while the latter was attempting to arrest the defendant, did not charge separate and distinct offenses; each action described in the indictment was but a part of a single episode. *Maroone v. State*, 317 So. 2d 25 (Miss. 1975).

An indictment is not defective because it does not state definitely the time at which the offense was committed. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260 (1955).

An indictment which stated that the defendant committed assault and battery upon a minor child of the age of nine years, with force and means likely to have

produced death by beating and striking her with a cowhide belt and with a large switch or stick, and by pulling her hair out by the roots, and by burning her leg with cigarette lighter, and by holding her by her feet and by striking her head against the floor and wall, and by mashing or snapping her head with his feet, was not demurrable upon the ground that the several acts of violence alleged constituted separate and distinct offenses. *McNally v. State*, 213 Miss. 356, 56 So. 2d 834 (1952).

Where name of victim is used in indictment, it is unnecessary to allege that he is a human being. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Permitting amendment of indictment charging assault with intent to murder, to charge assault and battery with intent to murder, held not reversible error. *Sauer v. State*, 166 Miss. 507, 144 So. 225 (1932).

Indictment charging assault with deadly weapon with intent to kill and murder must allege felonious intent. *State v. May*, 147 Miss. 79, 112 So. 866 (1927).

Indictment in the language of Code 1906, § 1359 cannot be sustained under Code 1892, § 967, relative to assault, etc. *Barton v. State*, 94 Miss. 375, 47 So. 521 (1908).

Indictment held not objectionable as duplicitous in charging assault and battery in attempt to kill. *Jimerson v. State*, 93 Miss. 685, 46 So. 948 (1908).

6. —Sufficiency of.

Indictment against defendant was sufficient as it clearly set out the essential elements of aggravated assault and specifically referred to simple assault as a lesser crime; there was no requirement that the State prove intent to cause serious bodily injury when defendant was charged pursuant to Miss. Code Ann. § 97-3-7(2)(b), and the State put forth sufficient evidence that defendant purposefully or knowingly caused bodily injury to the victim with a deadly weapon. *Russell v. State*, 924 So. 2d 604 (Miss. Ct. App. 2006).

Indictment alleged that defendant attempted to cause bodily injury to the victim by firing a gun at her, without any legal justification. The indictment tracked the statutory language, and was sufficient to charge defendant with the crime of

aggravated assault. *Brewer v. State*, 920 So. 2d 546 (Miss. Ct. App. 2006).

Defendant's indictment charged defendant with aggravated assault under Miss. Code Ann. § 97-3-7(2)(b); no serious injury was required for a § 97-3-7(2)(b) charge, such that the indictment issued against defendant was sufficient. *Mason v. State*, 867 So. 2d 1058 (Miss. Ct. App. 2004).

Indictment for aggravated assault properly charged one of the means in which to commit the crime; the failure of the indictment to charge other means was appropriate. *Sanderson v. State*, 881 So. 2d 878 (Miss. Ct. App. 2004).

State did not fail to prove that defendant's action in striking one of the police officers attempting to restrain and subdue him was willful and intentional as charged in the indictment; there was nothing in the record to suggest that defendant's conclusion that he struck the officer as the result of an involuntary reaction to being sprayed with mace was the only reasonable interpretation of evidence that jurors could possibly have drawn. *Griffin v. State*, 872 So. 2d 90 (Miss. Ct. App. 2004).

State did not err in failing to include recklessness language in the indictment because Miss. Code Ann. § 97-3-7(2)(a) is written in the disjunctive (either an accused acted purposely and knowingly or he acted recklessly with indifference to the value of human life); by failing to include the recklessness language in the indictment, the State did not err but was limiting itself to proving that defendant had acted purposefully as opposed to recklessly. *Paris v. State*, 848 So. 2d 880 (Miss. Ct. App. 2002).

An indictment for aggravated assault was sufficient where it included the seven required elements and provided adequate notice of the offenses charged. *Holmes v. State*, 754 So. 2d 529 (Miss. Ct. App. 1999).

An indictment for aggravated assault was insufficient where it asserted that the defendant willfully, unlawfully, knowingly, feloniously, and purposely caused or attempted to cause bodily injury to another with his fist by striking her in violation of subsection (2) of this section; the fact that the state was granted leave to

amend the indictment to insert the word "serious" before the phrase "bodily injury" was insufficient to cure the indictment. *Hawthorne v. State*, 751 So. 2d 1090 (Miss. Ct. App. 1998).

Indictment which tracks language of aggravated assault statute (this section) is legally sufficient notwithstanding failure to allege overt acts evidencing intent and action required for offense. *Ward v. State*, 479 So. 2d 713 (Miss. 1985).

An indictment charging defendant with aggravated assault, apparently in violation of subsection (2) of this section, was substantially defective in that it did not set out any alleged overt act whatsoever regarding defendant's alleged attempt to cause bodily harm to a patrolman, and, thus, his failure to file a demurrer under the provisions of § 99-7-21 did not prevent him from challenging the indictment. *Joshua v. State*, 445 So. 2d 221 (Miss. 1984).

An indictment charging defendant unlawfully, wilfully, and feloniously caused serious bodily injuries by driving a vehicle recklessly under the circumstances manifesting extreme indifference to the value of human life sufficiently stated an offense under subsection (2) of this section. *Gray v. State*, 427 So. 2d 1363 (Miss. 1983).

In a prosecution for aggravated assault upon a police officer, the indictment was sufficient where it stated facts clearly showing aggravated rather than simple assault and indicated in unambiguous language that the victim was a police officer acting within the course of his employment. *Norman v. State*, 385 So. 2d 1298 (Miss. 1980).

The trial court properly sentenced defendant for a felony following conviction for aggravated assault, notwithstanding the discretion given the court by this section for imprisonment in the county jail or penitentiary; the indictment charging defendant with having knowingly and purposely caused bodily injury to another "with a deadly weapon" clearly categorized the assault as an aggravated assault rather than a simple assault, even though the indictment did not use the word "feloniously". *Mississippi State Tax Comm'n v. Reynolds*, 351 So. 2d 326 (Miss. 1977).

Under an indictment alleging aggravated assault upon a police officer acting

“within the scope of his duty”, the evidence was sufficient to prove scope of duty, where defendant assaulted a person whom he recognized as a law enforcement officer engaged in assisting the arresting officer in placing defendant into custody, notwithstanding the fact that the initial arrest was without probable cause. *Watkins v. State*, 350 So. 2d 1384 (Miss. 1977).

Indictment charging shooting at another with intent to kill and murder and alleging that shooting was done unlawfully, with malice aforethought, feloniously and wilfully with intent to kill and murder, is sufficient to charge that shooting was done with felonious intent to kill and murder and properly charges an offense of assault and battery with intent to kill and murder. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

An indictment charging an assault with a deadly weapon “with the intent and in the attempt to kill and murder” charged an offense with the intent to kill and murder under this section [Code 1942, § 2011] and not an offense under Code 1930, § 793 (Code 1942, § 2017). *Norwood v. State*, 182 Miss. 898, 183 So. 523 (1938).

Indictment charging wilful, unlawful, felonious, and malicious assault and battery upon one in crowd with felonious intent to kill held to sufficiently charge assault and battery with intent to murder, as against contention that it did not charge intent “to kill and murder” some human situated in building, but merely charged intent “to kill.” *White v. State*, 169 Miss. 332, 153 So. 387 (1934).

Where record indicated defendant was aware he was being prosecuted under statute making robbery, or attempt at robbery, capital offense under certain conditions, indictment, though awkwardly worded, was sufficient. *Hall v. State*, 166 Miss. 331, 148 So. 793 (1933).

Affidavit charging accused with striking officer in resisting arrest held to sufficiently charge assault and battery. *Martin v. City of Laurel*, 106 Miss. 357, 63 So. 670 (1913).

Indictment for attempted rape held to charge an assault with intent to commit felony, constituting a misdemeanor at common law. *Moore v. State*, 102 Miss. 148, 59 So. 3 (1912).

An indictment charging that defendant assaulted and beat C with “leather bridle reins” while armed with a pistol, with intent to intimidate C and prevent him from defending himself while not good under Code 1906, § 1044, is good as one for common assault and battery. *State v. Spigener*, 96 Miss. 597, 50 So. 977 (1910).

Held indictment should charge that accused shot into wagon wherein was D and other persons, with felonious intent of killing one or more of them, not caring which and in fact shot D. *Gentry v. State*, 92 Miss. 141, 45 So. 721 (1908).

Indictment is sufficient if it avers that the assault was committed with a deadly weapon. *Canterberry v. State*, 90 Miss. 279, 43 So. 678 (1907).

7. Defenses; generally.

Action in the heat of passion is not a defense to aggravated assault. *Brown v. State*, 749 So. 2d 204 (Miss. Ct. App. 1999).

Consent of the victim is irrelevant in a trial for simple assault. *Durr v. State*, 722 So. 2d 134 (Miss. 1998).

A defendant waived and forfeited his right to assert the statute of limitations under § 99-1-5 as a defense to a charge of aggravated assault when he failed to assert it in the lower court and thereafter entered a voluntary and counseled plea of guilty to the charge. *Conerly v. State*, 607 So. 2d 1153 (Miss. 1992).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused’s testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

State’s instruction that voluntary drunkenness was no excuse or justification for the commission of a crime in that one could not take advantage of a situation in which he had placed himself voluntarily by being drunk or drinking, and if the jury believed beyond a reasonable

doubt that defendant, with felonious intent and malice aforethought to kill, shot and wounded the victim, it should find defendant guilty even though they might believe that defendant had been drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

The shooting at a twelve-year-old boy by a sheriff and his posse who were seeking generally to take into custody persons whom they believed to have been present when a felony was committed justified the boy's brother in returning the fire. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414 (1947).

Husband cannot inflict corporal punishment on wife. *Gross v. State*, 135 Miss. 624, 100 So. 177 (1924).

8. —Self-defense.

To make an assault justifiable on the grounds of self-defense, danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill, or to do him or her some great bodily harm, and there must be imminent danger of such design being accomplished. On the other hand, if a person provokes a difficulty, arming himself or herself in advance, and intending, if necessary, to use the weapon and overcome his or her adversary, that person becomes the aggressor and is deprived of the right of self-defense. *Anderson v. State*, 571 So. 2d 961 (Miss. 1990).

Jury instruction was proper where it paralleled statutory language of this section; therefore, jury could have believed all of defendants' story, but not found self-defense proper in this case where 3 people beat admittedly unarmed man. *Johnson v. State*, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

Testimony of aggravated assault defendant, whose sole defense is self defense, as to efforts, prior to alleged assault, to obtain assistance of law enforcement officers in response to threats against defendant by alleged victim are admissible as being highly relevant to defendant's state of mind leading up to alleged assault. *Brown v. State*, 464 So. 2d 516 (Miss. 1985).

In an action for damages which arose when the decedent was shot and killed by a deputy sheriff, the killing would be justifiable under the provisions of the justifiable homicide statute where it was done in self-defense; the shooting was also necessary under the circumstances in order to preserve the peace and to apprehend the decedent, who had fired two rifles at the officers while resisting arrest. *Coghlan v. Phillips*, 447 F. Supp. 21 (S.D. Miss. 1977), aff'd, 567 F.2d 652 (5th Cir. 1978).

Trial court's refusal to grant a continuance to a father, who is charged with shooting a 17-year-old boy for slapping his daughter, was erroneous, where the affidavit in support of the motion for continuance showed that the accused's wife, a witness to the shooting, was hospitalized and averred that she would testify that the victim was the aggressor to the affray and that the accused shot in apparent self-defense, and it further appeared that as a result of the absence of his wife as a witness, the accused was compelled to testify in his own behalf whether he desired to do so or not, since otherwise the state's case would have stood undisputed. *Ivy v. State*, 229 Miss. 491, 91 So. 2d 521 (1956).

Accused was not guilty of assault and battery with intent to kill sheriff were sheriff made an unlawful arrest without warrant by entering accused's own backyard, the accused did not use any more force than necessary in resisting arrest when she scuffled with the sheriff who as a result sustained a slight cut on arm, and where force used did not prevent the unlawful arrest. *Hartfield v. State*, 209 Miss. 787, 48 So. 2d 507 (1950).

One being shot at by a sheriff and his posse who were seeking generally to take into custody persons whom they believed to have been present when a felony was committed had a right to return the fire. *Craft v. State*, 202 Miss. 43, 30 So. 2d 414 (1947).

Acts of Negro in self-defense to an aggression by a white man did not warrant conviction for assault and battery. *Nichols v. State*, 198 Miss. 821, 24 So. 2d 14 (1945).

If plaintiff approached defendant with menacing looks and drawn fists and de-

fendant struck plaintiff to prevent assault and only struck until he overcame threatened assault, blows were justified. *Stamps v. Polk*, 143 Miss. 551, 108 So. 729 (1926).

Where accused, in prosecuting for assault and battery, insulted other party who struck first blow, instruction of self-defense was error. *Wicker v. State*, 107 Miss. 690, 65 So. 885 (1914).

Defendant was not precluded from claiming self-defense because after previous difficulty he had armed himself and sought out his adversary to renew the conflict, where it appeared that the defendant shot and wounded his adversary after the adversary had fired upon him, and the shooting was not in pursuance of an original intent to kill. *Garner v. State*, 93 Miss. 843, 47 So. 500 (1908).

Held that instruction on self-defense should not be modified by words "without fault in himself in bringing on the difficulty". *Garner v. State*, 93 Miss. 843, 47 So. 500 (1908).

9. —Civil suit as bar to prosecution.

The prosecutor in an indictment for an assault with intent to kill, who has commenced a civil suit for the injury, will not be compelled to elect or abandon the civil suit or the prosecution; both may be sustained. *Wheatley v. Thorn*, 23 Miss. 62 (1851).

9.5. Double jeopardy.

Inmate's convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. *Thomas v. State*, — So. 2d —, 2005 Miss. App. LEXIS 993 (Miss. Ct. App. Dec. 6, 2005).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a deadly weapon, and aggravated assault, clearly required different elements of proof, and double jeopardy did not apply. *Houston v. State*, 887 So. 2d 808 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Defendant's conviction for aggravated assault on a law enforcement officer, pursuant to Miss. Code Ann. § 97-3-7(2)(b) was not obtained in violation of the Double Jeopardy Clause as conviction on that charge required proof of at least one element not present in the resisting arrest charge, Miss. Code Ann. § 97-9-73, on which defendant had earlier been convicted. *Powell v. State*, 806 So. 2d 1069 (Miss. 2001).

10. Evidence; generally.

Evidence substantially supported defendant's guilt in a simple assault of a police officer case where defendant did not dispute that the officer was a law enforcement officer who was acting in the scope of his duty on the night of the incident and the officer testified that defendant struck him behind the head with defendant's fist, while his back was turned to defendant; the officer also testified that he sustained a cut from defendant's blow. A witness testified that she saw defendant hit the officer toward the back of the neck with his fist or hand after the officer ordered defendant to stand back from the woman defendant was pursuing and that the attack was unprovoked. *Enlow v. State*, 878 So. 2d 1111 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Defendant was properly convicted of aggravated assault where her husband was attacked in the middle of the night in the trailer in which he lived. *Favre v. State*, 877 So. 2d 554 (Miss. Ct. App. 2004).

State's identification of defendant consisted of the victim's eyewitness identification from a photo line-up and in-court identification, and a videotape of the robbery which showed the robber; moreover, the trial court instructed the jury to consider *Neil v. Biggers* to determine whether the identification made by the victim was credible and reliable, and the jury resolved the issue of credibility in favor of the State's witnesses. Thus, the evidence was sufficient to sustain defendant's convictions for robbery with the use of a deadly weapon, and aggravated assault. *Houston v. State*, 887 So. 2d 808 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Evidence was sufficient to support defendant's aggravated assault conviction where numerous witnesses testified that defendant attacked the victim with a metal object, that the victim was unarmed and did not attempt to fight back, that onlookers attempted to stop defendant, and that defendant continued to beat the victim after he was on the ground. Although defendant attempted to make a case of self-defense, reasonable and fair-minded jurors could have found defendant guilty. *Hoye v. State*, 867 So. 2d 266 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's conviction for attempted aggravated assault on a police officer where three officers present at the scene testified that defendant had pointed a gun at them and refused demands that he drop it, an officer testified that he saw the gun as it was fired and that defendant was the first one to shoot, and an investigator concluded that the bullets fired from defendant's gun were shot in an officer's direction. *Stringer v. State*, 862 So. 2d 566 (Miss. Ct. App. 2004).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. *Wells v. State*, 849 So. 2d 1231 (Miss. 2003).

Evidence that defendant grabbed the victim's wrists in an aggressive manner was sufficient to support defendant's conviction for simple assault. *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037 (Miss. Ct. App. 2001).

Defendant struck the victim with a mop handle, inflicting pain and injury on her so she would be quiet while he assaulted her; thus, the evidence was sufficient to convict defendant of aggravated assault and the trial court properly denied defendant's motion for directed verdict. *Bridges v. State*, 790 So. 2d 230 (Miss. Ct. App. 2001).

State's introduction of evidence that defendant in aggravated assault case has previously been in jail does not prejudice jury where reference to jail does not specify any particular offense and court sus-

tains objection of defendant's attorney and instructs jury to disregard reference. *Stringer v. State*, 477 So. 2d 1335 (Miss. 1985).

Prosecution in aggravated assault case may cross-examine defense witness as to whether witness has previously been character witness for defendant. *Stringer v. State*, 477 So. 2d 1335 (Miss. 1985).

In prosecution for felonious assault by cutting with knife, attorney who is employed by defendant to represent him in divorce action is competent to testify against him in regard to what occurred since attorney when testifying in criminal case was not divulging any private or confidential communication between himself and his client, but was merely testifying as witness for state to a crime committed in presence of witness and in presence of third party. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

In prosecution for assault and battery with intent to kill, defendant's prior conviction of drunkenness is competent evidence against him when both sides, without objection, entered upon proof of fact whether he was drunk or drinking on night of crime, and defendant took stand as witness, as his prior conviction of crime was competent as bearing upon weight of his testimony and his credibility as witness. *Phillips v. State*, 43 So. 2d 208 (Miss. 1949).

On appeal from judgment of conviction on charge of assault with intent to kill, supreme court will accept testimony introduced by state as constituting true account, but, since burden of proof is on state, it will interpret that testimony in favor of defendant when it is manifestly capable of two reasonable interpretations. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778 (1948).

In prosecution under this section [Code 1942, § 2011], questions so framed as to impress jury that accused is man of violent and quarrelsome disposition and that he has committed serious assaults upon other persons on different occasions in past, repeatedly asked by prosecuting attorney, objections to which are repeatedly sustained, are improper, and defendant's motion for mistrial therefor should be sustained. *Buchanan v. State*, 204 Miss. 304, 37 So. 2d 318 (1948).

11. —Admissibility.

Where defendant was convicted of aggravated assault with a weapon, a violation of Miss. Code Ann. § 97-3-7, the trial court did not err in admitting a second knife into evidence because a witness testified that after defendant stabbed the victim with a butcher knife, he tried to stab him with a different knife, and the police found defendant with the second knife in his hands when he was arrested, and it was not a butcher knife, thereby corroborating the witness's testimony. *Clark v. State*, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005).

Trial court did not err in granting a motion in limine barring any mention of the civil suit pending between the victim and the rescue mission that he and defendant were living in where defendant claimed that had such evidence been allowed the bias and animosity of the victim towards defendant would have been proven and would have supported defendant's self-defense theory. Notwithstanding the trial court's ruling, after an examination of the record, the appellate court found that defendant was not prevented from testifying regarding the alleged bias of the prosecution's witnesses and the jury heard and considered that testimony and found the prosecution's witnesses more credible. *Clark v. State*, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005).

Trial court did not err in excluding evidence of defendant's fear of the victim that defendant claimed was relevant to his self-defense claim because defendant was able to testify about his fears; furthermore, the prosecution offered evidence regarding defendant's alleged fears; the trial court merely excluded the repetition of such testimony on re-direct. *Clark v. State*, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation between defendant and the victim prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive under Miss. R. Evid. 404(b), and the pro-

bative value of the evidence outweighed the prejudice caused under Miss. R. Evid. 403. *Brown v. State*, 864 So. 2d 1009 (Miss. Ct. App. 2004).

Evidence of alleged racial slurs made by the defendant were improperly admitted into evidence as race is not an element of a violation of subsection (1)(c) and as the probative value, if any, of the defendant's alleged racial slurs was clearly substantially outweighed by the danger of unfair prejudice. *Tate v. State*, 784 So. 2d 208 (Miss. 2001).

Prosecutor's cross-examination of defense witness, concerning reason defendant had so much money in his house in the form of small bills, was entirely irrelevant to charge of aggravated assault and constituted improper attempt to give jury the inference that defendant needed small bills in order to deal narcotics. *Cotton v. State*, 675 So. 2d 308 (Miss. 1996).

In a prosecution for aggravated assault, a witness' rebuttal testimony that the defendant had visited her house 3 days before the assault looking for the victim and that he had a gun in his pocket, did not violate Rule 608(b), Miss. R. Evid. because it was not introduced as a specific instance of conduct to impeach the defendant's credibility. Additionally, the impeachment was not on a collateral issue since the issue of whether the victim or the defendant had a gun and which one was the aggressor was a central factual issue. The witness' testimony was not reputation or character evidence but a statement of fact relevant to the merits, and was therefore admissible. *Lewis v. State*, 580 So. 2d 1279 (Miss. 1991).

In a prosecution for aggravated assault, evidence of a drug transaction involving the defendant's husband was properly admitted into evidence where the State contended that the defendant shot 6 nightclub patrons because of a beating her husband received during the drug transaction, the evidence was introduced for the purpose of establishing the defendant's motive for the shooting, and no evidence was presented to suggest that the defendant was involved in any drug transaction at the nightclub on the night of the shooting. *Hogan v. State*, 580 So. 2d 1275 (Miss. 1991).

Although wide latitude should be given in the cross-examination of witnesses, basic fairness requires that, before the State questions the accused as to whether he or she is guilty of a series of crimes unrelated to the charges being prosecuted, it have some basis in fact for such questioning. This would be the case even if the commission of such crimes were admissible evidence. Thus, where the record did not show any evidentiary basis to ask such questions, the State's conduct in cross-examining the defendant in a sexual battery prosecution about unrelated acts of deviant, sexual conduct with his stepchildren constituted reversible error even though the defense objection was sustained. *Hosford v. State*, 525 So. 2d 789 (Miss. 1988).

Admission into evidence of results of blood alcohol test at trial for manslaughter and aggravated assault arising out of a motor vehicle accidents was reversible error, where deputy sheriff who investigated the accident had insufficient probable cause to request a blood alcohol test for defendant driver, in view of deputy's statement that he smelled no odor of alcohol on defendant either at the accident scene or at the hospital, he observed no whiskey bottles or beer cans in defendant's car, no aspect of defendant's speech, appearance or behavior indicated that he was under the influence of alcohol, and deputy admitted that the real reason for requesting the blood alcohol test was because it was sheriff department policy to do so when someone was killed in an automobile accident. *Cole v. State*, 493 So. 2d 1333 (Miss. 1986).

Testimony of aggravated assault victim as to victim's reluctance to testify based on fear for mother, who lives close to defendant, and upon fact that someone had come looking for victim's address with pistol is admissible on redirect examination where defense counsel has elicited from witness on cross-examination that victim did not want to testify in case. *Stringer v. State*, 477 So. 2d 1335 (Miss. 1985).

In a prosecution for aggravated assault under subsection (2) of this section, the trial court properly admitted testimony by a witness that he met the automobile

driven by defendant approximately one fourth mile from the collision scene and was required to drive off the road in order to prevent a collision. *Gray v. State*, 427 So. 2d 1363 (Miss. 1983).

In a prosecution for aggravated assault with an automobile that arose when the victim, who had attempted to intervene in an altercation between defendant and a third person over an automobile collision, was struck by either the open door or the rear of defendant's car, the trial court did not err in permitting the state to introduce evidence about the collision and altercation where such action on defendant's part was intimately connected with and related to the crime charged and was relevant to establish defendant's motive. *McGee v. State*, 365 So. 2d 302 (Miss. 1978).

Confession of defendant, charged with assault and battery with intent to kill his wife, made and signed at a time when the wife was still living, was not inadmissible on the ground that the officers misrepresented the wife's condition or that it constituted a promise of leniency. *Harris v. State*, 209 Miss. 102, 46 So. 2d 75 (1950).

General reputation of deceased for peace in murder trial cannot be shown until or unless such reputation is first attacked by defense, and same rule applies to injured party in lesser offense of assault and battery with intent to kill. *Hinton v. State*, 209 Miss. 608, 45 So. 2d 805 (1950), suggestion of error overruled, 209 Miss. 608, 46 So. 2d 445 (1950), cert. denied, 340 U.S. 802, 71 S. Ct. 68, 95 L. Ed. 590 (1950), reh'g denied, 340 U.S. 894, 71 S. Ct. 205, 95 L. Ed. 648 (1950).

Testimony of sheriff that shortly after an alleged assault with intent to murder, he smelled liquor on defendant's breath is admissible for purpose of showing defendant's state of mind at time of attack, since no motive therefor was in evidence. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Introduction in evidence of a large stick in a prosecution for assault and battery with intent to kill constituted reversible error, where there was no showing that such stick was used in the assault and battery. *Henley v. State*, 202 Miss. 37, 30 So. 2d 423 (1947).

In prosecution for assault and battery with intent to murder, largely controlled by circumstantial evidence, any circumstances logically tending to show motive held competent. *Sauer v. State*, 166 Miss. 507, 144 So. 225 (1932).

Threat is admissible, though it be conditional. *Cordell v. State*, 136 Miss. 293, 101 So. 380 (1924).

Where the evidence is conflicting as to who was aggressor, uncommunicated threats are admissible. *Miles v. State*, 99 Miss. 165, 54 So. 946 (1911).

Error to exclude obscene postal card alleged by prosecuting witness to have caused assault. *De Silva v. State*, 91 Miss. 776, 45 So. 611 (1908).

12. — Nature of injuries.

Colored photographs of the victim's face before and after surgery were admissible in an assault prosecution where the photographs were necessary to aid the jury in its decision of whether the assault with fists constituted aggravated assault or simple assault. *Gardner v. State*, 573 So. 2d 716 (Miss. 1990).

It was competent for aggravated assault victim to describe the nature and extent of injuries received as result of being shot by the defendant, since the essence of the offense of aggravated is that the accused has knowingly caused bodily injury to another with a deadly weapon likely to produce death or serious bodily harm. *Cooley v. State*, 495 So. 2d 1362 (Miss. 1986).

Admission in evidence of a photograph of aggravated assault victim's leg wound was not error, since it was relevant to prosecution's need to show infliction of a wound with a deadly weapon in order to succeed under the indictment, and there was no basis to believe its probative value was substantially outweighed by danger of unfair prejudice. *Cooley v. State*, 495 So. 2d 1362 (Miss. 1986).

Admission of evidence as to stabbing victim's considerable bleeding, his scar, and the nature and size of his wound, was not reversible error, since its inflammatory or prejudicial effect, if any, on jury did not outweigh its relevancy to the issue as to whether the assault upon the victim was an aggravated one. *Norris v. State*, 490 So. 2d 839 (Miss. 1986).

13. — Other offenses or conduct.

Where officers received a report of a robbery in a nearby state and were warned to be on the lookout (BOLO), and where they then pursued defendant who hit three police cars during the chase, in defendant's trial on counts of assaulting a police officer, the trial judge did not abuse his discretion in admitting the BOLO warning and the gun recovered from defendant into evidence, because those items were essential to the State's presentation of a complete and coherent story to the jury; further, the trial judge did not err in not giving, sua sponte, a limiting instruction. *Conerly v. State*, 879 So. 2d 1101 (Miss. Ct. App. 2004).

Witness' references to aggravated assaults allegedly committed by defendant in past were invited by defense counsel during cross-examination of witness and, in any event, no serious or irreparable damage occurred, particularly in view of direction to jury to ignore inappropriate references. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Affiliation or membership with street gang constitutes "bad act" within meaning of rule that allows evidence of other bad acts to be admitted to prove motive. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Probative value of evidence of defendant's alleged involvement in street gang to show motive to commit aggravated assault against rival gang member was not outweighed by danger of unfair prejudice. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Foundation for admission of evidence concerning defendant's alleged involvement in street gang was laid by one witness' testimony that he knew defendant was gang member, and defendant's testimony that he "hung out" with gang members. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

An aggravated assault conviction would be reversed and the case remanded for a new trial where evidence of the defendant's prior misdemeanor assault conviction was improperly admitted into evidence. *Ivy v. State*, 522 So. 2d 740 (Miss. 1988).

At trial of charge of simple assault on a police officer, evidence of neighbor's com-

plaint against defendant for disturbing the peace, issuance of arrest warrant, and arrest of defendant for disturbing the peace, were admissible in evidence under exception to general rule that proof of a crime distinct from that alleged in indictment is not admissible against the accused. *Thomas v. State*, 495 So. 2d 481 (Miss. 1986).

At trial of charge of simple assault on police officer, evidence of defendant's threatening act against neighbor, at neighbor's house, who had complained about loud noise from defendant's lawn party disturbing the peace, was admissible in evidence, since the incident was integrally related to the assault which occurred a couple of hours later in the general vicinity of the lawn party. *Thomas v. State*, 495 So. 2d 481 (Miss. 1986).

In prosecution for aggravated assault based upon shooting of one person, testimony that another person was also shot and that defendant fled to another county for 2 weeks is admissible as constituting part of *res gestae*. *Davis v. State*, 476 So. 2d 608 (Miss. 1985).

14. — Self-defense.

In a prosecution for simple assault on a law enforcement officer, in which the defendant claimed that a deputy sheriff attacked him without provocation and that he was attempting to defend himself, the defendant was precluded from introducing evidence of the deputy's reputation for violence unless and until he introduced evidence of an overt act of aggression by the deputy. *Robinson v. State*, 566 So. 2d 1240 (Miss. 1990).

Testimony to the effect that on the night of the fight and a short time before it occurred, the assaulted party had expressed ill will toward the accused because of having been let out as church treasurer, which was also the matter which precipitated the fighting, was admissible on the issue of self-defense. *Ridgeway v. State*, 245 Miss. 506, 148 So. 2d 513 (1963).

15. — Sufficiency.

Defendant's argument that the jury did not have sufficient evidence to convict her of aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2), was without merit;

the State presented credible evidence that defendant knowingly stabbed the victim with a knife. Even if the victim had struck defendant prior to the stabbing, the jury could have found that defendant was not in imminent danger and used more force than reasonably necessary to repel the victim's assault. *Vaughn v. State*, 926 So. 2d 269 (Miss. Ct. App. 2006).

State produced evidence and witnesses tending to show that defendant did indeed commit simple assault upon a police officer; while it was true defendant called his own witnesses to contradict the State's evidence, the appellate court could not say that any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt, particularly when the evidence was viewed in the light most favorable to the State. *Morris v. State*, 927 So. 2d 744 (Miss. 2006).

Regarding the assault charge on which defendant was convicted, the State must have proven (1) that under circumstances manifesting extreme indifference to human life (2) defendant did purposefully, knowingly or recklessly (3) attempt to cause or caused serious bodily injury to the officer, Miss. Code Ann. § 97-3-7(2); the testimony at trial established that defendant drove his vehicle with the officer's arm trapped in the closed driver's side window, evidencing defendant's indifference to human life, and defendant admitted that he rolled up the window and that he was trying to leave; there was testimony that the car window ripped the flesh from the officer's arm, and this evidence was sufficient to support the verdict. *Hubbard v. State*, — So. 2d —, 2006 Miss. App. LEXIS 163 (Miss. Ct. App. Mar. 7, 2006).

Where the victim was shot in the thigh during the course of the carjacking, in circumstances from which jurors could have inferred the purposeful or knowing intent to injure another with a deadly weapon, the evidence supported a jury verdict convicting defendant of aggravated assault under Miss. Code Ann. § 97-3-7(2) and armed carjacking under Miss. Code Ann. § 97-3-117(2)(b). *Walters v. State*, — So. 2d —, 2006 Miss. App. LEXIS 115 (Miss. Ct. App. Feb. 14, 2006).

Evidence was sufficient to sustain defendant's convictions for aggravated as-

sault, kidnapping, and unlawful possession of a firearm where, according to the victim's testimony, she was accosted by defendant who grabbed her, placed a gun to her head, and physically forced her into a van against her will; an eyewitness testified that he saw the victim jump out of the van and saw the van swing back in such a fashion so as to accomplish a "perfect hit" on the woman in flight. In addition, the State presented two witnesses attesting to the fact that defendant was in possession of a firearm, and it introduced the gun into evidence with additional proof that the gun was recovered when defendant was arrested. *Jones v. State*, 920 So. 2d 465 (Miss. 2006).

Where eyewitnesses testified that shots were fired from defendant's vehicle and the victim testified that defendant was the man who shot him, the evidence was sufficient to support the jury's verdict convicting defendant of aggravated assault. *Williams v. State*, 914 So. 2d 1246 (Miss. Ct. App. 2005).

Sufficient evidence existed to convict defendant of aggravated assault as defendant sprayed the victim with lighter fluid after setting his house on fire and the victim sustained second-degree burns to 50-60% of his body. *McIntosh v. State*, 917 So. 2d 78 (Miss. 2005).

Even by his own argument, defendant was responsible for aggravated assault and a reduced charge of manslaughter, to which he had plead guilty because he had heard the factual basis which the district attorney's office stated was proof should defendant's case go to trial and defendant had previously told the court that he had no disagreement with those statements. *Graham v. State*, 914 So. 2d 1256 (Miss. Ct. App. 2005).

Evidence was sufficient to sustain a conviction for causing serious bodily injury where the victim testified that defendant threw a caustic substance down his shoulder, back, and leg, the substance gave him second degree burns, and defendant stated to the victim that he was "messed up now." *Chambliss v. State*, 919 So. 2d 30 (Miss. 2005).

Evidence presented at trial was legally sufficient to convict defendant of aggravated assault pursuant to Miss. Code Ann.

§ 97-3-7(2) because the victim identified defendant as one of her attackers, informed her rescuers that defendant and a codefendant had shot her, was shot at close range, and identified defendant and the codefendant at trial as her attackers. *Jones v. State*, 913 So. 2d 436 (Miss. Ct. App. 2005).

Court did not err in denying defendant's motion for judgment notwithstanding the verdict because the State proved the elements of aggravated assault, provided in Miss. Code Ann. § 97-3-7(2), against him; in a tape-recorded statement to the police following the shooting, defendant admitted firing two shots at the victim. Substantial evidence supported defendant's conviction. *Dunn v. State*, 891 So. 2d 822 (Miss. 2005).

Where the victim testified that defendant had cut her on the neck with a box cutter, requiring ten stitches, her uncorroborated testimony was sufficient evidence to sustain defendant's conviction for aggravated assault. *Wilks v. State*, 909 So. 2d 1252 (Miss. Ct. App. 2005).

Evidence was sufficient to sustain defendant's attempted aggravated assault conviction where the victim testified extensively about the crime, her testimony was corroborated by other witnesses, and photographs of the victim's injuries were admitted. *Wilson v. State*, 904 So. 2d 987 (Miss. 2004).

Where defendant pulled out a gun and fired a shot at his live-in girlfriend, the evidence was sufficient to support his conviction for aggravated assault. The State presented three witnesses who testified that defendant shot the gun at least three times. *Griffin v. State*, 883 So. 2d 1201 (Miss. Ct. App. 2004).

Undisputed evidence revealed that defendant led police on a chase that spanned over two counties and that the police attempted to stop defendant numerous times, but he refused to stop, hitting three police cars in the process. Accepting the evidence in the light most favorable to the State, the jury was justified in finding defendant guilty of two counts of simple assault on a law enforcement officer and one count of aggravated assault on a law enforcement officer. *Conerly v. State*, 879 So. 2d 1101 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction for assaulting his elderly relative was supported by credible evidence, as the State offered testimony that: at the time of the attack the victim lived alone, supported herself, and prepared her own meals; the victim's identification of defendant as her attacker; and testimony from police officers that on at least two separate occasions the victim identified defendant as her attacker. *Robinson v. State*, 870 So. 2d 669 (Miss. Ct. App. 2004).

Sufficient evidence existed to support defendant's guilt for aggravated assault where the victim testified that defendant had shot him, and several witnesses not only placed defendant at the scene of the crime, but confirmed that he had shot the victim. *Anderson v. State*, 874 So. 2d 1000 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of aggravated assault where the jury must have determined that the victim's account of the stabbing was correct; allowing the verdict to stand did not create an unconscionable injustice. *Sanderson v. State*, 881 So. 2d 878 (Miss. Ct. App. 2004).

Where codefendants testified that defendant shot the owner of the lounge and fled with billfolds taken from the owner and patrons, and the owner and the co-owner both identified defendant as the shooter, the evidence was sufficient to sustain defendant's convictions for armed robbery and aggravated assault, even though the money and the gun were not recovered and the bullet fragments were not retrieved from the ceiling and the victim's head. *Graham v. State*, 861 So. 2d 1053 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant where a person was guilty of simple assault if he either attempted or purposely, knowingly, or recklessly caused bodily injury to another; the officer was treated at a hospital for scratches that went from his neck to his chest, although defendant had argued that the slight injuries to the officer were inadvertent, the jury was entitled to disbelieve his account of the episode and find his conduct met the definition of assault under Miss. Code Ann. § 97-3-7(1). *Abram v. State*, 861 So. 2d 1064 (Miss. Ct. App. 2003).

Evidence was sufficient to support defendant's aggravated assault conviction, because the evidence adduced at the trial consisted of not only the victim's testimony, but also that of three witnesses who either saw an altercation between defendant and the victim at a convenience store or saw defendant's actual possession of the firearm, and two of the witnesses were eyewitnesses to the altercation. *Davis v. State*, 866 So. 2d 1107 (Miss. Ct. App. 2003).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. *Wells v. State*, 849 So. 2d 1231 (Miss. 2003).

Where jury heard testimony from both sides and viewed a videotape of the assault, a reasonable and fair minded jury was presented enough evidence to reach a guilty verdict on the inmate's charge of assaulting a law enforcement officer for assaulting the prison warden. *Hicks v. State*, 845 So. 2d 755 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant where testimony was presented that defendant was seen with a gun during the altercation, a muzzle flash from his gun, and that bullet casings from a weapon matching defendant's gun were recovered; while there was testimony that at least one other person drew a gun inside the club that night, the jury decided to give that testimony less weight than the testimony supporting defendant's guilt. *Anderson v. State*, 856 So. 2d 650 (Miss. Ct. App. 2003).

In a case where defendant threatened his estranged wife with a gun, forced her to have intercourse with him, and struck her, the evidence was sufficient to support defendant's rape and simple assault convictions based on the victim's testimony, as her testimony was not incredible on its face nor was it contradicted by other, more compelling, evidence. *Williams v. State*, 868 So. 2d 346 (Miss. Ct. App. 2003).

State did not fail to prove beyond a reasonable doubt that defendant had committed an aggravated assault where the

victim presented testimony that went to all of the essential elements of aggravated assault — she was attacked by defendant, who was wielding a knife, and she received lacerations while attempting to defend herself from his attack; the victim's testimony was not impeached during cross-examination nor did the defense present evidence that would have made her version of events so improbable as to be unworthy of belief. *Page v. State*, 843 So. 2d 96 (Miss. Ct. App. 2003).

Victim's testimony that defendant lured her into a back room in a coin-operated laundry and attacked her with a knife causing a wound to the victim's hand was sufficient to support defendant's conviction of aggravated assault despite the fact that no other witness actually observed the assault or that the State did not present evidence of defendant's motive. *Page v. State*, 843 So. 2d 96 (Miss. Ct. App. 2003).

Defendant's conviction for aggravated assault was affirmed, where there was clearly substantial credible evidence upon which the jury could and did find that defendant assaulted the victim. *Alonso v. State*, 838 So. 2d 309 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. Ct. App. 2003).

Evidence was sufficient where the victim and his nephew both testified to the circumstances which led to the victim's fateful meeting with defendant, the victim also testified with certainty that defendant was the man who shot him, and a doctor testified that metal fragments were recovered from the wound in the victim's leg. *Clay v. State*, 829 So. 2d 676 (Miss. Ct. App. 2002).

Evidence was sufficient to support defendant's conviction for aggravated assault of the victim, as the evidence showed that following a discussion over why defendant was driving a vehicle that the victim had given to his former girlfriend, defendant fired a gun at the victim three times, the victim was struck two times in the legs, and the victim had to obtain treatment at a local hospital for his gunshot wounds. *Satcher v. State*, 852 So. 2d 595 (Miss. Ct. App. 2002).

A conviction for aggravated assault was reduced where the state failed to prove

every element of attempted assault, but instead proved threatened simple assault. *Genry v. State*, 1999 Miss. App. LEXIS 716 (Miss. Ct. App. Dec. 14, 1999), subst. op., 767 So. 2d 302 (Miss. Ct. App. 2000).

There was sufficient evidence from which the jury could find that the defendant's use of his fist was a means likely to produce death or serious bodily harm, notwithstanding that the victim was not hospitalized and suffered no broken bones, where the force of the defendant's blow knocked the victim across a table to the floor, knocked out a tooth, cut his lip, and broke his glasses. *Harrison v. State*, 737 So. 2d 385 (Miss. Ct. App. 1998).

Evidence was sufficient to support convictions for aggravated assault and aggravated assault on a law enforcement officer where two deputies testified that the defendant fired a weapon in the direction of a carnival midway which was crowded with people and that, as they chased him toward the parking lot, he shot in their direction. *Gibson v. State*, 731 So. 2d 1087 (Miss. 1998).

Though the defendant contended that he shot the victim in self-defense only, there existed substantial evidence to support his conviction for aggravated assault where he admitted in a letter written to the district attorney as well as during trial that he shot the victim with a deadly weapon; two different accounts of the incident were given by the defendant and the victim, but the jury was the sole judge of the weight and worth of their testimony. *Brown v. State*, 726 So. 2d 248 (Miss. Ct. App. 1998).

Evidence independent of defendant's alleged admissions established corpus delicti of aggravated assault where victim was admitted to hospital with gunshot wound to his leg, officers testified that victim, while at hospital, said that defendant shot him, and narcotics agent, who was defendant's brother, recovered weapon from defendant, who admitted shooting victim. *Cotton v. State*, 675 So. 2d 308 (Miss. 1996).

A conviction for aggravated assault would be reduced to a conviction for simple assault and the case remanded for resentencing where the evidence established that the defendant, a convict, had

threatened a corrections officer with a simulated knife in order to obtain the officer's keys but there was no evidence that the convict had attempted to cause serious bodily injury to the officer even though he had had every opportunity to do so. *Murray v. State*, 403 So. 2d 149 (Miss. 1981).

Where, in view of the direct contradictions in the state's proof taken alone, and of the material conflicts in the evidence as a whole, reasonable man engaged solely in the search for clues and uninfluenced by other considerations could not safely act upon the evidence as produced, conviction was reversed and remanded in order that another jury might pass upon it. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110 (1958).

Where it appears that at the time the accused at bar fired his gun, the prosecutor armed with a stick was chasing him intending to beat him, state must show that gun was fired with intent to kill and with malice aforethought. *Cunningham v. State*, 87 Miss. 417, 39 So. 531 (1905).

A defendant is not guilty of shooting with intent to kill another if, when he discharged his gun, he could not see and could not have shot, the other person, a house being between them. *Lott v. State*, 83 Miss. 609, 36 So. 11 (1904).

16. — Charge or conviction supportable.

Defendant's conviction for aggravated assault was appropriate because the evidence showed that the victim's knife wound required 40 stitches and that defendant nearly severed the victim's ear in his attack on the victim. *Kimble v. State*, 920 So. 2d 1058 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where the evidence was sufficient to support the convictions because the State not only produced a complaining victim, but also an eyewitness to the crime. Additionally, the living victim testified that defendant shot him in the neck after defendant shot and killed the other victim. *McGee v. State*, 929 So. 2d 353 (Miss. Ct. App. 2006).

Defendant's actions at the first victim's home were sufficient to support defendants' convictions for the crimes of burglary and simple assault because (1) defendants were present at the home for the

sole purpose to obtain money; (2) when the victims did not voluntarily allow defendants into the home, defendants went into a rage and broke into the dwelling and assaulted two of the victims; (3) one of the defendants then proceeded to commit a further act of violence when he burst the windshield of one of the second victim's vehicle with a large rock; (4) the other defendant continued to threaten and intimidate the first victim until she surrendered her paycheck whereupon defendants left the premises and cashed the check in order to satisfy a debt; and (5) the jury could reasonably infer that defendants formed the intent to assault those inside the home immediately upon gaining entry to the home. *Arbuckle v. State*, 894 So. 2d 619 (Miss. Ct. App. 2004), cert. dismissed, 904 So. 2d 184 (Miss. 2005).

Defendant's convictions on two counts of aggravated assault were proper under Miss. Code Ann. § 97-3-7(2)(b) where the elements of the offense were clearly established; defendant had a knife and struck the victims, both of whom required medical attention. Further, a witness testified that she had seen defendant walk through her backyard and throw down an object, which later turned out to be the knife. *McManis v. State*, 901 So. 2d 648 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Where victim and defendant's ex-girlfriend both testified defendant stabbed the victim when he was asked to leave his ex-girlfriend's apartment, sufficient evidence existed to support defendant's conviction for aggravated assault. *Shorter v. State*, 888 So. 2d 452 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

There was sufficient evidence to support a conviction for aggravated assault based on the fact that victims of a robbery were put in fear for their lives by the exhibition of a deadly weapon; moreover, the evidence showed that defendant and another man used a baseball bat to beat a victim into unconsciousness, another victim was raped, and several victims were tied together with telephone cords and wires. *Perkins v. State*, 863 So. 2d 47 (Miss. 2003).

State was not required to prove that defendant had a prior conviction for sim-

ple domestic violence as the State was only required to prove that a simple domestic violence charge had been proven since defendant was not convicted of the original charge of domestic violence, second offense, and, indeed, the trial court granted defendant's motion to dismiss the second offense aspect of the charge. *Murrell v. City of Indianola*, 858 So. 2d 183 (Miss. Ct. App. 2003).

Though the testimony of defendant and the woman conflicted about his intent in entering the woman's home, the jury was entitled to believe the woman's testimony, as opposed to defendant's testimony, that defendant forced his way into her house, placed a makeshift noose around her neck, and threatened to kill her, as defendant admitted entering her house and backing her against a wall; accordingly, the evidence was legally sufficient to support defendant's conviction for aggravated assault as the evidence was not such that no reasonable juror could have assigned guilt to defendant on that charge. *Ferguson v. State*, 865 So. 2d 369 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004).

Because (1) the evidence showed that, while police attempted to arrest defendant on an outstanding warrant, defendant jumped into a vehicle, twice drove the vehicle to strike a police officer, and then defendant drove the vehicle into another police officer vehicle, causing injury, and (2) the court was not persuaded that the evidence tending to demonstrate defendant's innocence was of such weight that it constituted a substantial miscarriage of justice to permit the present verdicts to stand, the court affirmed defendant's convictions of taking possession of or taking away a motor vehicle and aggravated assault on a law enforcement officer. *Hogan v. State*, 854 So. 2d 497 (Miss. Ct. App. 2003).

Trial court properly denied defendant's motion for a directed verdict, as the evidence, viewed in the light most favorable to the verdict, was sufficient to show defendant fired multiple shots at the victim, that defendant's shots struck the victim's legs, and that the victim had to be treated for the gunshot wounds at a hospital. *Satcher v. State*, 852 So. 2d 595 (Miss. Ct. App. 2002).

Where jury heard testimony from both sides and viewed a videotape of the assault, a reasonable and fair minded jury was presented enough evidence to reach a guilty verdict on the inmate's charge of assaulting a law enforcement officer for assaulting the prison warden. *Hicks v. State*, 845 So. 2d 755 (Miss. Ct. App. 2003).

There was sufficient evidence presented to support defendant's conviction on the charge of aggravated assault because a physician testified that a victim had been assaulted with a gun, a blood covered magazine clip for a gun was found under a seat where defendant had been sitting, and witnesses testified that they had noticed laser lights on their chests when defendant was in their presence. *Crosby v. State*, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Evidence was sufficient to convict a defendant of aggravated assault, where his accomplice admitted in his statement for his plea agreement that he called to defendant to assist him while he was fighting with the assault victim, and the victim identified defendant at trial. *Wells v. State*, 849 So. 2d 1231 (Miss. 2003).

Defendant's conviction for aggravated assault was proper where his objection to other wrong or criminal acts being admitted was untimely and where the evidence was sufficient to find him guilty of the crime; two eyewitnesses identified defendant and they stated that he pointed a handgun in their directions and fired several times. *Ball v. State*, 845 So. 2d 736 (Miss. Ct. App. 2003).

Where evidence showed that defendant and his father entered the victim's home armed with a sword, a knife, a baton, and a stun gun, and victim was cut with the sword or knife (he was not sure which) when he took it from the defendant, the evidence was sufficient to convict the defendant of assault with a deadly weapon. *Al-Fatah v. State*, 856 So. 2d 494 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Evidence supported a conviction for aggravated assault upon a law enforcement officer where (1) the defendant inmate struck a corrections officer with a sharp

object that broke the skin and caused bleeding, (2) a toothbrush was found nearby after the blow was struck, and (3) another officer testified from his training and experience as a law enforcement officer that the toothbrush had a sharpened end and could cause serious bodily injury. *Spann v. State*, 797 So. 2d 365 (Miss. Ct. App. 2001).

The defendant was not entitled to judgment notwithstanding the verdict or a new trial where, in the face of contradictory evidence, the jury determined that the defendant used unreasonable force in evicting trespassers from his property where he placed his hand on the victim and pointed a gun at him. *Tate v. State*, 784 So. 2d 208 (Miss. 2001).

Evidence was sufficient to support a conviction for aggravated assault where there was testimony that the defendant shot the victim in the foot after a conversation between the defendant and the victim's son; a contrary determination was not required by contradictory evidence as to whether the victim had a knife in his hand at the time of the incident. *Moore v. State*, 785 So. 2d 308 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction for aggravated assault where the defendant shot the victim and, although the defendant claimed self-defense, every other witness to the incident testified that the defendant was unprovoked when he drew a gun and began shooting at the victim, and that he was the initial aggressor. *Rice v. State*, 782 So. 2d 171 (Miss. Ct. App. 2001).

Evidence was sufficient to establish aggravated assault where (1) the defendant entered a store under the false pretense of experiencing mechanical trouble with his vehicle, (2) as the store owner and his employees worked to assist the defendant, he grabbed a store employee, wrapped one arm around her and used his other arm to place a butcher knife at her throat, (3) as he grabbed the employee, he announced he was "fooling" those inside the store and intended to rob the establishment, and (4) the defendant then released the employee and fled when the store owner produced a firearm and pointed it at him. *Genry v. State*, 767 So. 2d 302 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for aggravated assault where (1) the defendant lay in wait for the victim in the latter's mobile home, (2) he kicked her in the back and shoulder and stomped her face, and (3) he then took a piece of a broken vase and inflicted a severe cut on her face. *Owens v. State*, 763 So. 2d 917 (Miss. Ct. App. 2000).

Evidence supported a conviction for aggravated assault where two eyewitnesses testified that the defendant, at a time when he was not threatened with any imminent physical harm, purposely discharged a firearm in the direction of the victim and that the bullets discharged from the weapon, and in fact came dangerously close to striking her; the defendant's competing version of events, i.e., that he purposely avoided any attempt to injure the victim and was firing in self-defense merely to distract a third party in his preparations to fire his own weapon at the defendant offered a classic conflict in the evidence that the jury resolved against the defendant. *Brown v. State*, 763 So. 2d 207 (Miss. Ct. App. 2000).

Evidence was sufficient to establish a bodily injury and, thus, to support a conviction where the victim, who was a police officer, that he experienced pain due to the defendant's hitting him in the back with his fists. *Jones v. State*, 756 So. 2d 852 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for simple assault where the victim testified that he experienced pain due to the defendant's hitting him in the back with his fists. *Jones v. State*, 1999 Miss. App. LEXIS 613 (Miss. Ct. App. Nov. 9, 1999), subst. op., 756 So. 2d 852 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for aggravated assault, notwithstanding the assertion of self-defense by the defendant, where it appeared that the defendant shot the victim without justification: (1) a neighbor at the scene who was 15 feet away from the victim when he was shot testified that the victim did not have a gun, (2) police officers testified that there was no physical evidence showing that the defendant's car had been struck by bullets, (3) police officers testified that physical evidence

showed that the shots in the defendant's windshield were fired from the inside of the car, and (4) the defendant left the scene prior to the incident and returned with a gun. *Wooten v. State*, 752 So. 2d 1105 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction for aggravated assault on a law enforcement officer where the officer testified that (1) he responded to a disturbance call regarding shots fired at an apartment complex, (2) he saw a vehicle leaving from that direction in a hurry as he approached the area and attempted to block the passage of the vehicle with his police cruiser, but that the vehicle went around his patrol car, (3) he then turned on his blue lights and siren and pursued the vehicle, (4) just as the vehicle turned a corner, it began pulling to the side just behind a parked car, and (5) the defendant rolled out of the back passenger side of the vehicle, pointed a gun, fired it, and ran away. *Norwood v. State*, 741 So. 2d 992 (Miss. Ct. App. 1999).

Evidence was sufficient to establish aggravated assault where (1) the victim testified that she was struck repeatedly on her buttocks, lower extremities, and arms with a pool stick and was choked about the neck, (2) such testimony was corroborated by the investigating officer, who testified that he saw bruises on the victim's arms and legs and that, while taking her statement, he noted that the victim was in pain, (3) the registered nurse on duty at hospital at which the victim was treated testified that she had a red mark on the right side of her neck and bruises on her buttocks, legs, and arms, (4) an x-ray of the victim's hand revealed a broken finger, and (5) a CAT scan was also performed due to the trauma to the victim's head and her statement that she had been in and out of consciousness. *Rushing v. State*, 1999 Miss. App. LEXIS 350 (Miss. Ct. App. June 22, 1999), subst. op., 753 So. 2d 1136 (Miss. Ct. App. 1999).

Evidence was sufficient to sustain a conviction for aggravated assault where the physician who treated the victim at the emergency room testified that the injuries were possibly "severe," in that there was a risk of intracranial injury, and the physician who ultimately performed sur-

gery on the victim's broken nose stated that the swelling was so severe that surgery had to be postponed for one week. *Gayle v. State*, 743 So. 2d 392 (Miss. Ct. App. 1999).

In a prosecution for simple assault upon a law enforcement officer, the trial court did not err in finding that the victim was a "law enforcement officer" acting within the scope of his duties at the time of the offense, even though he had not attended the law enforcement training academy as required by § 45-6-3(c), since he was a "de jure deputy sheriff" where he was appointed by the sheriff pursuant to § 19-25-19 to act as a jailer, and he was wearing a signed identification card and a uniform at the time of the offense. *Amerson v. State*, 648 So. 2d 58 (Miss. 1994).

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the victim to the hospital after the attack. *Taylor v. State*, 577 So. 2d 381 (Miss. 1991).

There was sufficient evidence to support a conviction for aggravated assault where the victim had been bitten on the face and had been stabbed several times in the neck and hand with a pen. *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Evidence was sufficient to prove aggravated assault where, during argument, defendant threw unidentified liquid into victim's face and attacked victim with knife, cutting him several times around face and neck. *Black v. State*, 506 So. 2d 264 (Miss. 1987).

Jury's finding Vietnam War veteran, suffering from post-traumatic stress disorder, guilty of aggravated assault was not against the overwhelming weight of the evidence, in view of the conflicting opinions of 2 psychiatric experts as to whether he knew right from wrong at the time he stabbed victim, and lay testimony as to facts surrounding the incident. *Norris v. State*, 490 So. 2d 839 (Miss. 1986).

Admission of aggravated assault defendant that defendant cut victim with knife having 5 to 6 inch blade, testimony by emergency room physician establishing that wound cut several major arteries and would have been life threatening if not treated, and testimony of victim that prior to assault, defendant threatened to kill victim is sufficient evidence to establish that defendant purposely caused serious bodily injury to victim with deadly weapon, which is all that is required for aggravated assault conviction. *Nobles v. State*, 464 So. 2d 1151 (Miss. 1985).

Evidence was sufficient to support the conviction of defendant for aggravated assault on a policeman where officers had followed defendant after observing his reckless driving and their identity as policemen should have been clear since they were in a marked car, yet, when the officers overtook defendant and one asked for his license, defendant shot him and continued shooting him after he was knocked down by the first bullet. *Kinney v. State*, 336 So. 2d 493 (Miss. 1976).

Where defendant armed himself with a deadly weapon, declared that he would not be brought to jail upon a warrant, and shot an arresting officer, he placed himself within the category of persons subject to the penalties prescribed in this section. *Maroone v. State*, 317 So. 2d 25 (Miss. 1975).

Although conflicting in part, evidence that upon husband's unexpected return home, accused ran out of the back door, came around the house and shot the husband as he was standing on the front porch, unarmed, and was not threatening accused, supported conviction. *Shannon v. State*, 237 Miss. 550, 115 So. 2d 293 (1959), overruled on other grounds, *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

Evidence, including the testimony of the victim, that immediately before the shoot-

ing he had seen the accused with a shotgun only a short distance away and that the accused had shot him, sustained a conviction of assault and battery with intent to kill. *Williams v. State*, 232 Miss. 613, 100 So. 2d 137 (1958).

Although the evidence was conflicting, proof for the state that accused struck at the neck of another with a handsaw was sufficient to sustain conviction. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

Evidence that the defendant pointed a pistol at the prosecuting witness to compel the latter to drop an axe which he had in his hand and which he had carried over to the car upon being called there, was sufficient to justify a conviction of an assault on a charge of assault and battery with intent to kill, where it did not appear that the pistol was aimed in self-defense, or that defendant was in any danger at the time. *Eaton v. State*, 186 Miss. 459, 191 So. 93 (1939).

Evidence of threat to kill, unless certain papers signed, would support charge of assault. *Stroud v. State*, 131 Miss. 875, 95 So. 738 (1923).

17. — Charge or conviction unsupportable.

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179 (Miss. 1997), overruled in part, *Carr v. Town of Shubutu*, 733 So. 2d 261 (Miss. 1999). But see *Carr v. Town of Shubutu*, 733 So. 2d 261 (Miss. 1999).

In a prosecution for simple assault upon a law enforcement officer, the evidence was insufficient to support a jury determination that the defendant caused "injury" where there was no testimony that the officer suffered pain, illness or impairment, and the circumstantial evidence concerning the defendant's actions, though sufficient to allow an inference that the officer suffered pain, was weak; circumstantial evidence should be supportive of, not in lieu of, direct testimony which is readily at hand, and therefore a

new trial would be required so that the officer could be asked whether he suffered pain. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

A conviction of aggravated assault of an 8-year-old child was not supported by the evidence where the defendant, while committing a rape of the child's mother, pointed a gun toward the child and told her to "shut up," but did not touch her or make any advances toward her; the defendant had the means and opportunity to cause the child great bodily harm but did not "attempt" to do so since there were no extraneous events which prevented him from discharging the firearm. *Brown v. State*, 633 So. 2d 1042 (Miss. 1994).

Although defendant was charged with and convicted of aggravated assault, defendant was guilty of no more than simple assault where the victim's injuries were not serious and where there was insufficient evidence to prove that defendant intended to cause her serious bodily injury. *Brooks v. State*, 360 So. 2d 704 (Miss. 1978).

One may not be convicted of assault with intent to kill where the evidence fails to show beyond a reasonable doubt that he used more force than was reasonably necessary to protect his employer's property from destruction. *Higgenbotham v. State*, 237 Miss. 841, 116 So. 2d 407 (1959).

Testimony that defendant pointed pistol at deputy who was attempting to arrest him and said that he, defendant, would shoot deputy if he moved, and that deputy did not move and defendant did not shoot, does not support verdict and judgment of felonious intent to kill and murder. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778 (1948).

Evidence which shows that the accused having an axe in his hands was not in striking distance of the state's witness nor sufficiency near to put the witness in fear of being struck, and accused was not restrained, is insufficient to justify a conviction of assault. *Grimes v. State*, 99 Miss. 232, 54 So. 839 (1911).

18. —Variance between indictment and proof.

There was no variance between an indictment charging the defendant with assault and battery with intent to kill a

particular person and testimony introduced by the prosecution showing that the defendant had no intention to shoot the person he actually shot but mistook that person he shot for another, and shot the victim thinking that he was shooting the other. *Brandon v. State*, 263 So. 2d 560 (Miss. 1972).

In prosecution for assault and battery with intent to kill where evidence showed that the accused had no ill will toward the person assaulted but made a mistake as to identity and the indictment charged that the accused intended to kill the person she assaulted, the variance between evidence and indictment was not fatal. *Garner v. State*, 227 Miss. 840, 87 So. 2d 80 (1956).

There is no fatal variance between an indictment charging defendant with assault and battery with intent to kill and murder "Floyd Griffin," and proof that victim's name was "Floyd Griffie" since defendant could not have been misled thereby. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

There is no fatal variance between an indictment charging defendant with shooting "John Horne," and proof that the name of the prosecuting witness was "John Horne, Jr." where throughout the trial such witness was referred to either by the name of John or John Horne, together with the mute evidence that such witness had suffered the loss of some fingers, which the evidence showed resulted from the shooting, all of which evidence sufficiently identified the witness as being the person named in the indictment as having been shot. *Foreman v. State*, 186 Miss. 529, 191 So. 657 (1939).

19. Instructions; generally.

Defendant's conviction for aggravated assault was appropriate under Miss. Code Ann. § 97-3-7 where his indictment sufficiently tracked § 97-3-7(2)(b). Further, a jury instruction was appropriate because it set forth the elements of the crime the jury was required to find in order to find him guilty of the assault. *Jenkins v. State*, 913 So. 2d 1044 (Miss. Ct. App. 2005).

Where defendant was tried and convicted for aggravated assault, there was no evidentiary basis warranting an instruction regarding his use of the weapon in a negligent manner, so as to have

allowed for an instruction on simple assault. Moreover, the instruction was not a proper statement of the law, for it gave the impression that one could shoot another with a gun and only be guilty of simple assault; finally, the evidence presented by the State revealed that defendant had intentionally fired shots at the victim, and defendant never refuted the State's proof that the shooting was done in an intentional manner. *Acreman v. State*, 907 So. 2d 1005 (Miss. Ct. App. 2005).

In defendant's attempted aggravated assault case, a court properly rejected his proposed instructions where, characterizing his offense as domestic violence would neither have reduced his crime to a misdemeanor, nor reduced his sentence. The proposed jury instructions misstated the law and were therefore properly rejected. *Wilson v. State*, 904 So. 2d 987 (Miss. 2004).

In a case where the indictment charged defendant with aggravated assault, a jury instruction mentioning attempt did not create plain error because attempted assault fell within the meaning of assault, and the indictment mentioned the statute number of the crime for which defendant was to be prosecuted and tracked the language of the statute. *Lewis v. State*, 897 So. 2d 994 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Although the trial court failed to instruct the jury of the elements of aggravated assault, it appeared beyond a reasonable doubt that the absence of the element instruction did not cause or contribute to the jury reaching the verdict that it reached. The evidence was overwhelming that defendant used his car in a manner that clearly indicated that he was attempting to cause serious bodily injury with a deadly weapon (the car), or under circumstances manifesting extreme indifference to the value of human life; consequently, the error was harmless. *Conerly v. State*, 879 So. 2d 1101 (Miss. Ct. App. 2004).

Defendant's aggravated assault conviction was upheld because the trial court had not erred in refusing to instruct the jury on self-defense, since there was no evidence that defendant was acting in self-defense when he shot two victims.

Additionally, the jury was provided more than adequate instruction on the essential elements of aggravated assault. *McKinley v. State*, 873 So. 2d 1052 (Miss. Ct. App. 2004).

Court rejected defendant's argument that the trial court committed reversible error when it granted a particular instruction because the alleged error was not properly preserved for appellate review and was procedurally barred; even with the procedural bar in place, the court found no plain error because even though the instruction itself was an unhelpful, abstract statement of law, given that aggravated assault was not a specific intent crime, the submission of the instruction did not constitute reversible error. *Hogan v. State*, 854 So. 2d 497 (Miss. Ct. App. 2003).

Where defendant was indicted only for four counts of simple assault, the trial court did not err in giving jury lesser offense instruction requested by defendant, allowing the jury to convict him of disorderly conduct as to one count; defendant argued that the most he could be convicted of was disorderly conduct, and that he was entitled to have the jury instructed as to his theory of defense. *Williams v. State*, 797 So. 2d 372 (Miss. Ct. App. 2001).

The defendant was entitled to a new trial on the ground that the jury was not instructed as to the essential elements of aggravated assault where the court instructed the jury that if they believed from the evidence in the case beyond a reasonable doubt that the defendant committed an aggravated assault in and upon the body of the victim with a shotgun, without provocation, or without threat of great bodily harm to himself, then it would be their sworn duty to find the defendant guilty as charged; the instruction failed to set out the essential elements of the crime of aggravated assault as it did not instruct the jury that it must find that the defendant attempted to cause or purposely or knowingly caused bodily injury to the victim. *Reddix v. State*, 731 So. 2d 591 (Miss. 1999).

In a prosecution for aggravated assault, the trial court erred in giving a "flight instruction" where there was an explana-

tion for the defendant's flight implicit in the defense of the case-the defendant's claim of self-defense-and there was ample reason for the defendant to have left the scene of the hostilities based on threats from a third person and the alleged danger from the victim. *Banks v. State*, 631 So. 2d 748 (Miss. 1994).

Where an assault defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value; a flight instruction would have particular prejudicial effect in a case where self-defense is claimed because to suggest and highlight, through the sanction of a court-granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument. *Banks v. State*, 631 So. 2d 748 (Miss. 1994).

In a prosecution for aggravated assault, the injuries inflicted upon the victim clearly constituted "serious bodily injury" within the meaning of subsection (2) of this section where a blow to the head knocked the victim unconscious and opened a flesh wound requiring sutures, the victim's jaw was broken in 2 places, an injury to the victim's arm required surgery under general anesthesia, a bone graft, and the insertion of a metal plate, and the victim was unable to use his arm or return to work for at least 4 weeks; thus, the trial court did not err in refusing the defendant's requested instruction defining serious bodily injury as "injuries involving great risk of death." *Fleming v. State*, 604 So. 2d 280 (Miss. 1992).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

Trial court committed reversible error when it instructed jury to completely disregard testimony of witness who testified

that individual, not defendant, had told her that he had used boxcutter to cut "a boy", because issue concerning that individual was not whether he had character trait for being truthful, but whether he was telling truth about circumstances surrounding fight, cutting of victim, and his participation in those events; witness whose testimony was excluded contradicted testimony of individual that he did not cut anybody, and possibility that individual cut victim was relevant factor to be considered by jury in its deliberations as to whether or not defendant was guilty of cutting victim, since issue at trial was identity of person who cut victim. *Clark v. State*, 514 So. 2d 1221 (Miss. 1987).

In a prosecution for aggravated assault under § 97-3-7(2), the trial court properly instructed the jury if they believed beyond a reasonable doubt defendant drove his automobile in the manner enumerated in the instruction and that if they believed beyond a reasonable doubt such manner of driving manifested extreme indifference to the value of human life, then they should find defendant guilty. *Gray v. State*, 427 So. 2d 1363 (Miss. 1983).

An instruction which required in order for the jury to find defendant guilty of assault, the jury must find from the evidence the defendant unlawfully, wilfully or feloniously caused bodily injury to the alleged victim recklessly under circumstances manifesting extreme indifference to the value of human life by driving into the alleged victim and striking him with an automobile, was an adequate instruction on assault. *Buchanan v. State*, 427 So. 2d 697 (Miss. 1983).

In an action for aggravated assault with an automobile that arose when the victim, who had attempted to intervene in an altercation between defendant and a third party over an automobile collision, was struck by either an open door or the rear of defendant's car, the evidence was insufficient to support an instruction that required a guilty verdict if defendant knowingly or recklessly caused serious bodily injury by running into the complainant with his automobile under circumstances manifesting extreme indifference to the value of human life; giving such an instruction was reversible error, even

though defendant did not move for a directed verdict of not guilty or ask for a peremptory instruction of not guilty. *McGee v. State*, 365 So. 2d 302 (Miss. 1978).

State's instruction, in a prosecution for assault and battery with intent to kill, to the effect that voluntary drunkenness was no excuse or justification for the commission of the crime in that one could not take advantage of a situation in which he had placed himself voluntarily by being drunk or drinking, and that if the jury believed beyond a reasonable doubt that defendant, with felonious intent and malice aforethought to kill, shot and wounded the victim, it should find defendant guilty even though they might believe that defendant had been drunk or drinking at the time, was not misleading as assuming that a crime had been committed, nor was it misleading in any other particular. *Cobb v. State*, 235 Miss. 57, 108 So. 2d 719 (1959).

Instruction defining crime with which defendant is charged is sufficient if it sets forth all of the elements of crime, and state need not request instruction defining essential elements of crime of murder, though defendant may request such instruction if he desires. *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

In prosecution for assault and battery with intent to kill and murder, even assuming that court erred in authorizing jury, if certain facts were found, to find defendant guilty of injuring another by committing an assault and battery on him with a shotgun, such error was not prejudicial where the jury did not act on such instruction but found the defendant guilty as charged as authorized by another instruction. *Hudson v. State*, 199 Miss. 406, 24 So. 2d 779 (1946).

Alleged error in prosecution for assault with intent to murder of failure of instructions for state to define the term "murder" used therein, was not available to defendant where his instructions followed the language used by the state, some of which defined murder in the language of the statute. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

Striking out the words "in attempt" from defendant's requested instruction defining murder, in prosecution for as-

sault with intent to murder, to the effect that "the defendant acted feloniously without authority of law from his deliberate design and with his malice aforethought in attempt to kill and murder," was not error. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

Instruction that if the jury believed from the evidence beyond a reasonable doubt that the defendant feloniously, wilfully, and of malice aforethought, hit and wounded the prosecuting witness with a pair of wire pliers, which they believed was a deadly weapon, at a time when defendant was in no danger of losing his own life or suffering great bodily harm at the hands of the prosecuting witness, they should find defendant guilty of assault and battery with intent to kill and murder, was defective as authorizing conviction upon proof of a simple assault. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

Where evidence did not justify conviction under this section [Code 1942, § 201], defective instruction authorizing conviction hereunder upon proof of a simple assault would not cause reversal of conviction for assault with intent to kill and murder, but conviction would be affirmed as a conviction for simple assault and battery and remanded for appropriate sentence. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944).

Instruction authorizing conviction under the statute upon a finding that the defendant assaulted a police officer "with means or force likely to produce death," rather than a simple assault, where evidence showed that defendant committed battery on the officer with his hands and feet, was not erroneous, under the circumstances. *Blaine v. State*, 196 Miss. 603, 17 So. 2d 549 (1944).

In prosecution for shooting another with intent to murder him, court properly included in instruction definition of murder. *Martin v. State*, 163 Miss. 454, 142 So. 15 (1932).

In prosecution for assault with intent to murder, instruction setting forth elements of crime as stated in statute held sufficient without using word "felonious." *Martin v. State*, 163 Miss. 454, 142 So. 15 (1932).

20. —Intent.

Aggravated assault instruction, which used the term “willfully,” was not improper as the Supreme Court of Mississippi has made clear that the terms “willfully” and “purposely or knowingly” have substantially the same meanings. *Davis v. State*, 909 So. 2d 749 (Miss. Ct. App. 2005).

In an aggravated assault prosecution defended on M’Naghten insanity grounds, even though defendant requested no intoxication instruction, the giving of state’s instruction that voluntary intoxication was no defense was not error where, in view of defendant’s testimony, the jury could have inferred that, at the time of the offense, the defendant was too drunk to have the requisite intent to commit the crime. *Norris v. State*, 490 So. 2d 839 (Miss. 1986).

In a prosecution for assault with intent to kill and murder, an instruction to the effect that the jury should convict the defendants if it should find that the defendants committed assault and battery upon the victim “by use of means or force likely to produce death, with the intent to maim or kill and murder” him, was prejudicial error, where the evidence as to intent was inconclusive, as was evidence of facial injuries sustained by the victim of the assault. *Johnson v. State*, 230 So. 2d 810 (Miss. 1970).

An instruction that malice aforethought may be presumed from the unlawful and deliberate use of a deadly weapon should not have been granted. *Barnette v. State*, 252 Miss. 652, 173 So. 2d 904 (1965).

In absence of evidence to support it, it was not error for the lower court to refuse to charge the jury that the accused was entitled to an acquittal if he struck his victim in the heat of passion, and without deliberation. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342 (1964).

Any error in an instruction which failed to include intent as an essential element of the offense to be proved was cured by an instruction, given at accused’s request, which charged the jury that intent to kill and slay is the essential ingredient of the offense charged in the indictment. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342 (1964).

In a prosecution involving use of a deadly weapon, it was reversible error for the court to instruct for the state that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts knowingly done, and further that the jury might draw the inference that the defendant intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from his act knowingly done. *Hydrick v. State*, 246 Miss. 448, 150 So. 2d 423 (1963).

An instruction that there is no particular time during which it is necessary that an intent to kill should have existed is inaccurate, since the intent must exist at the time injury was inflicted. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

Even if an instruction to the effect that if the jury should find that the accused was intoxicated at the time of the difficulty it must be satisfied beyond a reasonable doubt that such intoxication did not incapacitate him from forming a deliberate design to kill the victim should be given where the evidence justifies it, it was properly refused where the accused’s testimony established that he was not drunk at the time of committing an assault and battery with intent to kill. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

The court did not commit error in granting to the state an instruction on the question of malice aforethought. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

Trial court’s refusal to instruct jury to find the defendant guilty of simple assault and battery was proper where proof showed that defendant was either guilty of assault and battery with intent to kill and murder or nothing. *Duckworth v. State*, 209 Miss. 318, 46 So. 2d 787 (1950).

Instruction, that malice aforethought “may be presumed from unlawful and deliberate use of a deadly weapon,” was proper where jury was also charged that burden was upon state to prove malice aforethought beyond every reasonable doubt, and that defendant intended to kill his victim. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

Instruction, that malice aforethought "may be presumed from the unlawful and deliberate use of a deadly weapon," was proper in absence of evidence showing justification or necessity for assault. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

In prosecution for assault and battery with intent to kill and murder, instruction directing jury to take into consideration fact that defendant had another load in his gun and could have used it and killed his alleged victim, if he had so desired, but did not do so because he did not want to kill him, was properly refused as it amounts to a comment on weight of evidence as to whether or not defendant shot with intent to kill and murder. *Cearly v. State*, 204 Miss. 299, 37 So. 2d 316 (1948).

Instruction in prosecution for assault with intent to murder, that malice is implied by law from the nature and character of the weapon used, and that the use of a deadly weapon in a difficulty and not necessarily in self-defense is evidence of malice, constituted error, for the reasons that the instruction failed to characterize the use of the weapon as "deliberate," the court found peremptorily that the weapon was deadly, and there was no need or right to charge the jury upon a presumption. However, such error was not prejudicial to defendant whose guilt was overwhelming. *Bridges v. State*, 197 Miss. 527, 19 So. 2d 738 (1944).

Omission from instruction of words, "with intent to kill and murder," did not prejudice defendant convicted of assault and battery with intent to kill and murder, where, because evidence negated such intent, the supreme court affirmed conviction for constituent offense of assault and battery. *Griffin v. State*, 196 Miss. 528, 18 So. 2d 437 (1944).

Instruction that "deliberate intent" and "deliberate design" and "malice aforethought" meant the same thing, held not erroneous. *Word v. State*, 180 Miss. 883, 178 So. 821 (1938).

Instruction on assault with intent to kill eliminating felonious intent held erroneous. *Herring v. State*, 134 Miss. 505, 99 So. 270 (1924).

Instruction omitting intent to kill on trial for assault with such intent is erro-

neous. *Lott v. State*, 130 Miss. 119, 93 So. 481 (1922).

Erroneous instruction on assault with intent to kill held not cured by others stating the law correctly. *Lott v. State*, 130 Miss. 119, 93 So. 481 (1922).

Instruction is erroneous which fails to state that, when defendant called upon his wife to shoot, he must have had the intent to kill with malice aforethought. *Smith v. State*, 91 So. 41 (Miss. 1922).

Where evidence showed that accused shot in to a wagon occupied by a designated person and several others it was error to instruct the jury that proof of a design to kill the designated person was unnecessary to a conviction under indictment for assault with intent to kill said person. *Gentry v. State*, 92 Miss. 141, 45 So. 721 (1908).

21. —Deadly weapon.

In defendant's trial for kidnapping and the aggravated assault of his ex-girl-friend, the trial court's instruction to the jury that stun gun was a deadly weapon was peremptory and in error, necessitating reversal. *Russell v. State*, 832 So. 2d 551 (Miss. Ct. App. 2002), cert. denied, 832 So. 2d 533 (Miss. Ct. App. 2002).

Where defendant used knife's metal butt to strike victim on the back of the head six or seven times with all the force he had, the knife could be called a deadly weapon for the purposes of aggravated assault under Miss. Code Ann. § 97-3-7. *Walls v. State*, 827 So. 2d 718 (Miss. Ct. App. 2002).

The trial court committed reversible error where the defendant was indicted for aggravated assault by causing or attempting to cause serious bodily injury in violation of subsection (2)(a), but the court instructed the jury with regard to aggravated assault with a deadly weapon in violation of subsection (2)(b). *Rushing v. State*, 753 So. 2d 1136 (Miss. Ct. App. 1999).

In a prosecution for aggravated assault under subsection (2) of this section, the defendant may not have the jury instructed on the lesser offense of simple assault under subsection (1) of this section where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the

injury inflicted was relatively slight. *Hutchinson v. State*, 594 So. 2d 17 (Miss. 1992).

In a prosecution for aggravated assault under subsection (2)(a) of this section, the defendant's use of a shot gun, which is a deadly weapon, during the alleged assault precluded his entitlement to an instruction authorizing a conviction of simple assault under subsection (1) of this section. *Hunt v. State*, 569 So. 2d 1200 (Miss. 1990).

By failing to attack the constitutionality of subsection (2) of this section, by proper motion in the trial court, defendant waived any error in this regard, and was precluded from raising the issue on appeal; moreover, where he failed to object to a jury instruction that the pocket knife used in the alleged crime was a deadly weapon, the issue was not preserved for appeal. *Colburn v. State*, 431 So. 2d 1111 (Miss. 1983).

Whether the use of feet and fists constituted the use of a deadly weapon is a question for the jury to determine from the evidence, and the trial court committed reversible error when it instructed the jury that feet and fists were a deadly weapon. *Pulliam v. State*, 298 So. 2d 711 (Miss. 1974).

Granting of an instruction, in a prosecution for assault and battery with intent to kill, that malice aforethought might be assumed from the unlawful and deliberate use of a deadly weapon, constituted reversible error since the instruction was on abstract principle of law, no mention was made of the specific facts of the case, and the two different versions of what had occurred and all of the facts surrounding the shooting were in evidence. *Allison v. State*, 274 So. 2d 678 (Miss. 1973).

An instruction which plainly predicated guilt upon the assault being made with "a deadly weapon, to wit, a pistol or metal instrument," was not subject to the claimed infirmity that it did not require the jury to determine that a deadly weapon had been used but instead created an assumption that the metal instrument used was a deadly weapon. *Frierson v. State*, 250 Miss. 339, 165 So. 2d 342 (1964).

An instruction under which the nature of the weapon, and the felonious assault

were facts to be determined by the jury from the evidence in the case beyond a reasonable doubt, did not assume that a handsaw was a deadly weapon. *Cobb v. State*, 233 Miss. 54, 101 So. 2d 110 (1958).

Instruction requiring only that the jury find that an assault was made "with some instrument capable of producing death or great bodily harm" was held error, since this section requires that the assault be made "with any deadly weapons or other means or force likely to produce death." *Williams v. State*, 205 Miss. 515, 39 So. 2d 3 (1949).

22. —Self-defense.

Self-defense instruction was not improper because it unambiguously required the jury to find defendant not guilty if they concluded that she acted in self-defense. *Davis v. State*, 909 So. 2d 749 (Miss. Ct. App. 2005).

Trial court did not err in refusing jury instruction D-9, a self-defense instruction, because it was repetitious of instruction S-3 that was given by the trial court. *Clark v. State*, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005).

Question was not whether the individual who was attacked was a victim, but whether he became a victim as a result of his own aggression or as a result of defendant's unjustified aggression against him. On that issue, the jury was properly instructed and defendant's request that the word "victim" be replaced with the individual's actual name in the self-defense instructions was properly rejected, as the jury was well aware that defendant had stabbed the "victim" and the use of that word did not prejudice defendant. *Roberts v. State*, 911 So. 2d 573 (Miss. Ct. App. 2005).

Trial court did not err in refusing defendant's proposed instruction in defendant's trial for simple assault on a law enforcement officer because the instruction was nothing more than an alternate method of stating the self-defense theory set out in another instruction already given. *Sheffield v. State*, 844 So. 2d 519 (Miss. Ct. App. 2003).

Jury instruction was proper where it paralleled statutory language of this section; therefore, jury could have believed

all of defendants' story, but not found self-defense proper in this case where 3 people beat admittedly unarmed man. *Johnson v. State*, 512 So. 2d 1246 (Miss. 1987), cert. denied, 484 U.S. 968, 108 S. Ct. 462, 98 L. Ed. 2d 402 (1987).

In an aggravated assault prosecution defended on M'Naghten insanity grounds, the giving of an instruction that voluntary intoxication was no defense could not have caused the jury to disregard defendant's insanity defense, where all of the instructions, when read together, clearly instructed the jury as to the state's burden in proving all elements of the crime and in proving defendant's sanity. *Norris v. State*, 490 So. 2d 839 (Miss. 1986).

Reckless or negligent beliefs of defendant to charge of aggravated assault that defendant was acting in self defense in attacking and cutting victim at time when victim had back turned is not basis upon which defendant may be granted instruction on lesser included offense of simple assault. *Nobles v. State*, 464 So. 2d 1151 (Miss. 1985).

The trial court properly refused defendant's instructions which contained inaccurate statements relative to the law of self-defense, and omitted the requirements that the defendant must have been in immediate danger, real or apparent, and that the intent to kill the defendant must have been manifested by some overt act on the part of the victim. *Yarber v. State*, 230 Miss. 746, 93 So. 2d 851 (1957).

In a prosecution for murder, an instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681 (1956).

Where accused, in prosecution for assault and battery, insulted other party who struck first blow, instruction of self-defense was error. *Wicker v. State*, 107 Miss. 690, 65 So. 885 (1914).

An instruction on self-defense should not be modified by words "without fault in himself in bringing on the difficulty." *Garner v. State*, 93 Miss. 843, 47 So. 500 (1908).

23. —Lesser offense.

Lesser-included simple assault instruction was proper because the record offered evidence in support of the defendant's theory that she had not wilfully caused bodily injury to the victim with a deadly weapon and the instruction clearly reflected the definition of simple assault as found in Miss. Code Ann. § 97-3-7(1). *Davis v. State*, 909 So. 2d 749 (Miss. Ct. App. 2005).

Evidence showed the assault to be intentional, not careless or negligent and defendant and his cohorts had purposefully inflicted serious injury to the victim by means of a tire tool and then proceeded to rob his business. Thus, the trial court did not err in denying defendant's request for a simple assault jury instruction. *Williams v. State*, 909 So. 2d 1233 (Miss. Ct. App. 2005).

Trial court did not err in refusing to instruct the jury on simple assault as the victim testified that defendant fondled her breast while on a three-wheeler, and defendant could not point to evidence in the record from which a jury could reasonably find him not guilty of sexual assault, and find him guilty of simple assault. *Ladnier v. State*, 878 So. 2d 926 (Miss. 2004).

In a sexual battery case, a trial court did not err in failing to instruct the jury on simple assault which was not a lesser-included offense; the element of "bodily injury" was missing from the sexual battery statute, Miss. Code Ann. § 97-3-95. *Seigfried v. State*, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

Defendant was not entitled to an instruction under Miss. Code Ann. § 97-3-7(1)(b), as the evidence indicated that defendant intentionally struck the victim; moreover defendant did not request the instruction at trial and the court was not required to offer it sua sponte. *Armstrong v. State*, 828 So. 2d 239 (Miss. Ct. App. 2002).

In a prosecution for aggravated assault, the court properly instructed the jury with

regard to simple assault as a lesser included offense where the state presented a witness claiming there was serious bodily injury and the defense brought forth a witness that the injuries were not serious. *Odom v. State*, 767 So. 2d 242 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault, the court properly refused to instruct the jury with regard to simple assault based upon negligent injury where the testimony was that the defendant intentionally shot the victim and the only issue was whether he or the victim shot first. *Reddix v. State*, 731 So. 2d 591 (Miss. 1999).

Even though victims' wounds were not very serious, defendant was not entitled to instruction on simple assault, as lesser included offense of aggravated assault, where defendant used gun during assault. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Aggravated assault defendant was not entitled to lesser included offense instruction on simple assault given that multiple stab wounds suffered by both victims were serious and life-threatening, and in light of absence of evidence that defendant was merely negligent in handling knife; evidence precluded finding that injuries were negligently inflicted. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting arrest where a reasonable fact-finder

could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he "injured" the officer within the meaning of this section. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a juror could conclude that the infant accidentally ingested the glass. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

In a prosecution for burglary of an inhabited dwelling, the defendant was not entitled to a lesser included offense instruction on the charge of simple assault where the evidence sufficiently supported a jury determination of the burglary charge, since simple assault is not a constituent offense of burglary of a dwelling. *Ross v. State*, 603 So. 2d 857 (Miss. 1992).

In a prosecution for aggravated assault under subsection (2) of this section, the defendant may not have the jury instructed on the lesser offense of simple assault under § 97-3-7(1) where the defendant wielded what was indisputably a deadly weapon and intentionally struck the victim, even if the injury inflicted was relatively slight. *Hutchinson v. State*, 594 So. 2d 17 (Miss. 1992).

In an assault prosecution, in which the defendant slashed the victim across the neck with a knife or a box cutter, the defendant was entitled to an instruction on self-defense where there was evidence that the victim had struck the defendant with an ice pick. *Anderson v. State*, 571 So. 2d 961 (Miss. 1990).

In a prosecution for aggravated assault, the trial court erred in refusing to give a lesser included offense instruction on simple assault where the evidence could have brought the case within the statutory definition of simple assault, even though some of the evidence was contradicted and the jury was not required to believe any of the testimony presented; as long as the

evidence "muddies the water enough," the defendant is entitled to the lesser included offense instruction. *Robinson v. State*, 571 So. 2d 275 (Miss. 1990).

In a prosecution for aggravated assault under subsection (2)(a) of this section, the defendant's use of a shot gun, which is a deadly weapon, during the alleged assault precluded his entitlement to an instruction authorizing a conviction of simple assault under subsection (1) of this section. *Hunt v. State*, 569 So. 2d 1200 (Miss. 1990).

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a \$500 fine and the maximum penalty for aggravated assault carries a 20-year prison term in the penitentiary, while the defendant would be faced with the possibility of serving a prison term for the remainder of his life if convicted for rape. *Boyd v. State*, 557 So. 2d 1178 (Miss. 1989).

Aggravated assault defendant is not entitled to have instruction given on lesser included offense of simple assault where uncontradicted evidence has been introduced showing victim suffered serious bodily injuries and evidence shows beyond reasonable doubt that injuries were inflicted under circumstances manifesting extreme indifference to value of human life. *Harbin v. State*, 478 So. 2d 796 (Miss. 1985).

Prisoner charged with aggravated assault arising from incident in which prisoner holds jail guard hostage while attempting to escape is entitled to

instruction on lesser included offense of simple assault by physical menace. *Lee v. State*, 469 So. 2d 1225 (Miss. 1985).

A conviction for aggravated assault on a fireman while acting within the scope of his duty would be reduced to a conviction for simple assault where evidence established that the defendant did not know that the victim of the assault was a fireman. *Morgan v. State*, 388 So. 2d 495 (Miss. 1980).

24. —Defendant as witness.

In a prosecution where the defendant was the only witness in his defense on the facts of the case, any error in the court's instruction that the jury in determining what weight should be given to the testimony of any witness had the right to consider what interest the witness had in the results of the trial, was cured by an instruction for the defense directing the jury to consider defendant's testimony as that of any other witness, and not to arbitrarily ignore him, simply because he was a defendant in the case. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533 (1959).

In a prosecution for assault and battery with intent to kill, where the defendant was the only witness in his behalf on the facts of the case, instruction that if the jury had no other reason to disbelieve the defendant than the fact he was a defendant in the case, it was the jury's sworn duty to believe him, was more than the defendant was entitled to and has been condemned. *Reed v. State*, 237 Miss. 23, 112 So. 2d 533 (1959).

Instruction that defendant is a competent witness in her own behalf, that her testimony is entitled to the same consideration as that of any other witness, and that it is jury's duty to believe every word she said while so testifying if the jury had no other reason to disbelieve her than that she is the defendant in the case, is improper as being confusing and on the weight of the testimony. *Coleman v. State*, 22 So. 2d 410 (Miss. 1945), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

25. Conviction of lesser crime.

Where appellant was charged with sexual battery, his defense attorney was not ineffective for allowing him to plead guilty

of aggravated assault. Aggravated assault is a lesser crime than sexual battery and carries a lower maximum sentence. *Pearson v. State*, 906 So. 2d 788 (Miss. Ct. App. 2004).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. *Grayer v. State*, 519 So. 2d 438 (Miss. 1988).

Since the doctrine of collateral estoppel contemplates a prior adjudication of an issue by the trier of the facts, the doctrine did not require the court to decline a verdict of guilty of aggravated assault, returned along with a verdict of not guilty of attempted kidnapping, both charges arising from the same facts, since the 2 indictments had been consolidated and simultaneously submitted to the jury, and there had been no prior adjudication of any issue. *Johnson v. State*, 491 So. 2d 834 (Miss. 1986).

The trial court did not err in refusing defendant's suggested instruction on simple assault, where there was no evidence that the wounds inflicted upon the victim were anything but serious, involving great risk of death. *Colburn v. State*, 431 So. 2d 1111 (Miss. 1983).

Where there was ample evidence that the accused deliberately shot his victim for no apparent reason, and on trial the accused vigorously denied that he either pointed or aimed a gun at the victim, accused was correctly charged with, and convicted of, assault and battery with intent to kill, notwithstanding his contention that the conviction should have been for pointing and aiming a gun. *Wixon v. State*, 229 Miss. 430, 90 So. 2d 859 (1956).

In a prosecution for assault with a deadly weapon with intent to kill and murder, evidence showing that defendant placed the shotgun on his lap pointing at another person was insufficient to sustain conviction for felony but was sufficient to support conviction for simple assault. *Washington v. State*, 222 Miss. 782, 77 So. 2d 260 (1955).

When state's evidence is not sufficient to sustain conviction under this section

[Code 1942, § 2011], but is sufficient to sustain charge of assault, supreme court is not authorized to discharge defendant, and judgment will be reversed and case remanded. *Craddock v. State*, 204 Miss. 606, 37 So. 2d 778 (1948).

Where intent to murder was not shown, conviction for assault with intent to murder was remanded for sentence as in simple assault. *Edgar v. State*, 202 Miss. 505, 32 So. 2d 441 (1947).

Sentence of accused after indictment, trial, and conviction under the statute (Code 1942, § 2361) providing for punishment of one convicted of an assault with intent to forcibly ravish any female of previous chaste character, was not improper because accused could have been prosecuted and sentenced under this section [Code 1942, § 2011]. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211 (1947), suggestion of error overruled, 201 Miss. 434, 30 So. 2d 74 (1947), rev'd on other grounds, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Where evidence did not justify conviction under this section [Code 1942, § 2011], defective instruction authorizing conviction hereunder upon proof of a simple assault would not cause reversal of conviction for assault with intent to kill and murder, but conviction would be affirmed as a conviction for simple assault and battery and remanded for appropriate sentence. *Daniels v. State*, 196 Miss. 328, 17 So. 2d 793 (1944); *Webb v. State*, 30 So. 2d 894 (Miss. 1947).

Conviction of assault and battery of defendant indicted for assault and battery with intent to kill whom the evidence proves to be guilty as charged, or innocent altogether, will be reversed. *Bailey v. State*, 93 Miss. 79, 46 So. 137 (1908).

26. Sentence.

Defendant's conviction for aggravated assault was affirmed as the evidence indicated that defendant went to his estranged wife's boyfriend's apartment, shot and killed the boyfriend, and shot the wife in the neck; the trial court did not err in admitting photographs of the crime scene as the evidence was relevant to the circumstances surrounding the crime. The two twenty-year consecutive sentences

that were imposed for defendant's convictions for manslaughter and aggravated assault did not constitute cruel and unusual punishment. *Lewis v. State*, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Probation under Miss. Code Ann. § 47-7-33 was a conditional term that was not part of the prison sentence and was therefore not subject to the totality of sentence concept found in Miss. Code Ann. § 47-7-34; defendant's five-year probation period would not be added to her original twenty-year sentence for aggravated assault when calculating time to be served, and reinstating the full original sentence therefore would not violate the statutory maximum for her crime as set forth in Miss. Code Ann. § 97-3-7. *Miller v. State*, 879 So. 2d 1050 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Where the statute did not give a minimum penalty for aggravated assault, the trial judge did not err in not telling the inmate what the minimum sentence was. *Dennis v. State*, 873 So. 2d 1045 (Miss. Ct. App. 2004).

Twenty-year maximum sentence imposed on 63-year-old defendant for aggravated assault was not cruel and unusual punishment; trial court was not required to impose a lesser sentence on the theory that the sentence amounted to a life sentence because that rule applied only to cases where the maximum sentence was a life sentence as imposed by a jury or a lesser term as imposed by a trial court and not where legislature has set a specific term of years as a possible sentence and allowed the trial court to impose that term. *Ray v. State*, 844 So. 2d 483 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

Statute specified no minimum sentence, where the statute specified no minimum number of years of imprisonment, the judge was not obliged to inform the defendant that no minimum sentence was provided, or that the minimum penalty he faced was zero. *Vance v. State*, 803 So. 2d 1265 (Miss. Ct. App. 2002).

There was no indication in the record that the trial judge enhanced the sentence of one defendant over the other, and the sentences were all well within the statu-

tory limits for armed robbery, aggravated assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245 (Miss. 1999).

Thirty-year sentence was not grossly disproportionate to crime consisting of two counts of aggravated assault; jury found defendant guilty of shooting two people, apparently for no other reason than they were in rival street gang, and trial judge was statutorily empowered to sentence defendant to 20 years on each count. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

The sentencing of a defendant under § 99-19-81, the habitual offender statute, to the 20-year maximum term for aggravated assault as set forth in subsection (2) of this section was not disproportionate to the crime charged and did not violate the Eighth Amendment where the defendant was convicted of severely bludgeoning the victim with an iron pipe; the statutory maximum penalty for aggravated assault is not grossly out of line with the maximum terms allowed for the commission of other violent crimes in Mississippi, and the maximum penalties imposed for aggravated assault in neighboring states are not profoundly different from those in Mississippi. *Fleming v. State*, 604 So. 2d 280 (Miss. 1992).

The trial court properly sentenced defendant for a felony following conviction for aggravated assault, notwithstanding the discretion given the court by this section for imprisonment in the county jail or penitentiary; the indictment charging defendant with having knowingly and purposely caused bodily injury to another "with a deadly weapon" clearly categorized the assault as an aggravated assault rather than a simple assault, even though the indictment did not use the word "feloniously". *Anthony v. State*, 349 So. 2d 1066 (Miss. 1977).

In prosecution for felonious assault by cutting with knife, when jury finds defendant guilty, trial judge is justified in imposing maximum sentence when there are no mitigating circumstances, since jury has found by its verdict that state's testimony is true. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

27. Domestic violence aggravated assault.

Evidence that defendant attacked his girlfriend with a box cutter was sufficient to support a charge of domestic violence aggravated assault, and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict. *Gainwell v. State*, 843 So. 2d 107 (Miss. Ct. App. 2003).

28. Miscellaneous.

A defendant did not have the right to resist an unlawful arrest where the arresting officers were acting in good faith on an unlawful warrant erroneously issued by a judge. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

The concept of "self-help" in resisting an arrest should be limited to those situations where the arrest is in fact illegal and the arrester and arrestee have reason to know that it is, or where the arrest is accompanied by excessive force; there is no right to resist an arrest based upon good faith reliance on a duly issued arrest warrant where the arrestee has no reasonable basis to conclude that the warrant was issued in bad faith. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

Section 45-6-3(c), which establishes the requirements for training of law enforcement officers who have been given traditional law enforcement duties, was not applicable in a prosecution for simple assault upon a law enforcement officer in which the defendant contended that the victim was not a "law enforcement officer" within the meaning of this section because he had not attended the training academy as required by § 45-6-3(c). *Amerson v. State*, 648 So. 2d 58 (Miss. 1994).

A conviction for simple assault upon a law enforcement officer would stand even if the victim was not a "de jure officer" but was merely a "de facto officer" acting within the scope of his duties and under the color of appointment at the time of the offense. *Amerson v. State*, 648 So. 2d 58 (Miss. 1994).

A simple assault involving the shearing of the victim's hair was not a lesser included offense of an aggravated assault involving biting of the victim and stabbing her with a pen, since the offenses were separate and distinct even though they

arose out of the same sequence of events, where the stabbing and biting took place while the defendant and the victim were on an interstate highway and the shearing took place after they returned to town to get scissors, so that there was a sufficient gap in time between the assaults to constitute separate offenses. *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

The offenses of aggravated assault under this section and shooting into a dwelling house under § 97-37-29 did not constitute the "same offense" for double jeopardy purposes where at least 18 shots were fired into the house and the victim was not struck with all 18 shots; the 2 statutes require proof of different facts in that shooting into a dwelling house is not required to establish an aggravated assault, and neither injury nor attempt to injure is required to prove the offense of shooting into a dwelling house. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. *Smith v. State*, 489 So. 2d 1389 (Miss. 1986).

In a prosecution for aggravated assault under subsection (2) of this section, the district attorney's statements in his closing argument to the effect that the State did not have a burden to prove defendant guilty beyond all reasonable doubt and every reasonable doubt, as distinguished from beyond a doubt, did not constitute reversible error on the facts of the case. *Gray v. State*, 427 So. 2d 1363 (Miss. 1983).

That accused in prosecution for felonious assault by cutting with knife was arraigned under indictment before he had employed counsel is not ground for reversal of case when accused did not ask court to delay arraignment until he could employ counsel nor claim that he would be unable to employ counsel and ask court to appoint one for him and defendant was

well represented throughout trial by attorneys. *Ferrell v. State*, 208 Miss. 539, 45 So. 2d 127 (1950).

Fact that judgment of conviction in prosecution for assault and battery with intent to kill and murder erroneously recites that case was tried by jury of twelve consisting of named juror and eleven others, named juror being member of regular jury panel for term but not in fact on this jury, will not be considered by supreme court on appeal when affidavits setting forth facts were filed long after motion for new trial had been overruled and after court term had adjourned, and matter was

not presented to trial court for correction. *Craig v. State*, 208 Miss. 528, 44 So. 2d 860 (1950).

Where jury returned verdict finding defendant guilty as charged but recommended the mercy of the court, trial court had the right to discard as surplusage that portion which said "but recommend the mercy of the court." *Craig v. State*, 208 Miss. 528, 44 So. 2d 860 (1950).

Verdict of guilty of assault and battery "with intent to commit manslaughter" is a conviction of assault and battery only. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 131 Am. St. R. 511 (1907).

ATTORNEY GENERAL OPINIONS

Based on subsection (2) of this section, person convicted of crime of aggravated assault on law enforcement officer is disqualified from holding public office; therefore, if election officials find, as matter of fact, that potential candidate has been convicted of such crime, they could not legally allow person's name to be placed on ballot; in order for person with such conviction to again become eligible to hold public office, person must obtain full pardon from Governor. *Chaney*, Mar. 9, 1993, A.G. Op. #93-0119.

Violations of this section that are misdemeanors would be handled by justice, county or circuit courts, and offenders would be sentenced to county jail; legislature is speaking to those courts in Miss. Code Section 97-3-71. *Evans*, June 9, 1993, A.G. Op. #93-0296.

Argument has been advanced that this section, which is simple assault statute, by stating that offender may be punished by imprisonment in "county jail"; did not intend this language to mandate county jail when offender is convicted in municipal court of simple assault, which is offense against municipality not state; reading statute as a whole it appears that legislature was using phrase "county jail" as opposed to penitentiary to help distin-

guish misdemeanor punishments from felony punishments. *Evans*, June 9, 1993, A.G. Op. #93-0296.

"Family or household member", as that term is used in Sections 97-3-7 and 99-3-7, includes individuals who are married, were married, or who live together in a relationship, although not married; further, it is not limited to a blood relationship and can relate to an in-law relationship or other relatives of one spouse living in the household; however, "boyfriend-girlfriend" (or any other variation of this) relationships are not included in the definition of "family or household member", unless the persons reside or resided together as spouses; finally, although not falling into the definition of "family or household member", if the individuals have a biological or legally adopted child between them, the relationship is also protected. *Carrubba*, Oct. 6, 2000, A.G. Op. #2000-0588.

Simple domestic violence as defined in subsection (3) of this section, is a crime against the person. Municipal courts may not utilize the provisions of § 99-15-26 (1) to non-adjudicate criminal defendants charged with and pleading guilty to the offense of simple assault or simple domestic violence. *Dawson*, Jan. 23, 2004, A.G. Op. 04-0019.

RESEARCH REFERENCES

ALR. Acquittal on homicide charge as bar to subsequent prosecution for assault

and battery or vice versa. 37 A.L.R.2d 1068.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery. 58 A.L.R.2d 808.

Attempt to commit assault as criminal offense. 79 A.L.R.2d 597.

Fact that gun was unloaded as affecting criminal responsibility. 79 A.L.R.2d 1412.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 A.L.R.2d 926.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon. 92 A.L.R.2d 635.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 33 A.L.R.3d 922.

Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Consent as defense to charge of criminal assault and battery. 58 A.L.R.3d 662.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute. 89 A.L.R.3d 1026.

Assault: criminal liability as barring or mitigating recovery of punitive damages. 98 A.L.R.3d 870.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient. 99 A.L.R.3d 854.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females. 5 A.L.R.4th 708.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 1268.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault. 24 A.L.R.4th 243.

Liability of hotel or motel operator for injury to guest resulting from assault by third party. 28 A.L.R.4th 80.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense. 73 A.L.R.4th 1123.

Double jeopardy: various acts of weapons violations as separate or continuing offense. 80 A.L.R.4th 631.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Sufficiency of bodily injury to support charge of aggravated assault. 5 A.L.R.5th 243.

Validity and construction of "extreme indifference" murder statute. 7 A.L.R.5th 758.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 8 A.L.R.5th 775.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 19 A.L.R.5th 823.

Excessiveness or adequacy of damages awarded for injuries to head or brain. 50 A.L.R.5th 1.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 A.L.R.5th 657.

What constitutes assault "resulting in serious bodily injury" within the special maritime or territorial jurisdiction of the United States for purposes of 18 USCS

§ 113(f), providing punishment for such act. 55 A.L.R. Fed. 895.

Am Jur. 6 Am. Jur. 2d, Assault and Battery §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Assault and Battery, Forms 1 et seq. (complaint, petition, or declaration — allegation — guilty plea in prior criminal action for same assault); Form 31 et seq. (complaint, petition, or declaration — assault and battery — attack on pregnant woman — prenatal injury to child); Form 79.1 (complaint, petition, or declaration — assault and battery — attack with knife or other sharp object).

2A Am. Jur. Pl & Pr Forms, Rev, Arrest, Form 81.

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 12 (assault scene).

36 Am. Jur. Trials 241, Defending Assault and Battery Cases.

2 Am. Jur. Proof of Facts, Assault and Battery, Proofs 1-8.

1 Am. Jur. Proof of Facts 3d 613, Assault and Battery.

CJS. 6A C.J.S., Assault and Battery §§ 69 et seq.

Law Reviews. 1983 Mississippi Supreme Court Review: Reckless driving as aggravated assault. 54 Miss. L. J. 130, March, 1984.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie)

Mississippi Penal Code Annotated (Michie).

§§ 97-3-9 and 97-3-11. Repealed.

Repealed by Laws, 1974, ch. 458, § 2, eff from and after July 1, 1974.

§ 97-3-9. [Codes, 1880, § 2983; 1892, § 968; 1906, § 1044; Hemingway's 1917, § 772; 1930, § 788; 1942, § 2012]

§ 97-3-11. [Codes, 1880, § 2984; 1892, § 969; 1906, § 1045; Hemingway's 1917, § 773; 1930, § 789; 1942, § 2013]

Editor's Note — The substance of the above section, as repealed by Section 2 of Chapter 458, Laws of 1974, has been incorporated in general terms in § 97-3-7, as amended by Section 1 of Chapter 458, Laws of 1974.

Former § 97-3-9 was entitled: Assault and battery; while in possession of deadly weapons.

Former § 97-3-11 was entitled: Assault and battery; pointing, aiming, discharging a gun.

§ 97-3-13. False confinement; sending sane person to insane asylum.

Every person or officer who shall maliciously send to or confine in an asylum, mad-house, or other place, any sane person as a lunatic or insane person, knowing such person to be sane, shall be guilty of a felony, and, on conviction, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the penitentiary not more than one year, or in the county jail not more than six months.

SOURCES: Codes, 1892, § 1316; Laws, 1906, § 1390; Hemingway's 1917, § 1133; Laws, 1930, § 1164; Laws, 1942, § 2407.

Cross References — Criminal sanctions for unlawfully conspiring to commit an individual to a treatment facility, see § 41-21-107.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal. 50 A.L.R.3d 144.

Am Jur. 40 Am. Jur. Proof of Facts 2d 81, False Imprisonment in Connection with Confinement in Nursing Home or Hospital.

§ 97-3-15. Homicide; justifiable homicide; use of defensive force; duty to retreat.

(1) The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases:

(a) When committed by public officers, or those acting by their aid and assistance, in obedience to any judgment of a competent court;

(b) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty;

(c) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in retaking any felon who has been rescued or has escaped;

(d) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in arresting any felon fleeing from justice;

(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be;

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished;

(g) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed;

(h) When necessarily committed in lawfully suppressing any riot or in lawfully keeping and preserving the peace.

(2)(a) As used in subsection (1)(c) and (d) of this section, the term "when necessarily committed" means that a public officer or a person acting by or at the officer's command, aid or assistance is authorized to use such force as necessary in securing and detaining the felon offender, overcoming the offender's resistance, preventing the offender's escape, recapturing the offender if the offender escapes or in protecting himself or others from bodily

harm; but such officer or person shall not be authorized to resort to deadly or dangerous means when to do so would be unreasonable under the circumstances. The public officer or person acting by or at the officer's command may act upon a reasonable apprehension of the surrounding circumstances; however, such officer or person shall not use excessive force or force that is greater than reasonably necessary in securing and detaining the offender, overcoming the offender's resistance, preventing the offender's escape, recapturing the offender if the offender escapes or in protecting himself or others from bodily harm.

(b) As used in subsection (1)(c) and (d) of this section the term "felon" shall include an offender who has been convicted of a felony and shall also include an offender who is in custody, or whose custody is being sought, on a charge or for an offense which is punishable, upon conviction, by death or confinement in the Penitentiary.

(c) As used in subsections (1)(e) and (3) of this section, "dwelling" means a building or conveyance of any kind that has a roof over it, whether the building or conveyance is temporary or permanent, mobile or immobile, including a tent, that is designed to be occupied by people lodging therein at night, including any attached porch;

(3) A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, occupied vehicle, business, place of employment or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling, occupied vehicle, business, place of employment or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred. This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties;

(4) A person who is not the initial aggressor and is not engaged in unlawful activity shall have no duty to retreat before using deadly force under subsection (1) (e) or (f) of this section if the person is in a place where the person has a right to be, and no finder of fact shall be permitted to consider the person's failure to retreat as evidence that the person's use of force was unnecessary, excessive or unreasonable.

(5)(a) The presumptions contained in subsection (3) of this section shall apply in civil cases in which self-defense or defense of another is claimed as a defense.

(b) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant acted in accordance with subsection (1) (e) or (f) of this section. A defendant who has previously been adjudicated "not guilty" of any crime by reason of subsection (1) (e) or (f) of this section shall be immune from any civil action for damages arising from same conduct.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (2); 1857, ch. 64, art. 168; 1871, § 2631; 1880, § 2878; 1892, § 1152; Laws, 1906, § 1230; Hemingway's 1917, § 960; Laws, 1930, § 988; Laws, 1942, § 2218; Laws, 1983, ch. 382; Laws, 2006, ch. 492, § 1, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "in any dwelling, in any occupied vehicle in any place of business in any place of employment or in the immediate premises thereof in which such person shall be" for "in any dwelling house in which such person shall be" in (1)(e); redesignated former (2) and (3) as present (2)(a) and (b); in (2), substituted "As used in subsection (1)(c) and (d)" for "As used in paragraphs (1)(c) and (1)(d)" at the beginning of (a) and (b), and added (c); and added (3) through (5).

Cross References — Excusable homicide, see § 97-3-17.

JUDICIAL DECISIONS

1. In general.
2. Killing in seeking to arrest.
3. Killing in resisting unlawful act.
4. Self-defense; generally.
5. —Evidence.
6. —Question for jury.
7. Instructions; generally.
8. —Self-defense.
9. —Defense of others.
10. —Defense of property.

1. In general.

Where husband shot wife's paramour and there was no claim of self-defense and evidence did not show that the deceased was about to commit a felony, this section [Code 1942, § 2218] was not applicable. *Carter v. State*, 221 Miss. 111, 72 So. 2d 231 (1954).

2. Killing in seeking to arrest.

The killing of a person who is fleeing from arrest for felony is not justifiable, even when the arrest is under warrant, except when the arrest could not otherwise be made and in cases of arrest of

desperate and dangerous criminals of a vicious type. *Hubbard v. State*, 202 Miss. 229, 30 So. 2d 901 (1947).

A sheriff having reliable information that a felony had been committed at a house was not justified in concluding that there was probable cause to believe that the negroes who ran from the house when the sheriff and his posse approached the next morning, because they ran, had participated in the felony, or in pursuing such cause to the extreme of shooting, or shooting at, the fleeing negroes. *Hubbard v. State*, 202 Miss. 229, 30 So. 2d 901 (1947).

Officer attempting to make unlawful arrest may plead self-defense. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 46 A.L.R. 895 (1926).

3. Killing in resisting unlawful act.

In his trial for murder of a police officer, defendant's contention that the homicide was justifiable because he was resisting an unlawful arrest and reasonably believed himself to be in imminent danger of great bodily harm was not supported by

the evidence, where the law officers had sufficient grounds to believe that fugitives for whom they had arrest warrants were located in the house in which defendant was staying and fired gas into the house only after a reasonable time had elapsed following the announcements requesting the occupants to vacate the house; failure of the occupants to exit as requested demonstrated their refusal to cooperate with the arresting officers who had identified themselves and stated their purpose, and the officers were warranted in using reasonable force and means to execute the arrest warrants. *Norman v. State*, 302 So. 2d 254 (Miss. 1974), cert. denied, 421 U.S. 966, 95 S. Ct. 1956, 44 L. Ed. 2d 453 (1975).

A girl's escort had a right to intervene for the purpose of preventing further injury to his girl friend but he had no right to kill the assailant. *Fortenberry v. State*, 213 Miss. 116, 56 So. 2d 56 (1952).

While malice aforethought is a necessary element in the crime of murder, it does not always follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder, since a person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter "to do any unlawful act, or after such attempt shall have failed," if such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is then thwarted, and is nonexistent prior thereto, each case depending upon its own facts and circumstances. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Where killing took place while accused was allegedly ejecting decedent from her home after forbidden him to re-enter, the fact that the law was being violated in accused's habitation did not deny her the right to defend or protect it from unwarranted intrusions or trespasses as a home. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he re-entered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Evidence of killing of constable, when constable, armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and without stating his purpose, held not to authorize conviction for crime higher than manslaughter. *Jones v. State*, 170 Miss. 581, 155 So. 430 (1934).

Married woman's killing of deceased to prevent his re-entering her home and committing assault upon her held not to constitute murder. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

Person is entitled to defend home with force against unlawful entries and to prevent crimes from being committed therein. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

Defendant, who killed deceased while he was breaking into home to kill or injure defendant, not guilty of manslaughter. *Williams v. State*, 98 So. 242 (Miss. 1923).

4. Self-defense; generally.

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or

not the male friend owned a gun at the time of the alleged threats was relevant because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. *Raiford v. State*, 907 So. 2d 998 (Miss. Ct. App. 2005).

Where individual is unjustifiably attacked by larger and unarmed person, is incapable of coping with that person in physical confrontation, and reasonably perceives that she will receive serious and great bodily injuries as result, that individual is justified in killing her attacker with a deadly weapon. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

Trial court properly refuses self defense instruction in homicide case in which uncontroverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147 (Miss. 1986).

Failure of district attorney to produce statement of homicide defendant for inspection and use by defendant and defendant's counsel does not prejudice defendant where statement, made to deputy sheriff, admitting killing of deceased, is not admission of guilt or inconsistent with defendant's plea of self defense, and circumstances surrounding statement do not indicate that defendant was fleeing or acting in manner inconsistent with defense. *Buckhalter v. State*, 480 So. 2d 1128 (Miss. 1985).

In an action for damages which arose when the decedent was shot and killed by a deputy sheriff, the killing would be justifiable under the provisions of the justifiable homicide statute where it was done in self-defense; the shooting was also necessary under the circumstances in order to preserve the peace and to apprehend the decedent, who had fired two rifles at the officers while resisting arrest. *Coghlan v. Phillips*, 447 F. Supp. 21 (S.D. Miss. 1977), *aff'd*, 567 F.2d 652 (5th Cir. 1978).

In a homicide prosecution, in order to justify a contention of self-defense, the record must disclose that the defendant had a reasonable apprehension of a design or plan on the part of the deceased to kill him or to do great bodily harm, and further that there was imminent danger of such design being accomplished; the mere apprehension that some minor battery might be committed upon the defendant is not sufficient. *Stennis v. State*, 234 So. 2d 611 (Miss. 1970).

Where the defendant turned himself over to a constable immediately after shooting the decedent, and was found at the time to be suffering from numerous injuries including a broken jaw, and where the defendant was smaller and older than the decedent and had long been afflicted with a disabling heart disease, slight variances in the defendant's story as told to officers and as given on the witness stand, and the fact that the room where the shooting occurred showed few signs of a violent scuffle, were insufficient to overcome the presumption of innocence, and the defendant was entitled to a peremptory instruction of acquittal. *Cassidy v. State*, 233 So. 2d 122 (Miss. 1970).

One may be found guilty of murder notwithstanding his plea of self-defense, where he was the aggressor in the fatal encounter. *Spearman v. State*, 237 Miss. 853, 116 So. 2d 823 (1960).

In order to justify or excuse the taking of human life in self-defense, the danger of peril, loss of life or the infliction of serious bodily harm must be, or appear to be, impending and imminent so urgent and pressing that it is necessary for him to kill in order to save himself. *Pitts v. State*, 211 Miss. 268, 51 So. 2d 448 (1951).

To justify a killing in self-defense the defendant must have believed, and had good reason to believe, that at the time he was in danger of the loss of his life, or great bodily harm at the hands of the deceased. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

The phrase "reasonable ground to apprehend," as used in this section [Code 1942, § 2218], implies apparent danger. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728 (1949).

To justify a homicide as self-defense, the danger need not be actual, but only rea-

sonably apparent and imminent so as to raise a reasonable doubt of guilt; the defendant is not required to prove that he acted in justifiable self-defense. *Scott v. State*, 203 Miss. 349, 34 So. 2d 718 (1948).

The phrase "reasonable ground to apprehend" implies apparent danger, fear or anticipation. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454 (1944).

In homicide prosecution for inflicting fatal wound while undertaking to arrest victim, wherein defendant invoked defense that he acted in necessary self-defense, nature of the instrument employed, whether a pistol or blackjack, both of which defendant had, was immaterial, since the important issue was the justification of the means employed. *Howard v. State*, 18 So. 2d 148 (Miss. 1944).

Homicide not justified by mere knowledge of threat. *James v. State*, 139 Miss. 521, 104 So. 301 (1925).

There is little practical difference in the meaning of the statutory words "reasonable ground to apprehend" and the words "good reason to believe." *Matthews v. State*, 108 Miss. 72, 66 So. 325 (1914).

Great bodily harm justifying killing of human being does not mean mere bruises inflicted by hands and fists, though the party inflicting is the stronger of the two persons. *Waldrop v. State*, 98 Miss. 567, 54 So. 66 (1911).

Defendant held justified in using a deadly weapon to protect himself, where deceased was a much larger and stronger man and defendant was liable to receive great bodily injury at his hands, although deceased was unarmed. *Hill v. State*, 94 Miss. 391, 49 So. 145 (1909).

Defendant may plead self-defense although following a fight he armed himself and sought his former adversary intending to kill him, where the latter fired first. *Garner v. State*, 93 Miss. 843, 47 So. 500 (1908).

5. —Evidence.

Defendant's murder conviction was proper where defendant's argument that a reasonable jury could only have found that he acted in self-defense was without merit because the evidence was uncontradicted that the victim was in fact unarmed, and no one other than defendant saw the victim reach for a weapon before

defendant shot him. *Ables v. State*, 850 So. 2d 172 (Miss. Ct. App. 2003).

Evidence supported the jury's finding of insufficient evidence of self-defense, notwithstanding that the victim had very recently beaten the defendant (his girlfriend) and that he was advancing on her at the time she shot him, where the defendant had left the scene of the altercation, armed herself, and then returned to confront the victim. *Wade v. State*, 724 So. 2d 1007 (Ct. App. 1998), *aff'd*, 748 So. 2d 771 (Miss. 1999).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835 (Miss. 1991).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to stand ground. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

Defendant's testimony on events at scene of killing is not such persuasive evidence of self-defense as to preclude jury verdict of anything but not guilty where evidence shows that defendant entered scene of crime with loaded gun, no weapon was found on deceased, and defendant's version of events is disputed by other witnesses and photographs. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

Even if the deceased had been physically capable of inflicting serious bodily injuries upon the defendant with his hands and his feet, such fact alone was inadequate to justify the defendant's use of a deadly weapon in a homicide case. *Stennis v. State*, 234 So. 2d 611 (Miss. 1970).

Accused's uncontradicted testimony that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man, and upon inquiring who it was, the man cursed him and continued to advance, so that accused, apprehending that the man was about to do him some great bodily harm, then fired in defense of his own life, being reasonable, under the circumstances, it must be accepted as true, and accused was entitled to a peremptory instruction. *Lee v. State*, 232 Miss. 717, 100 So. 2d 358 (1958).

Evidence that, at the time the accused shot and killed the deceased, the deceased was pursuing the accused with pistol in hand and threatening to kill him, failed to sustain a manslaughter conviction. *Pickens v. State*, 229 Miss. 409, 90 So. 2d 852 (1956).

Defendant is not required to prove that he acted in justifiable self-defense, but only that he raise a reasonable doubt of his guilt of the charge against him. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728 (1949).

In homicide prosecution defendant's explanation that he acted in self-defense, not contradicted directly, or by fair inference, must be accepted as true. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728 (1949).

Evidence that accused left his employment because of threats of plantation manager against his life and because of his terror of such manager who habitually carried a pistol, that accused thereafter kept out of manager's way until the day preceding the homicide, when manager was chasing and searching for accused during that day and night, finally coming upon accused in a house where accused had sought refuge, and accused, finding he could not escape, shot and killed the manager, although manager had not drawn his pistol, constituted circumstances justifying accused in reasonably believing he actually had no mode of escape except to take the life of the manager and substantiated his plea of self-defense. *Bell v. State*, 207 Miss. 518, 42 So. 2d 728 (1949).

When defendant is the only eyewitness to homicide, her version, if reasonable, must be accepted as true, unless substan-

tially contradicted in material particulars by creditable witnesses for state, or by physical facts or by facts of common knowledge, and when such evidence shows that the defendant acted upon what then reasonably appeared to be necessary for protection of her life, verdict should be directed in favor of defendant. *Lomax v. State*, 205 Miss. 635, 39 So. 2d 267 (1949).

Accused in homicide case, in order to establish that she acted as reasonably appeared to be necessary for protection of her life, need not show that deceased had weapon in her hand, or in sight, or said anything, at time shot was fired, where deceased had previously threatened to shoot defendant, had displayed pistol in her pocketbook, had threatened to beat defendant up with broom handle, and, immediately prior to shooting, deceased had been driving with defendant's husband, and on getting out of car approached defendant as defendant backed away, deceased trying to open her purse as she advanced. *Lomax v. State*, 205 Miss. 635, 39 So. 2d 267 (1949).

Testimony that deceased had the reputation of being dangerous, quarrelsome, and abusive when intoxicated was properly excluded in murder prosecution, where self-defense is not pleaded and neither the confession of defendant nor his testimony made the issue relevant. *Pinter v. State*, 203 Miss. 344, 34 So. 2d 723 (1948).

The jury had the right in a murder prosecution to reject defendant's testimony that he killed deceased in self-defense, where the proof of the state and the evidence of the only witness for the defendant, except that given by himself, showed that the killing was deliberate murder. *Flowers v. State*, 29 So. 2d 653 (Miss. 1947).

Where a defendant is claiming self-defense and is the only eyewitness to the homicide, the jury may consider all facts and circumstances bearing on the manner in which the homicide occurred and need not accept the defendant's version as true. *Herrin v. State*, 201 Miss. 595, 29 So. 2d 452 (1947).

Exclusion of corroboratory and cumulative evidence indicative of reasonable apprehension of imminent danger and the

practical admission of evidence only as to things done at the time and scene of the homicide was reversible error. *Eaton v. State*, 200 Miss. 729, 28 So. 2d 230 (1946).

Facts must be sufficient to justify belief that killing is reasonably necessary to prevent felonious killing of another before killing justified. *McGehee v. State*, 138 Miss. 822, 104 So. 150 (1925).

Aggression is doubtful where evidence thereon is conflicting. *Mott v. State*, 123 Miss. 729, 86 So. 514 (1920).

6.—Question for jury.

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

If to be sodomized unwillingly is to "suffer great bodily harm" so as to bring a subsequent killing of the assailant within the meaning of the justifiable homicide statute, the question of the reasonableness of the force used to repel the sexual attack would then become a jury issue. *Johnson v. State*, 346 So. 2d 927 (Miss. 1977), but see *Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).

Where a number of extenuating circumstances in favor of the accused, who was convicted of manslaughter, was disclosed by the record, the ends of justice would be better served by reversing and remanding the case and permitting another jury to pass on the issue as to whether or not the accused had good cause to believe, and did believe, in view of the disparity in size of the two men, that he was in either real or apparent danger of great bodily harm at the hands of the deceased at the time he shot him. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461 (1957).

Where three witnesses declared that the deceased had no knife and four witnesses affirmed that he did have a knife with which he was chasing the defendant's brother, it was for the jury to determine the veracity of witnesses. *Crawford v. State*, 54 So. 2d 230 (Miss. 1951).

In murder prosecution the question whether defendant shot the deceased in self-defense was for the jury. *Goff v. State*, 49 So. 2d 238 (Miss. 1950).

Question whether defendant killed victim in self-defense is one of fact for the jury to determine. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

Issues in homicide prosecution of justification as well as of extent of force employed were for the jury, where the fatal wound was inflicted while defendant was undertaking to arrest the victim and defendant sought to justify the act as in necessary self-defense. *Howard v. State*, 18 So. 2d 148 (Miss. 1944).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to re-enter, used more force than reasonably appeared to be necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

7. Instructions; generally.

In murder prosecution, state is entitled, upon request, to instruction submitting lessor included offense of manslaughter committed in heat of passion to jury even though heat of passion is affirmative element of manslaughter not present in murder. *Cook v. State*, 467 So. 2d 203 (Miss. 1985).

While a manslaughter instruction should not be given in a case of murder or complete justification, such instruction is not reversible error. *Vassar v. State*, 200 Miss. 412, 27 So. 2d 541 (1946).

Instruction that every killing of a human being without authority of law is either murder or manslaughter, murder when done with deliberate design to effect death, and manslaughter when done in heat of passion without malice and without any premeditation, did not constitute error, either as not correctly stating the law or as depriving defendant of her plea of necessary self-defense. *Wiggins v. State*, 199 Miss. 114, 23 So. 2d 691 (1945).

Concluding an instruction in murder prosecution authorizing conviction if de-

fendant was in no real or apparent danger of losing his own life or suffering great bodily injury, with the phrase "this is true regardless of every other fact or circumstance in the case," did not constitute reversible error, where considerable irrelevant testimony concerning the so-called "unwritten law" was admitted prejudicial to the prosecution, and the concluding phrase probably disabused the minds of the jurors of its influence. *Kilgore v. State*, 198 Miss. 816, 23 So. 2d 690 (1945).

Instruction in manslaughter prosecution that the jury should not give the defendant the benefit of mere timidity or needless fear, but that she must reasonably have believed herself in danger of death or great bodily harm, satisfactorily contracted capricious or groundless fear with reasonable apprehension, and was not prejudicial. *Bangren v. State*, 198 Miss. 359, 22 So. 2d 360 (1945).

Instruction authorizing jury to disregard testimony, which did not consider whether such testimony was immaterial, collateral, incompetent, or irrelevant, was error. *Boykin v. State*, 86 Miss. 481, 38 So. 725 (1905).

Error to grant instructions for state without first submitting them to defendant's attorney. *Boykin v. State*, 86 Miss. 481, 38 So. 725 (1905).

Error for court to charge that if defendant was cutting witness with a knife, which was a deadly weapon, not in his necessary self-defense, then deceased was entitled to attack defendant while he was so cutting witness with a knife, even to taking his life. *Boykin v. State*, 86 Miss. 481, 38 So. 725 (1905).

8. —Self-defense.

Court committed reversible error in instructing the jury to find the defendant guilty of manslaughter if it found that he killed the victim while resisting the victim's unlawful trespass; this instruction prevented the jury from returning a finding of justifiable homicide and left it with the choice of either murder or manslaughter. *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-

defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

Trial court properly refuses self defense instruction in homicide case in which uncontroverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147 (Miss. 1986).

Murder defendant is not entitled to have jury instructed peremptorily that he should be found not guilty where, although evidence shows that person shot by defendant struck him in head with beer bottle before defendant lifted so much as finger, following receipt of beer bottle blow, defendant did nothing but just stood at bar for 5 or 10 minutes, person shot went to cash register and started counting money, and at point when person had ceased to be aggressor, defendant shot and killed person. *Gavin v. State*, 473 So. 2d 952 (Miss. 1985).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Defendant pleading self defense to murder charge is entitled to instruction which in substance advises jury that so long as defendant was in place where he had right to be and was neither immediate provoker or aggressor, he was not required to flee on pain of forfeiting defense of self defense. *Cook v. State*, 467 So. 2d 203 (Miss. 1985).

The trial court's instruction in a murder prosecution resulting in a conviction of manslaughter, that defendant had a right to kill the deceased if it reasonably appeared that he was undertaking to force entrance into defendant's house with the design to do defendant great personal injury, adequately set forth defendant's right under this section to protect her domicile from unlawful entry. *Hull v. State*, 350 So. 2d 60 (Miss. 1977).

In a prosecution for murder, the instruction to the jury was erroneous where it failed to inform the jury that there are instances in which a deliberate design to kill may exist at the moment the fatal blow was struck and yet the homicide may be justifiable or excusable, and therefore required the jury to convict the defendant of murder if it found premeditation or deliberate design to kill even though the killing might have been justifiable by reason of self-defense. *Pittman v. State*, 297 So. 2d 888 (Miss. 1974).

In a prosecution for murder, an instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681 (1956).

Instruction that if jury believed beyond a reasonable doubt that defendant killed victim at a time when he was in no immediate danger, real or apparent, of losing his life or suffering some great bodily harm at the hands of victim, then defendant is guilty, etc., was not erroneous as excluding from consideration of jury that if defendant reasonably believed or had reasonable cause to believe that he was in danger of losing his life or suffering some great bodily harm at the hands of deceased he had a right to take deceased's life in defending himself even though he might have been in no actual danger whatever, especially in view of other instructions embodying the principal contended for by defendant. *Johnson v. State*, 46 So. 2d 924 (Miss. 1950).

It is not error to grant to state manslaughter instruction, it being contended by defense that accused was either guilty of murder or was justified in committing homicide in necessary self-defense, when under all of evidence accused cannot be properly convicted of greater offense than manslaughter and even that offense is not satisfactorily proved beyond every reason-

able doubt. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

Refusal of court to grant peremptory instruction to find defendant not guilty is not error where defendant's testimony that he was in danger of death or great bodily harm at hands of deceased and that it was necessary for him to strike in self-defense was contradicted by undisputed evidence that killing occurred at crap table, with table and crowd of people between accused and deceased, and defendant advanced on deceased around table and struck at him by reaching around another person. *Robinson v. State*, 205 Miss. 281, 38 So. 2d 723 (1949).

That an elderly father in ill health who claimed to have shot his robust son as he threateningly advanced upon the father in his bed was denied his defense of self-defense by an instruction that the homicide could not be excused by the mere fact that the defendant was a smaller man than the deceased, of less powerful build and proportions and of greater years, and was assaulted by the deceased with his fists at the time of the slaying, constituted reversible error. *Bailey v. State*, 202 Miss. 221, 31 So. 2d 123 (1947).

The burden of proof is not shifted to the defendant by an instruction that in order to justify a homicide on the plea of self-defense there must be something shown in the conduct of the deceased indicating a present intention to kill or to do some great personal injury to the slayer, and imminent danger of such intention being accomplished. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Omission from state's instruction defining justifiable self-defense that danger of death or great bodily harm may be either real or reasonably apparent, constituted reversible error where under state's proof defendant was guilty of murder whereas under her proof jury could have found that defendant acted in justifiable self-defense, since in such a situation it is important that the state's instruction be technically correct. *Gooch v. State*, 199 Miss. 280, 24 So. 2d 736 (1946).

Instruction that "to justify a homicide on the plea of self-defense there must be

something shown in the conduct of the deceased indicating a present intention to kill, or to do some great personal injury to the slayer, and immediate danger of such intention being accomplished," was not erroneous, either on the ground that the word "apparent" should have preceded the word "danger," even though such would have been technically correct, where rest of instruction informed jury that this danger might be actual or apparent, or on ground that the word "imminent" should have been used instead of the word "immediate," although the former word, which is used in this section [Code 1942, § 2218], would have been preferable. *Holmes v. State*, 199 Miss. 137, 24 So. 2d 90 (1945), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

In a prosecution for homicide, in which the defendant testified that the acts resulting in the death of the decedent had been done at a time when the decedent was attempting to impose his attentions upon the defendant, over her protest and against her will, in such manner as to commit a statutory offense against her person, an instruction to the jury, which would seem to require that the jury should believe that the defendant entertained a reasonable apprehension that he intended to take her life, or to do her great bodily harm, in the sense of endangering her life, before the jury would be warranted in acquitting her, entirely leaving out of consideration the right to protect her person against the commission of the threatened felony testified to, was erroneous. *Hodges v. State*, 192 Miss. 322, 6 So. 2d 123 (1942).

Instruction on law of self-defense held erroneous as shifting burden of proof. *Reddix v. State*, 134 Miss. 393, 98 So. 850 (1924).

9. —Defense of others.

An instruction regarding defense of another was sufficient, notwithstanding that the instruction did not precisely follow the language of subsection (1)(f), as there was no evidence regarding a felony other than an aggravated assault and, therefore, it was not error to eliminate the alternative felony language of the statute. *Moore v.*

State, 776 So. 2d 717 (Miss. Ct. App. 2000).

Though the statute casts the killing of a man in the necessary defense of another in terms of justification, this license does not justify shooting wildly and blindly into a crowd of people, some of whom are mere bystanders; such indiscriminate use of deadly force cannot be thought to be a reasonable use. *Moore v. State*, 776 So. 2d 717 (Miss. Ct. App. 2000).

Evidence was insufficient in a murder prosecution to justify an instruction to the jury with regard to defense of others where there was no evidence that the defendant drew his gun in an attempt to break up the fight between the defendant and another. *Robinson v. State*, 758 So. 2d 480 (Miss. Ct. App. 2000).

In a prosecution for murder arising out of the killing of a man who was allegedly attacking the defendant's wife, the trial court properly refused the defendant's request for a directed verdict of acquittal under this section where the evidence was in conflict as to whether the victim had actually been attacking the defendant's wife; however, where the evidence did not rise to that high degree which would justify a jury in finding the defendant guilty of murder beyond a reasonable doubt, his motion for a directed verdict as to the charge of murder should have been sustained, leaving only the charge of manslaughter under § 97-3-31 to be considered by the jury. *Edge v. State*, 393 So. 2d 1337 (Miss. 1981).

The trial court did not commit reversible error in refusing to instruct that if accused shot deceased in the lawful defense of his sister-in-law, wife of deceased, the jury should acquit him, in view of insufficient evidence showing that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time of the killing. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461 (1957).

Where the accused shot the deceased who was shooting at accused's unarmed brother, while the latter was seated at a booth in a dining room of a cafe and it appeared that the brother had made no hostile demonstration at the decedent, the court should have given a peremptory

instruction as requested by the defendant. *Newman v. State*, 222 Miss. 660, 77 So. 2d 282 (1955).

10. —Defense of property.

Giving instruction upon murder charge, where defendant's explanation of killing as in defense of home was uncontradicted, held error. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

Where defendant sought to justify killing as in defense of home, instruction killing could not be justified unless to save defendant's life, or prevent great bodily harm, or unless defendant was in immediate danger, held erroneous as ignoring defense of habitation. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

RESEARCH REFERENCES

ALR. Homicide: Extent of premises which may be defended without retreat under right of self-defense. 52 A.L.R.2d 1458.

Admissibility on behalf of accused in homicide case of evidence that killing was at victim's request. 71 A.L.R.2d 617.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense. 9 A.L.R.3d 933.

Homicide: duty to retreat where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment. 41 A.L.R.3d 584.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 A.L.R.3d 221.

Unintentional killing of or injury to third person during attempted self-defense. 55 A.L.R.3d 620.

Withdrawal, after provocation of conflict, as reviving right of self-defense. 55 A.L.R.3d 1000.

What constitutes "imminently dangerous" act within homicide statute. 67 A.L.R.3d 900.

Modern Status: right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 A.L.R.3d 174.

Homicide: duty to retreat where assailant is social guest on premises. 100 A.L.R.3d 532.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 104 et seq.

5A Am. Jur. Pl & Pr Forms (Rev), Civil Rights, Forms 3.1, 5.1, 5.2 (pleadings in federal civil rights case involving use of deadly force in preventing escape of suspected felon).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.
40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

3 Am. Jur. Proof of Facts 2d, Withdrawal by Aggressor Reviving Right of Self-defense, §§ 9 et seq. (proof of withdrawal by aggressor — subsequent homicide committed in self-defense).

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

34 Am. Jur. Proof of Facts 2d 1, Criminal Law: The Battered Woman Defense.

38 Am. Jur. Proof of Facts 2d 731, Justified Use of Force in Defense of Private Property.

CJS. 40 C.J.S., Homicide §§ 101 et seq.

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(Michie).

§ 97-3-17. Homicide; excusable homicide.

The killing of any human being by the act, procurement, or omission of another shall be excusable:

(a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;

(b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;

(c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (3); 1857, ch. 64, art. 169; 1871, § 2632; 1880, § 2879; 1892, § 1153; Laws, 1906, § 1231; Hemingway's 1917, § 961; Laws, 1930, § 989; Laws, 1942, § 2219; Laws, 1985, ch. 380, eff from and after July 1, 1985.

Cross References — Justifiable homicide, see § 97-3-15.

JUDICIAL DECISIONS

1. In general.
2. Killing by accident or misfortune.
3. Killing in sudden combat.
4. Instructions to jury.

1. In general.

This section was inapplicable in a murder prosecution arising from the shooting death of a game warden where, at the time of the homicide, the defendant was in the process of headlighting deer, an unlawful activity under subsection (a) of this section, and was in possession of a firearm, a dangerous weapon under subsection (c) of this section, and a "heat of passion" defense was not argued by the defendant. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

A jury instruction in a murder prosecution, which listed sudden combat, as stated in subsection (c) of this section, as the only excuse for killing, but which completely failed to mention accident, misfortune, the heat of passion, or any sudden and sufficient provocation, as set out in (a) and (b) of that section, was reversible error, notwithstanding another instruction that was given, which did

mention those factors, but which was in hopeless conflict with the first instruction. *Scott v. State*, 446 So. 2d 580 (Miss. 1984).

Statute defining excusable homicide does not extend to homicide committed in the course of an unlawful act nor to homicide committed with a deadly weapon. *Hailes v. State*, 315 So. 2d 917 (Miss. 1975).

This section [Code 1942 § 2219] does not excuse an offense in the commission of which a deadly weapon is used nor does it excuse the killing of a human being when done in the course of an unlawful act. *Powell v. State*, 279 So. 2d 161 (Miss. 1973).

One may not repel the attack of an unarmed man, not his superior in physical power, by slaying him; for such attack does not furnish sufficient evidence to one of ordinary strength and courage to anticipate either that his life will be taken, or great bodily harm done, such as justifies the killing of his adversary. *Reed v. State*, 197 So. 2d 811 (Miss. 1967).

Insulting words can never justify a homicide, unless they are of such nature as to cause defendant to believe he is threat-

ened with grave, impending danger. *Reed v. State*, 197 So. 2d 811 (Miss. 1967).

2. Killing by accident or misfortune.

Defendant's motion for a judgment notwithstanding the verdict pursuant to the *Weathersby* rule was properly overruled by the trial court because the physical evidence and collective testimony of a police officer, a former friend of defendant, and a forensic pathologist, substantially contradicted defendant's version of events. Testimony that the victim sat in a chair and faced away from defendant and that defendant stepped back and shot the victim created a jury issue as to whether defendant shot the victim by accident. *Gilbert v. State*, — So. 2d —, 2006 Miss. App. LEXIS 241 (Miss. Ct. App. Apr. 4, 2006).

Since defendant presented no evidence to support a defense of killing by accident or misfortune, the trial court did not err in not instructing the jury on that defense in his murder case. *Montana v. State*, 822 So. 2d 954 (Miss. 2002).

Trial court did not err in not giving defendant's requested instruction on killing by accident or misfortune as that defense was precluded by the fact that defendant intentionally fired defendant's gun within the city limits, which was an unlawful act, as commission of an unlawful act prevented a defendant from asserting such a defense. *Montana v. State*, 822 So. 2d 954 (Miss. 2002).

Since an intentional act could not fit within the doctrine of killing by accident or misfortune, and because all evidence showed defendant fired defendant's gun intentionally, defendant could not assert the defense of killing by accident or misfortune in defendant's murder case where the victim was struck in the head as the victim was driving away in a minivan and defendant fired his gun at the minivan. *Montana v. State*, 822 So. 2d 954 (Miss. 2002).

In a murder prosecution arising from events surrounding an altercation between the defendant and others at a bar, the court properly instructed the jury with regard to accident where the defendant claimed that he did not think that he shot the victim, but that if he did, he did not intend to shoot her and it happened while

he was preparing to shoot his gun in the air to scare off attacking bar patrons. *Evans v. State*, 797 So. 2d 811 (Miss. 2000).

The court properly instructed the jury with regard to the defense of accident where the defendant asserted that he did not think that he shot the victim, but that if he did, he did not intend to do so, and it happened as he was preparing to fire his gun in the air to scare off patrons in a bar who were attacking him. *Evans v. State*, 797 So. 2d 811 (Miss. 2000).

Under the circumstances presented, there was no evidentiary basis capable of supporting a factual finding that defendant had accidentally stabbed the victim, and the requested jury instruction for excusable homicide was properly denied. *Webster v. State*, 754 So. 2d 1232 (Miss. 2000).

In the prosecution of a 14 year old for manslaughter arising from an incident in which he shot another child after teasing her, he was not entitled to have the jury instructed in regard to "accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent," where the defendant admitted to unlawfully carrying a concealed weapon. *Towner v. State*, 726 So. 2d 251 (Miss. Ct. App. 1998).

Whether killing was result of accident or misfortune is question for jury to decide after proper instruction. *Miller v. State*, 677 So. 2d 726 (Miss. 1996).

Refusal to grant murder defendant's request for jury instruction on accident or misfortune was reversible error; under defendant's version of events, he and victim were struggling over gun when it discharged, and thus, it was not sudden combat situation, nor did shooting happen during commission of unlawful act. *Miller v. State*, 677 So. 2d 726 (Miss. 1996).

In context of determining whether defendant committed excusable homicide, which arises when committed by accident and misfortune in doing any lawful act by lawful means, "unlawful acts" are crimes or misdemeanors. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

Defendant's display of pistol and his heated request for victim to shoot him,

following his repeated threats against victim, constituted violation of stalking statute and was an unlawful act which would preclude defendant's use of accident as a defense to homicide charge. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

Defense of accident to homicide charge was inapplicable if defendant, as he alleged, fatally shot victim while attempting to commit suicide, an unlawful act, and thus defendant was not entitled to requested instruction on accident. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

In a homicide prosecution under this section, it was error to exclude evidence of prior threats made by the victim to the defendant, even though the defendant took the position that the ultimate shooting was accidental, where the prior threats had bearing on the issue of whether the result was manslaughter or murder because they were relevant to show the defendant's state of mind at the time of the incident. *Day v. State*, 589 So. 2d 637 (Miss. 1991).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to stand ground. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

Failure of court to authorize manslaughter verdict is not error where proof showed no element of manslaughter, theory of defense was that of accidental killing, and neither state nor defense re-

quested an instruction on manslaughter. *Hendrix v. State*, 41 So. 2d 48 (Miss. 1949).

Instructions for state defining malice aforethought is not erroneous on ground that it omits reference to accidental killing when there is little, if anything, in record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

An instruction permitting the jury to find the defendant guilty of manslaughter if it believed that the defendant cut or stabbed the deceased with a knife "as shown by the testimony," is not in direct conflict with an instruction to the effect that defendant could be acquitted if the jury found that he had killed the deceased as a result of an accident or misfortune while in the heat of passion upon a sudden and sufficient provocation, and does not constitute reversible error, where the only positive evidence in the case was to be found in the dying declarations of decedent wherein the declarant said that defendant "knifed him," and the defendant himself admitted that he was armed with an open knife at the time. *Morris v. State*, 182 Miss. 763, 183 So. 694 (1938).

Where accused unlawfully pointed pistol at deceased who was killed as result, court properly refused to submit accidental killing to jury. *Long v. State*, 163 Miss. 535, 141 So. 591 (1932).

3. Killing in sudden combat.

The defendant was not entitled to an instruction with regard to sudden combat where (1) after the defendant and his wife left a nightclub, the victim walked by his wife while she was making a telephone call, knocked her into a wall, and called her a name, (2) the defendant saw the incident from about 45 feet away, went to aid his wife, and pursued the victim into a dark breezeway, (3) upon entering the breezeway, he felt someone (the victim) grab his shirt and he responded by hitting him twice and kicking him twice, (4) the victim fell and hit his head and died over

a month later. *Goff v. State*, 778 So. 2d 779 (Miss. Ct. App. 2000).

Only time homicide cannot be excusable when dangerous weapon is used is when it takes place during sudden combat. *Miller v. State*, 677 So. 2d 726 (Miss. 1996).

Paragraph (c) of this section [Code 1942, § 2219] is not available to an aggressor. *Jeffcoat v. State*, 21 So. 2d 8 (Miss. 1945).

Evidence that accused struck deceased when deceased was doing no overt act in or toward a combat, and that there was no conduct on part of deceased sufficient to produce any appearance that deceased intended any such act, did not authorize peremptory charge for accused under statute defining "excusable homicide." *Conner v. State*, 179 Miss. 795, 177 So. 46 (1937).

4. Instructions to jury.

Defendant's argument that he acted in the heat of passion as a consequence of his being distraught over the denial of his

visitation request was not provocation that the appellate court considered to be either sudden or sufficient within the meaning of the statute. *Jackson v. State*, 815 So. 2d 1196 (Miss. 2002).

Where defendant presented no evidence that any of the shots fired were accidentally fired, but only that the direction of the bullet was accidental, the court correctly held that because the defendant intentionally fired the weapon, the defendant was precluded from receiving the requested jury instructions. *Montana v. State*, — So. 2d —, 2002 Miss. LEXIS 172 (Miss. May 9, 2002).

Evidence was insufficient in a murder prosecution to justify an instruction to the jury with regard to excusable homicide where there was no evidence that the defendant drew his gun in an attempt to break up the fight between the defendant and another. *Robinson v. State*, 758 So. 2d 480 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR. Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 A.L.R.2d 396.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 A.L.R.3d 1292.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Homicide predicated on improper treatment of disease or injury. 45 A.L.R.3d 114.

Unintentional killing of or injury to third person during attempted self-defense. 55 A.L.R.3d 620.

Homicide: burden of proof on defense that killing was accidental. 63 A.L.R.3d 936.

Venue in homicide cases where crime is committed partly in one country and partly in another. 73 A.L.R.3d 907.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 A.L.R.4th 983.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary — modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 104 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

27 Am. Jur. Trials 261, Hunting Accident Litigation.

40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

CJS. 40 C.J.S., Homicide §§ 101 et seq.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 4:3. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-19. Homicide; murder defined; capital murder; lesser-included offenses.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies;

(d) When done with deliberate design to effect the death of an unborn child.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the State Tax Commission, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age

of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated on educational property as defined in Section 97-37-17;

(h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

(3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (3, 4); 1857, ch. 64, art. 165; 1871, § 2628; 1880, § 2875; 1892, § 1149; Laws, 1906, § 1227; Hemingway's 1917, § 957; Laws, 1930, § 985; Laws, 1942, § 2215; Laws, 1974, ch. 576, § 6(1, 2); Laws, 1983, ch. 429, § 1; Laws, 1992, ch. 508, § 1; Laws, 1996, ch. 422, § 3; Laws, 1998, ch. 588, § 1; Laws, 2000, ch. 516, § 134; Laws, 2004, ch. 393, § 1; Laws, 2004, ch. 515, § 2, eff from and after passage (approved May 4, 2004.)

Joint Legislative Committee Note — Section 1 of ch. 393 Laws, 2004, effective from and after passage (approved April 20, 2004), amended this section. Section 2 of ch. 515, Laws, 2004, effective from and after passage (approved May 4, 2004), also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the July 8, 2004 meeting of the Committee.

Amendment Notes — The first 2004 amendment (ch. 393), in (2)(a), inserted "senior status judge, special judge, district attorney, legal assistant to a district attorney, county" in the second sentence following "parole officer a judge," and made minor stylistic changes; and added (3).

The second 2004 amendment (ch. 515) inserted (1)(d).

Cross References — Construction of the terms "capital case", "capital offense", "capital crime", and capital murder", see § 1-3-4.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Employees of department of correction having status of peace officers under this section, see § 47-5-54.

Investigation of hunting accidents, see § 49-4-31.

Effect of conviction of homicide as disqualification to hold office in labor union, etc., see § 71-1-49.

Assault and battery with deadly weapon, see § 97-3-7.

Penalty for murder, see § 97-3-21.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Reward for arrest of one fleeing homicide, see §§ 99-3-35 through 99-3-39.

Requisites of indictment for homicide, see § 99-7-37.
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JUDICIAL DECISIONS

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III. INSTRUCTIONS.

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I. IN GENERAL.

1. In general.

Defendant's capital murder conviction in violation of Miss. Code Ann. § 97-3-19(2)(a) was proper where the statute did not violate U.S. Const. amends. VIII and XIV. The fact that Mississippi's capital murder scheme made the death penalty a possible punishment for felony murder where there was no requirement to prove an intent to kill, and not premeditated murder, did not make the Mississippi capital murder statute unconstitutional. *Davis v. State*, 914 So. 2d 200 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Evidence was sufficient to support defendant's conviction for capital murder pursuant to Miss. Code Ann. § 97-3-19(2)(e) based on an underlying burglary felony where the evidence showed that defendant killed his ex-girlfriend's brother after breaking into the girlfriend's home with the intent to kill her and her mother. Also the indictment sufficiently specified the underlying burglary offense. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

It was previously determined that Miss. Code Ann. § 97-3-19(e), the portion of Mississippi's death penalty statute that provides for the application of the statute to all defendants found guilty of felony murder, is constitutional, as is Miss. Code Ann. § 99-19-101, which provides that a jury is to determine punishment in capital cases, and lists the mitigating and aggravating factors to be considered; jury instructions used in defendant's capital murder trial were in compliance with *Enmund* and *Tison*, in that the jury found that all four factors contained in Miss. Code Ann. § 99-19-101 as to intent beyond a reasonable doubt were present, including that defendant had intended to kill the victim. *Grayson v. State*, 879 So. 2d 1008 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Where four eyewitnesses testified they saw the defendant point a gun and fire at

the victim, that the victim was unarmed and made no gestures to suggest that he had a weapon or that he intended any harm to defendant, and where other witnesses testified that defendant, after the first confrontation of the day, acquired a gun and made purposeful efforts to locate the victim, a jury could reasonably have found that defendant had a deliberate design to kill the victim and that he carried out that plan. *Carter v. State*, 845 So. 2d 748 (Miss. Ct. App. 2003).

Defendant's supported allegations that his guilty plea to murdering his girlfriend was involuntary and the result of coercion because his attorney refused to investigate an allegedly incorrect criminal record that would have shown defendant to be a habitual criminal could properly be rejected by the trial court considering defendant's motion for postconviction relief without holding an evidentiary hearing; trial court could properly impose a life sentence without referring the matter to a jury. *Riley v. State*, 848 So. 2d 888 (Miss. Ct. App. 2003).

Where a trial court fails to instruct the jury on the underlying felony in a capital murder prosecution, the Mississippi Supreme Court applies a harmless error analysis. *Kolberg v. State*, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Trial court did not err in not declaring Mississippi's death penalty statute, contained in Miss. Code Ann. § 97-3-19(e), unconstitutional as the death sentence was not excessive in relation to defendant's crime of stabbing a 78-year old woman to death and death sentences were imposed with reasonable consistency in Mississippi such that imposing a death sentence in defendant's case was not improper. *Grayson v. State*, 806 So. 2d 241 (Miss. 2001), cert. denied, 537 U.S. 973, 123 S. Ct. 466, 154 L. Ed. 2d 329 (2002).

Subsection (2)(f) of this section is constitutional, notwithstanding that it does not require deliberate design. *Miller v. State*, 748 So. 2d 100 (Miss. 1999).

The phrase "without authority of law" is an element of capital murder as defined by subsection (2)(e) of this section. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

The State supreme court rejected the contention that this section is unconstitu-

tional due to its failure to clearly define "deliberate design;" the defendant did not meet his burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. *Jones v. State*, 710 So. 2d 870 (Miss. 1998).

Capital murder defendant cannot be convicted of both capital murder and underlying felony, as defendant cannot be twice prosecuted for the same actions. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Aggravating factor of murder committed during course of robbery is constitutional. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Defendant could be prosecuted for capital murder based on felony murder, even though he could also have been charged with manslaughter. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Where defendant was charged with two acts of sexual battery, one of which constituted the underlying felony to the capital murder and the other of which served as the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Because defendant had previously been convicted of aggravated assault and certified as an adult, he would not have been entitled to a youth court hearing for his capital murder charge even if such a hearing would otherwise be required. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A defendant's convictions for both murder-for-hire capital murder under subsection (2)(d) of this section and conspiracy to commit capital murder under § 97-1-1

violated the constitutional protection against double jeopardy, since the definition of murder-for-hire in subsection (2)(d) of this section completely encompasses the agreement or conspiracy to commit capital murder. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

The constitutional principles of double jeopardy are not violated by the "double use" of the pecuniary gain factor in elevating a murder to the status of capital murder because it was perpetrated by one who had been given something of value for the killing pursuant to subsection (2)(d) of this section and in imposing the death penalty for committing murder by pecuniary gain pursuant to § 99-19-101(5)(f). *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989), reh'g denied, 492 U.S. 932, 110 S. Ct. 13, 106 L. Ed. 2d 628 (1989), post-conviction relief denied, 641 So. 2d 751 (Miss. 1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995).

Merger doctrine does not apply, and therefore underlying crime of felonious child abuse does not merge into murder, because societal interests are different regarding capital murder statute and felonious child abuse statute, former designed to punish and act as deterrent to such crimes should death result, the latter intended to protect children. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Intent of legislature was that serious child abusers would be guilty of capital murder if child died. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

District Attorney's statements that defendant had spent 6 years in jail in Cuba and had been arrested and imprisoned in Texas, both of which showed significant history of criminal activity, were not used against defendant as aggravating circum-

stances, because it was proper for District Attorney to rebut defendant's argument that absence of criminal activity should be regarded as mitigating circumstance. Defendant admitted he had previously been convicted in Cuba for possession of marijuana, had been imprisoned in Cuba for 4 years as political prisoner, and had been arrested in Texas but was not convicted of anything. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Circuit Court did not err when it allowed witness to testify who had refused to talk to defense counsel prior to trial unless District Attorney could be present during interview; it was also not error for Circuit Court to refuse to order disclosure of pre-trial statement of same witness, where there was no inconsistency between pre-trial statement and testimony of witness at trial. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

Trial court may deny defendant's request for permanent injunction enjoining media from covering pretrial motions and hearings in capital murder case. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

Venue for murder prosecution is proper in county in which body of victim is found. *Hickson v. State*, 472 So. 2d 379 (Miss. 1985).

Trial judge does not impermissibly deny murder defendant right to counsel by denying motion by defense counsel for leave to withdraw which is filed within 2 weeks from date case is to be tried where attorney ably cross-examines state's witnesses at trial, raises appropriate objections to inadmissible material, files numerous pretrial motions, succeeds in having defendant's custodial statements suppressed and in fact is successful in obtaining verdict of less than capital murder. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

In a prosecution for capital murder (subsection (2)(e) of this section), the trial court did not err in failing to suppress

defendant's confession, despite defendant's contention that the confession was not voluntary because he was concerned that the police were implicating his brother in the murder when in fact his brother was not involved, where the record was replete with evidence that defendant was given his Miranda rights on several occasions and where the record would not support a conclusion that his concern was used by officers to overreach him. *Reddix v. State*, 381 So. 2d 999 (Miss. 1980), cert. denied, 449 U.S. 986, 101 S. Ct. 408, 66 L. Ed. 2d 251 (1980), habeas corpus granted, 554 F. Supp. 1212 (S.D. Miss. 1983), aff'd in part, rev'd in part and remanded, 728 F.2d 705 (5th Cir. 1984), reh'g denied, 732 F.2d 494 (5th Cir. 1984), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984), on subsequent appeal, 547 So. 2d 792 (Miss. 1989).

This section is constitutional despite the language permitting the imposition of death upon one who harbors no specific intent to kill. Furthermore, since there are no statutory limitations on the mitigating factors that may be considered in the capital sentencing process (§ 97-3-21), it suffers no constitutional infirmities. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Culbertson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831 (1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992).

Where a victim was raped and murdered during a connected chain of events, a conviction for capital murder was proper under subsection (2)(e) of this section even though the death of the victim was not a result of the actual rape. *Pickle v. State*, 345 So. 2d 623 (Miss. 1977).

Test of defendant's criminal responsibility is his ability at the time he committed the act to realize the nature and quality thereof, and to distinguish right from wrong. *Smith v. State*, 95 Miss. 786, 49 So. 945, Am. Ann. Cas. 1912A,23 (1909).

2. Definitions and distinctions.

Miss. Code Ann. § 97-3-19(2) capital murders were found where underlying fel-

onies of burglary and felony child abuse elevated murders of defendant's ex-wife's family to capital status; the offenses were not merged. *Stevens v. State*, 806 So. 2d 1031 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195 (2003).

Subsections (a) and (b), which define premeditated murder and depraved heart murder, respectively, have been coalesced by long standing and widely accepted case law because, as a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, without regard for human life. *Ruttley v. State*, 746 So. 2d 872 (Miss. Ct. App. 1998).

Statute allowing conviction of capital murder if murder is committed by one who is "under sentence of life imprisonment" applies to persons who are on parole from life term. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

In the sentencing phase of a capital murder prosecution, the State's closing argument did not constitute a comment on the defendant's failure to take the witness stand in his own defense where the State made the following argument: "Do you think she was suffering? Do you think that's cruel and atrocious, and what's even more than that, what do you think was running through [defendant's] head as he sat through watching her gag on her own blood? What do you think he was thinking?" *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

Although the structure of this section suggests that deliberate design/premeditated murder and depraved heart murder are 2 different, mutually exclusive categories of murder, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life; Mississippi cases have for all practical purposes coalesced the 2 so that subsection (1)(b) subsumes (1)(a) of this section.

Mallett v. State, 606 So. 2d 1092 (Miss. 1992).

The difference between attempted murder and aggravated assault is the specific intent requirement, for the former, and the element of deadly weapon use, for the latter. In many fact scenarios, both charges are established by the same evidence. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

A burglary perpetrated with the specific intent of killing a person inside of the burglaried premises will not be deemed to be merged into, or an integral part of the, murder committed, so as to preclude a capital murder charge. *Smith v. State*, 499 So. 2d 750 (Miss. 1986).

A killing subsequent to a burglary does not negate the burglary but, rather, the burglary remains a separate and distinct crime from the succeeding killing, and the 2 crimes form the foundation for a capital murder charge. *Smith v. State*, 499 So. 2d 750 (Miss. 1986).

The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter. *Carter v. State*, 198 Miss. 523, 21 So. 2d 404 (1945).

Death of woman from abortion either "murder" or "manslaughter." *Lee v. State*, 124 Miss. 398, 86 So. 856 (1921).

3. Plea.

Defendant's ex post facto rights were knowingly waived where there was testimony that defendant's attorneys indicated that defendant would waive any and all rights to effectuate the plea agreement for armed robbery as an habitual offender, and avoid a possible death sentence on a murder charge. *Bell v. State*, 751 So. 2d 1035 (Miss. 1999).

Defendant who pleaded guilty to charges of capital murder and conspiracy was properly informed by trial court of possible sentences, and guilty plea was not involuntarily entered and was valid; defendant was fully advised of nature of charges against him and of consequences of guilty pleas, life sentence was only sentence court could impose, no minimum sentence existed for conspiracy, and defendant was not coerced, intimidated, or promised any reward beyond district attorney's announced recommendation for

sentence. *Simpson v. State*, 678 So. 2d 712 (Miss. 1996).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. *Fuselier v. State*, 654 So. 2d 519 (Miss. 1995).

A trial court erred in allowing a defendant to plead guilty to both capital murder and burglary where the burglary was the underlying felony elevating the crime of murder to capital murder, and there was no separate indictment for burglary. *Fuselier v. State*, 654 So. 2d 519 (Miss. 1995).

A circuit court properly summarily denied a defendant's post-conviction relief motion to vacate his murder conviction on the ground that his guilty plea was not made knowingly and intelligently and was devoid of a factual basis, even though the defendant did not admit outright that the killing of the victim was malicious, where the defendant struck the victim twice with the butt of a gun during an altercation and continued to knock the victim down each time he pulled himself up, and there was nothing in the record to suggest that the defendant was offered any hope of reward for entering his plea of guilty or that he was coerced, threatened or intimidated into making it, but, to the contrary, the circuit court interrogated the defendant thoroughly and carefully explained to him the full gamut of constitutional protections available to him as well as the ramifications of entering a guilty plea. *Lott v. State*, 597 So. 2d 627 (Miss. 1992).

Before a trial court may accept a guilty plea, it must have before it substantial evidence that the accused did commit the legally defined offense to which he or she is offering the plea. What facts must be shown are a function of the definition of the crime and its assorted elements. A factual showing does not fail merely because it does not flush out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings, and fair inference favorable to

guilt may facilitate the finding. There must be enough that the court may say with confidence that the prosecution could prove the accused guilty of the crime charged. Thus, there was an adequate factual basis for a defendant's plea of guilty to murder, even though the defendant advised the trial court at the plea hearing that he "didn't do the shooting," where the defendant admitted that he was at the crime scene, the prosecution's summary of the proof showed guilt and was made in the defendant's presence, and, even taking the defendant's version of the facts, it was fairly inferable that a third party shot and killed the victim under circumstances where the defendant was an accessory before the fact. *Corley v. State*, 585 So. 2d 765 (Miss. 1991).

Defendant who is granted new trial, after having previously been tried for capital murder and found guilty, and who enters plea of guilty to murder prior to second trial on basis of erroneous advice from counsel that he could be given death penalty upon retrial is entitled to withdraw guilty plea and be given new trial at which, upon conviction, maximum penalty imposed could be life imprisonment. *Odom v. State*, 483 So. 2d 343 (Miss. 1986).

Prosecutor's disclosure in capital murder case of plea agreement with state witness does not constitute impermissible affirmation or bolstering by prosecutor of credibility of witness. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

Where defendant fired a deadly weapon into a crowd the jury was justified in finding malice and motive from this act and could find the defendant guilty of murder. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

4. Sentence.

Where defendant entered a plea of guilty to murder as a habitual offender, he was sentenced to serve a term of life in custody of the Mississippi Department of Corrections, without the possibility of parole. Defendant was not entitled to post-conviction relief. *Padgett v. State*, — So. 2d —, 2006 Miss. App. LEXIS 150 (Miss. Ct. App. Mar. 7, 2006).

There was no merit in the allegation that the jury considered extraneous religious matters in connection with the sentencing phase of an inmate's capital murder trial because the inmate failed to show how the jury was improperly influenced and jurors were entitled to rely on all their experiences as long as they followed the law. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Court found no merit in an inmate's claim that counsel was ineffective for failing to adequately investigate, develop, and present mitigation evidence at the sentencing phase for capital murder; some of the proposed evidence would have been irrelevant or inadmissible, and most of the proposed testimony was testified to by the inmate's mother, and there was a minimal showing of deficient performance and no assertion of prejudice. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Because the court had already determined on direct appeal that an inmate's sentence for capital murder was not disproportionate, even though it appeared that co-defendant was the actual triggerman, and nothing changed the court's determination, the inmate's claim that the inmate's death sentence was subject to review was without merit. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Given case law, the court could not constitutionally deny an inmate the opportunity to present the issue of the inmate's possible mental retardation to the trial court in connection with the inmate's death sentence for capital murder. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

There was no merit in the allegation that the jury failed to consider an inmate's conviction and sentence for capital murder separately from co-defendant's; the court first noted that the issue was raised on direct appeal and was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2), and in any event, the jury returned individualized verdicts and the evidence showed that the jury considered the inmate separately. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Jury executed process for narrowing class of persons eligible for death penalty by finding that defendant intended to kill and actually killed victim while contem-

plating that lethal force would be used in her murder, and, thus, felony murder aggravating circumstance was not constitutionally infirm and penalty was not disproportionate to crime. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment, although unintentional felony murder is punishable by death, while premeditated murder, standing alone, is not; not every defendant eligible for death penalty will have committed murder while in course of robbery or kidnapping or other statutorily enumerated felonies, and thus, felony-murder aggravator genuinely narrows class of defendants eligible for death penalty. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instructing jury that defendant could be sentenced to life in prison precluded claim that overlapping statutes for felonious child abuse and manslaughter, one which

permitted death penalty and another that did not, gave prosecutors and juries unfettered discretion to impose the death penalty, in violation of Eighth Amendment rights. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult and another child while in search of money kept in residence. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

An agreement between a capital murder defendant and the State for the imposition of a sentence of life imprisonment without the possibility of parole was void and unenforceable on public policy grounds where the defendant was not an habitual offender, since a sentence of life imprisonment without the possibility of parole is not an option unless the defendant is adjudged an habitual offender; the agreement was an attempt to circumvent § 99-19-101, which only authorizes a sentence of life imprisonment or death for capital murder, and its enforcement by the court would bind the parole board, which would effect judicial encroachment on an executive function. *Lanier v. State*, 635 So. 2d 813 (Miss. 1994).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, in-

cluding a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

The Weathersby Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and Weathersby considerations are no longer applicable. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Death sentence is valid if based on single statutory aggravating factor. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Prosecutor did not improperly argue possibility of parole during sentencing phase by stating that defendant needed death penalty and not life sentence, and in any event comment was in response to defense counsel's argument for life sentence instead of death penalty and therefore proper in rebuttal. *Faraga v. State*,

514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

In light of "special interest" in affording protection to law enforcement officers, state's inclusion of subsection (2)(a) of this section as category of murder for which death penalty may be imposed can in no manner be termed arbitrary where any mitigating circumstances may be considered at sentencing phase. *Johnson v. Thigpen*, 623 F. Supp. 1121 (S.D. Miss. 1985), aff'd, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951, 107 S. Ct. 1618, 94 L. Ed. 2d 802 (1987), reh'g denied, 481 U.S. 1060, 107 S. Ct. 2207, 95 L. Ed. 2d 861 (1987).

While there may be legitimate differences of opinion as to just when and how heightened scrutiny on appeal works in death penalty cases, it would seem clear that heightened scrutiny approach is most needed and most applicable in cases resting upon circumstantial evidence and where matter of whether defendant is guilty at all is by no means free of all

doubt. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

A trial judge in a murder prosecution was well within his discretion in sentencing the 14-year-old defendant to life imprisonment for aiding and abetting in the murder, in spite of the defendant's argument that the judge abused his discretion by not stating in the record his reasons for declining to utilize possible alternative criminal sanctions for juvenile offenders provided for in § 43-21-159 of the Youth Court Act, where the judge stated that he was very much aware of the requirements in *May v. State* (Miss. 1981) 398 so2d 1331 because of the many cases he had handled dealing with teenagers charged with capital offenses; although minimal, the trial court adequately addressed the reasons for not utilizing the alternatives afforded. *Swinford v. State*, 653 So. 2d 912 (Miss. 1995).

Discretion of prosecutor and his power to plea bargain did not render capital murder law unconstitutional, since both practices are necessary to the system of justice, nor did imposition of the mandatory death penalty pursuant to the statute constitute cruel and unusual punishment, especially since there was no showing that it was discriminatorily applied. *Stevenson v. State*, 325 So. 2d 113 (Miss. 1975), overruled on other grounds, *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976).

5. Jury selection.

Trial court's decision denying defendant's Batson challenge to the State's use of a preemptory challenge to exclude a black juror was not clearly erroneous; defendant failed to establish a prima facie case that the challenge of the juror was racially motivated. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

The trial court erred in finding that defendant's counsel exercised his peremptory challenges in a racially motivated manner when his reason for striking the juror was because the juror was a member of management at a company that the attorney had successfully sued for discriminatory employment practices on behalf of defendant's sister-in-law. *Webster v. State*, 754 So. 2d 1232 (Miss. 2000).

Prosecutor's question to prospective jurors during voir dire asking whether they

would be influenced by fact that thirty years had passed between murder and current trial was appropriate to determine whether any jurors were predisposed to finding defendant not guilty simply due to passage of such length of time. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Prosecutor's question to individual venireperson in chambers regarding racial attitudes during earlier mistrial did not amount to prejudicial error in prosecution for murder of African-American civil rights leader, as such venireperson was not finally seated on jury. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Trial court's refusal to excuse for cause jurors who stated on voir dire that they had read newspaper articles or seen television newscasts about the case after being admonished by trial court not to do so was not prejudicial error in murder prosecution; upon questioning, none of these jurors said that his or her opinion would be affected by anything they had read or seen. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Defendant was not denied opportunity to intelligently use peremptory challenges when trial court conducted voir dire itself; trial court asked venire whether anyone would automatically vote for death penalty regardless of mitigating circumstances, counsel for both sides stated they were satisfied with voir dire, and defendant did not ask trial court to further voir dire jurors and did not ask that she be allowed to do so. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial court in a capital murder prosecution did not err by allowing the prosecutor to question potential jurors first in individual sequestered voir dire or by allowing the prosecutor to use leading questions during voir dire. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d

785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A murder defendant did not establish that the trial judge abused his discretion by refusing the defendant's request to draw venire members from both of the county's judicial districts where the defendant did not offer evidence indicating that the jury selected was biased or partial. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A trial court in a capital murder prosecution did not abuse its discretion by refusing to grant the defendant's motion for individual sequestered voir dire of the entire venire where the court asked the collective venire about the effect of pre-trial publicity or information received about the case, and the court later asked if there was any reason that a juror felt that he or she could not be fair and impartial, and anyone who responded affirmatively was questioned individually in chambers. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Circuit Court did not commit error when it refused to grant new trial upon discovery that father of one juror had been murdered, where that fact having not been disclosed in voir dire would not per se have rendered juror subject to defense challenge for cause, and question propounded to prospective jurors during voir dire was ambiguous. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

When coverage by local media, including television, radio and newspaper, of capital murder case, which in effect tries and finds defendant guilty not only of capital murder as charged, but also of capital murder in another, uncharged case, is so extensive that at proceedings on voir dire of prospective jurors some 10½ months after defendant's arrest, everyone of prospective jurors has heard of case, there is presumption that defendant cannot obtain fair and impartial jury and venue of case should be transferred to county substantially outside area of cov-

erage of local media. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Trial court is not required to excuse juror for cause on basis of juror's acquaintance with witness for prosecution where credibility of witness is not crucial issue and where defense has unexercised peremptory challenges remaining. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

The jury selection process under this section and § 99-19-101 is constitutional. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

6. Request for state funds.

Defendant admitted that he shook a two-year-old girl, the victim, so hard that she flew from his hands and hit the television; he also admitted that he was the only person who could have effected the victim's death. Thus, even if defendant had produced an expert witness to testify that the cause of death was shaken baby syndrome or suffocation, he would remain guilty of depraved heart murder under Miss. Code Ann. § 97-3-19(1)(b); as the exact cause of the victim's death was not an essential component of the defense, there was no abuse of discretion in the trial court's denial of funds for an expert witness for the defense. *McFadden v. State*, 929 So. 2d 365 (Miss. Ct. App. 2006).

Trial court did not err in denying defendant's request to authorize defense counsel and a court-appointed investigator to personally contact out-of-state witnesses or a request to appoint a forensic entomologist to review the report of a court-appointed pathologist; counsel and the investigator could conduct all necessary interviews by phone and the entomologist would not have been able to reach any conclusions from the pathologist's report

without some missing photographs. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

In sentencing phase of capital murder prosecution, jury cannot doubly weigh commission of underlying felony and motive behind underlying felony as separate aggravating circumstances. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In a prosecution for capital murder committed during the commission of a rape, the trial court's failure to provide funds to the defendant to retain an independent pathologist constituted reversible error where the opinion of the State's pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In *re Turner*, 635 So. 2d 894 (Miss. 1994).

A murder defendant was not denied a fair trial because his motion for a court-appointed expert criminalist was denied, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense of accidental discharge of the pistol used to kill the victim, where the State did not present any expert and the defendant elicited testimony from witnesses to support his defense of accidental discharge. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

A murder defendant was not denied a fair trial by the denial of his motion for a court-appointed psychologist, in spite of the defendant's argument that he was thereby prevented from properly presenting his theory of defense related to his state of mind when he was assaulted by the victim, where the State offered no expert testimony regarding the defendant's state of mind, the defendant did not testify as to his state of mind, and the record did not "even hint at a defense of this nature." *Green v. State*, 631 So. 2d 167 (Miss. 1994).

A murder defendant was not entitled to state funds to employ an independent fingerprint expert where the defense counsel had full access to the state's experts and their reports, counsel were able to subject them to rigorous cross-examination, and there was nothing to indicate that the experts were biased or incompe-

tent. *Johnson v. State*, 529 So. 2d 577 (Miss. 1988).

Capital murder defendant is not denied due process by trial court's refusal to provide defendant funds with which to obtain own experts, nor does defendant suffer any disadvantage thereby where defendant's counsel has full access to experts of state, together with investigation and reports of those experts, counsel is able to subject them to rigid cross-examination, and there is nothing to indicate that state experts are biased or incompetent. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

Trial court may refuse defense request for funds to hire criminal investigator to aid defense counsel in preparation of defense where there is no indication of purpose and value of investigator to defense and where there is no contention that state's expert witnesses are not impartial and independent. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

In a prosecution under section 97-3-19(2)(e) for murder while in the commission of the crime of rape, the overruling by the trial court of a defense motion for the payment by the state of the expenses of hiring independent experts to examine fingerprints and blood, hair, fiber, and spermatozoa samples obtained by the prosecution did not constitute reversible error, since an indigent's right to defense expenses is not absolute but is conditioned upon a showing that such expenses are needed to prepare and present an adequate defense, and since (1) the prosecution's evidence as to blood, hair, and spermatozoa was admitted by stipulation, (2) defense counsel had had an opportunity to ask the state's investigating officers whether or not the defendant's fingerprints had been found anywhere in or around the victim's residence, and (3) if examination of samples tested by the state's laboratory could have had any possible benefit to the defendant, diligent counsel could somehow have raised the small sum necessary for such tests. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

7. Practice and procedure.

Prosecutors remark asking jury to convict defendant of capital murder was

proper rebuttal where defense counsel had based his closing argument on premise that defendant should be convicted of murder instead of capital murder; also, prosecutor's remarks could not be construed as arguing possibility of parole and did not rise to level of reversible error. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

It was not reversible error for prosecutor to recall witness to stand to repeat statements, made by defendant when he was struggling immediately after commission of murder, for purposes of impeaching defendant's testimony about his activities immediately following incident. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Homicide defendant is entitled to fully cross-examine prosecution witness regarding witness' relationship and conduct with defendant and victim where state's theory of homicide is that homicide resulted from romantic triangle between defendant, witness and victim. *Miskelley v. State*, 480 So. 2d 1104 (Miss. 1985).

8. Deliberate design; malice.

Court rejected defendant's argument that the evidence was insufficient to sustain his conviction of the offenses for which he was indicted, arson and capital murder with the underlying felony of arson, because defendant was not convicted of the offenses for which he was indicted, but rather the jury found him guilty of deliberate design murder pursuant to Miss. Code Ann. § 97-3-19 (1)(a), which the jury was instructed on by the trial court in addition to the indicted offenses. Defendant's statements before and after the crime about his desire to burn down his ex-wife's house and kill his grandson, and his requests that others burn down the house, constituted admissions on deliberate design, a significant element of murder, and were direct evidence of his

guilt. *Smith v. State*, 897 So. 2d 1002 (Miss. Ct. App. 2004).

In a case where defendant was convicted of murdering his wife and her son, the trial court did not err in denying defendant's motion for a directed verdict because there was ample evidence of deliberate design, as two of the State's seven witnesses testified that defendant admitted killing his wife and her child, defendant used a kitchen knife to stab his unarmed wife 29 times and his unarmed son 27 times, and defendant admitted that he lived in the mobile home where the victims were found. *Wortham v. State*, 883 So. 2d 599 (Miss. Ct. App. 2004).

Defendant's effort to locate the victim after an earlier altercation and effort in obtaining a gun was sufficient evidence to prove the "deliberate design" element of deliberate design murder. *Carter v. State*, 845 So. 2d 748 (Miss. Ct. App. 2003).

Evidence that defendant lured the victim to a field and shot the victim in the back because defendant thought the victim had "snitched" to police about a burglary supported defendant's conviction for murder rather than manslaughter; whether the offense was murder or manslaughter was a question for the jury. *Hodge v. State*, 823 So. 2d 1162 (Miss. 2002).

Malice aforethought is not an element of the capital murder of a peace officer. *Stevenson v. State*, 733 So. 2d 177 (Miss. 1998).

In a depraved heart murder, malice can be inferred from circumstances if actions involved very high degree of carelessness evincing reckless indifference to danger to human life. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

Finding that state presented sufficient evidence that defendant acted with deliberate design in killing victim, so as to preclude directed verdict, was supported by defendant's statement to police following incident, transcript of 911 emergency call from victim, and testimony at trial, all of which indicated sufficient degree of recklessness and indifference to human life pointing to conviction, at the very least, for manslaughter or murder, and not culpable negligence. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

Act which poses risk to only one individual and which results in that individual's death may be deemed depraved heart murder. *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

Death resulting from injuries inflicted through use of sawhorse was within scope of depraved-heart murder statute. *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

"Malice aforethought," "premeditated design," and "deliberate design" all mean same thing for purposes of offense of murder. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Although a "deliberate design" to kill a person, as required for murder under subsection (1)(a) of this section, may be formed very quickly, and perhaps only moments before the act of consummating the intent, it is a contradiction in terms to state that a "deliberate design" can be formed at the very moment of the fatal act. *Windham v. State*, 520 So. 2d 123 (Miss. 1987).

Defendant's statement that he wanted to kill the victim, which was made prior to the fatal stabbing, was evidence of malice. *Russell v. State*, 497 So. 2d 75 (Miss. 1986).

Subsection (2)(e), making a homicide a capital murder when done "with or without any design to effect death" by any person engaged in the commission of designated major crimes, is not unconstitutionally vague. *Gray v. State*, 351 So. 2d 1342 (Miss. 1977).

Malice aforethought is the single most important element in the crime of murder. *Pendergraft v. State*, 213 So. 2d 560 (Miss. 1968), appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969), reh'g denied, 395 U.S. 941, 89 S. Ct. 1993, 23 L. Ed. 2d 459 (1969).

In murder prosecution it is unnecessary and unwise to define malice. *Smith v. State*, 237 Miss. 626, 114 So. 2d 676 (1959).

The universal malice murder statute is not applicable to one who kills a woman as a result of performing an attempted abortion upon her at her request. *Lackey v. State*, 211 Miss. 892, 53 So. 2d 25 (1951).

No particular period of deliberation is required to make killing deliberate, since

malice may be suddenly formed and deliberate design to effect the death of another may be formed in an instant. *Howard v. State*, 212 Miss. 722, 55 So. 2d 436 (1951).

Actual malice is not a necessary ingredient of murder; deliberate design is all that is required. *Hughes v. State*, 207 Miss. 594, 42 So. 2d 805 (1949).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

While malice aforethought is a necessary element in the crime of murder, it does not always follow therefrom that the existence of actual malice at the time of the slaying would necessarily have the effect of rendering a particular homicide a case of murder, since a person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter "to do any unlawful act, or after such attempt shall have failed," if such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is then thwarted, and is nonexistent prior thereto, each case depending upon its own facts and circumstances. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

"Malice aforethought" is equivalent to "premeditated design" or "deliberate design" and not "felonious design to effect the death of the person killed." *Dye v. State*, 127 Miss. 492, 90 So. 180 (1922).

Design to effect death and lack of justification are essential to malice aforethought. *Ellis v. State*, 108 Miss. 62, 66 So. 323 (1914).

"Malice" may be ascertained from previous threat and preparatory measures, or may arise suddenly and be implied from circumstances, as from intentional use at outset of deadly weapon. *Brown v. State*, 98 Miss. 786, 54 So. 305 (1911).

Malice is necessary element of murder. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

Deliberation is necessary element of murder. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

Absence of deliberation is one of things distinguishing manslaughter from murder. *Guest v. State*, 96 Miss. 871, 52 So. 211 (1910).

Law sometimes presumes malice from existence of certain facts; jury alone can determine whether such facts exist. *Burnett v. State*, 92 Miss. 826, 46 So. 248 (1908).

The statute does not alter the common law so as to limit murder to killing with express malice. The words "premeditated design," in the old statute, meant the same as "malice aforethought" in the common-law definition. *McDaniel v. State*, 16 Miss. (8 S. & M.) 401, 47 Am. Dec. 93 (1847).

9. —Interference, use of deadly weapon.

A killing with a deadly weapon may be susceptible of clear explanation by the accused or eyewitnesses as an accident, or justified as having been committed by the accused acting in lawful self-defense, or mitigated manslaughter. When no such proof is forthcoming the jury is warranted in finding the accused guilty of murder. *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

Malice may be inferred from defendant's use of a deadly weapon. *Russell v. State*, 497 So. 2d 75 (Miss. 1986).

Though malice is essential element of murder, malice may be implied from deliberate use of deadly weapon and it is not necessary that actual malice be shown. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949); *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961).

Law presumes malice from killing of human being with deadly weapon, and this presumption prevails and characterizes homicide as murder unless facts are introduced in evidence changing character of killing and showing either justification or necessity, but unless facts in evidence explain character of killing, presumption stands and state is entitled to instruction announcing this legal prin-

ciple. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

If accused armed himself with a deadly weapon with the purpose of killing the deceased on sight, and in pursuance of such intent, did so, then, under the law, accused's right of self-defense is cut off and it is wholly immaterial which one provoked the difficulty or who was the aggressor immediately before the homicide. *Lewis v. State*, 188 Miss. 410, 195 So. 325 (1940).

Evidence in murder trial that defendant discharged deadly weapon at passing truck, crowded with human beings, killing one of them, held to warrant finding of malice by jury. *Talbert v. State*, 172 Miss. 243, 159 So. 549 (1935).

If facts relied on to change presumption of murder from killing with deadly weapon are unreasonable and improbable, verdict of murder will not be disturbed on appeal. *McGehee v. State*, 138 Miss. 822, 104 So. 150 (1925).

Effect of presumption of innocence in murder trial stated; presumption of malice from use of deadly weapon will not support conviction of murder as against evidence of justification. *Patty v. State*, 126 Miss. 94, 88 So. 498 (1921), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

10. Corpus delicti.

Witness testified that (1) the victim and defendant got out of his car and walked into an empty field; (2) the witness then heard a shot, looked up, and saw defendant holding a gun; (3) defendant ran to the car and they left; (4) when the witness and defendant came to a bridge defendant threw the gun into the river because he said that he needed to get rid of it; (5) early that morning, defendant knocked on the witness's window and told him that they needed to move the body; (6) the witness drove back to the location at which he heard the shot; and (7) although the witness did not see the clothes or the victim's body as they were already in garbage bags, he testified that he and defendant disposed on the victim's clothes in a dumpster and threw her body into the river. The witness's testimony was sufficient to allow a reasonable jury to infer

that defendant shot and killed the victim; thus, the State proved its corpus delicti for homicide. *Jackson v. State*, 924 So. 2d 531 (Miss. Ct. App. 2005).

Defendant's conviction for murdering her husband in violation of Miss. Code Ann. § 97-3-19 was proper where her confession to a State witness was sufficient to establish the corpus delicti of murder. *Stephens v. State*, 911 So. 2d 424 (Miss. 2005).

Corpus delicti in capital murder case consists of death of victim and existence of criminal agency as cause of death. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Medical evidence is not required to prove elements of corpus delicti in capital murder case. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

State had proven corpus delicti in capital murder case by showing that victim left home under unusual circumstances, that victim was dead, and that victim's family had identified clothing and objects found on victim's body as same items that victim was wearing when she disappeared; state could, therefore, introduce inculpatory statements that defendant had made to witness. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Corpus delicti of criminal homicide was established despite argument of defendant that because 21 days had elapsed between injury and death, and there was no expert or lay testimony as to cause of death, it had not been established, where death certificate and medical examiner's report were admitted into evidence by stipulation; death certificate listed cause of death as cardio-pulmonary arrest due to or as consequence of generalized sepsis and multiple systems failure due to or as consequence of gunshot wound to abdomen; report of medical examiner also listed gunshot wound as cause of death;

cause of death may be established not only by physician or pathologist, but by lay and circumstantial evidence. *Luster v. State*, 515 So. 2d 1177 (Miss. 1987).

In a homicide case, the corpus delicti consists of the fact of death, and the fact of the existence of criminal agency as the cause of death. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716 (1956).

Corpus delicti must be established by evidence. *Taylor v. State*, 108 Miss. 18, 66 So. 321 (1914).

11. Provocation.

After defendant had a confrontation with his wife, she sat down outside a relative's home, and he fired a fatal shot into her head. The record supported the jury's verdict of murder, rather than manslaughter, because there was no evidence of provocation. *Bradford v. State*, 910 So. 2d 1232 (Miss. Ct. App. 2005).

Mere words of reproach, however grievous or provoking, are not sufficient to reduce to manslaughter what otherwise is murder. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Facts that accused was provoked over domestic difficulties with wife, that he was intoxicated, that he resented interference of deceased in his family row, neither singly nor collectively, were sufficient to reduce his crime from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

An opprobrious epithet directed to the slayer by the deceased immediately preceding the stabbing is not sufficient to reduce to manslaughter what otherwise is murder. *Camden Fire Ins. Ass'n v. New Buena Vista Hotel Co.*, 199 Miss. 600, 26 So. 2d 174 (1946).

Where express malice is shown, and the killing afterward takes place with a deadly weapon, and the question is whether the killing sprang from the heat of passion or previous grudge, no mere provocation at the time the act is done will reduce the homicide from murder to manslaughter. *Riggs v. State*, 30 Miss. 635 (1856).

12. Defenses; generally.

Evidence, though wholly circumstantial, was sufficient to convict defendant of murdering his wife's lover; the theory that

the victim committed suicide was unreasonable because, *inter alia*, the victim would not have packed an ice chest if he planned to kill himself, and though he had guns, he had no shells that fit defendant's shotgun. *Cox v. State*, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003).

A defendant is presumed sane until a reasonable doubt of his or her sanity is created. When such a doubt arises, the burden is then placed upon the State to prove, beyond a reasonable doubt, the defendant's sanity. The issue of a defendant's insanity is a determination for the jury to make, and the finding will not be reversed if it is supported by substantial evidence. In making this determination, the jury may accept or reject expert and lay testimony. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

A finding that one is mentally ill does not necessarily mean that one is M'Naghten insane. *Davis v. State*, 551 So. 2d 165 (Miss. 1989), cert. denied, 494 U.S. 1074, 110 S. Ct. 1796, 108 L. Ed. 2d 797 (1990), reh'g denied, 495 U.S. 953, 110 S. Ct. 2221, 109 L. Ed. 2d 546 (1990).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, curt on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

Fact that a defendant suffers from schizophrenia, paranoia type mental disorder does not in itself make him M'Naghten insane. *Laney v. State*, 486 So. 2d 1242 (Miss. 1986).

The defense of irresistible or uncontrollable impulse is unavailable unless such impulse springs from mental illness to such a degree as to overwhelm reason, judgment and conscience. *Burr v. State*, 237 Miss. 338, 114 So. 2d 764 (1959).

Uncontrollable impulse cannot be inferred from the severity of the beating by a mother of her child for a trivial reason. *Burr v. State*, 237 Miss. 338, 114 So. 2d 764 (1959).

Where defendant denies that he fired a gun, there is no issue of justification and the homicide is therefore murder or no crime at all. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

Partial intoxication will not lessen criminality. *Butler v. State*, 39 So. 1005 (Miss. 1906).

13. —Self-defense.

Where defendant asserted self defense in what he alleged was the accidental killing of his former girlfriend when he allegedly was confronted by her male friend, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership. However, in a second instance, the State elicited the same information on redirect examination that defendant was barred from eliciting on cross-examination, in regard to whether the male friend had also been a suspect early in the investigation; in the former respect, the error was harmless given the overwhelming weight of the evidence against defendant, and in the latter respect, defendant's right to confrontation was not violated as he suffered no prejudice. *Raiford v. State*, 907 So. 2d 998 (Miss. Ct. App. 2005).

Defendant's murder conviction was proper under Miss. Code Ann. § 97-3-19(1)(a), where a hypothetical juror could have been convinced that physical facts contradicted defendant's claims that the shooting was in self-defense or accidentally inflicted. *Davis v. State*, 891 So. 2d 256 (Miss. Ct. App. 2004).

Defendant was not entitled to a directed verdict based on the theory of "imperfect

self-defense” for the killing of her abusive husband where at least 45 minutes elapsed between the last act of abuse by the husband and the time defendant killed him and during that time, defendant could have obtained help against her husband, could have requested aid from the owner of the trailer where defendant and her husband resided, or could have left the premises completely. *Moore v. State*, 859 So. 2d 379 (Miss. 2003).

Defendant in a murder trial was not entitled to a directed verdict or JNOV when the jury was entitled to reject defendant’s claim of self-defense. *Thomas v. State*, 818 So. 2d 335 (Miss. 2002).

The defense of self-defense is unavailable to a defendant who is charged with capital felony-murder. *Layne v. State*, 542 So. 2d 237 (Miss. 1989).

A murder defendant who claimed self-defense should have been permitted to present testimonial evidence that the deceased habitually went armed with concealed weapons, and that the defendant was cognizant of that fact, in order to enable the jury to determine whether there was a reasonable cause to apprehend danger. *Stoop v. State*, 531 So. 2d 1215 (Miss. 1988).

Refusal to grant instruction that jury should put themselves in place of defendant and judge his acts by facts and circumstances by which he was surrounded at time of difficulty was not erroneous where theory of self-defense was fully covered in another instruction. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

The fact that deceased husband was found to have been shot in back contradicted defendant wife’s testimony that she had shot her husband in self-defense as he was approaching her. *Mullins v. State*, 493 So. 2d 971 (Miss. 1986).

It is well settled in Mississippi that the person who provokes the difficulty and remains the aggressor throughout the difficulty cannot invoke the plea of self-defense. *Weatherspoon v. State*, 243 So. 2d 53 (Miss. 1971).

Where defendant, armed with a pistol, left the victim’s yard upon being told to do so by the victim, but after leaving came back into the yard at which time the victim rose from his chair on the porch

and started toward the defendant with a pistol in his hand and both parties began shooting, resulting in the victim’s death, such evidence was sufficient to justify the jury in finding that the defendant provoked the difficulty and was the aggressor throughout, and that the defendant was guilty of manslaughter. *Weatherspoon v. State*, 243 So. 2d 53 (Miss. 1971).

To justify a killing in self-defense the defendant must have believed, and had good reason to believe, that at the time he was in danger of the loss of his life, or great bodily harm at the hands of the deceased. *Spivey v. State*, 47 So. 2d 855 (Miss. 1950).

Right to resist unlawful arrest is phase of right of self-defense. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 46 A.L.R. 895 (1926).

Killing after blow struck in self-defense and when no real or apparent danger existed held murder. *Hays v. State*, 130 Miss. 381, 94 So. 212 (1922).

Fact that accused, while unarmed and with no intention to kill, brought about difficulty did not preclude him from setting up self-defense. *Lucas v. State*, 109 Miss. 82, 67 So. 851 (1915).

One who kills another, reasonably believing that he is in real or apparent danger of his life or great bodily harm, is not guilty of murder. *Echols v. State*, 99 Miss. 683, 55 So. 485 (1911).

14. Questions for jury.

When the defendant or the defendant’s witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, but when there is a contradiction between the physical evidence and the defendant’s version of what happened, the matter properly sits before the jury as a question of fact. *Hudson v. State*, 754 So. 2d 582 (Miss. Ct. App. 2000).

Due process clause, through vagueness doctrine, places limits on state’s ability to define different courses of conduct or states of mind as alternative means of committing single offense, thereby permitting conviction without jury agreement as to which course of conduct or state of mind occurred; if two mental states are supposed to be equivalent means of satisfying mental state require-

ment of offense, they must reasonably reflect notions of equivalent blameworthiness or culpability; under right circumstances, such equivalence may reasonably be found, and first-degree murder conviction was not rendered invalid by trial court's failure to require jury to agree whether defendant was guilty of first-degree murder by virtue of premeditation or by virtue of felony murder, each of which constitutes first-degree murder under state law. *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), reh'g denied, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109 (1991).

In cases in which the defendant is the only eyewitness to the slaying, and in which the *Weathersby* rule is inapplicable (i.e., the defendant does not secure a directed verdict of acquittal), it then becomes a jury issue as to whether to believe or not believe the defendant's testimony of how the slaying occurred, and to either convict or acquit. *Blanks v. State*, 547 So. 2d 29 (Miss. 1989).

Expert opinions of psychiatrists are not conclusive upon the issue of insanity but rather insanity is an issue for the jury. *Laney v. State*, 486 So. 2d 1242 (Miss. 1986).

A jury issue as to whether the accused had sexually assaulted victim while in commission of murder was made by evidence showing that a puddle of liquid was found under the pelvic area of the partially unclad body, although testimony of witnesses showed that a shot was fired almost immediately after accused had forced his way into victim's apartment, and the pathologist testified that bullet had gone through victim's heart. *West v. State*, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

In a prosecution for capital murder whether or not defendant "robbed" the victim of his car was a question for the jury, in light of the circumstances of the murder including the facts that the feet and hands of the victim's body were tied and there was a bullet hole through the back of his head and shortly after the time of the murder the defendant was solely in possession of the victim's vehicle and its contents. *Wheat v. State*, 420 So. 2d 229

(Miss. 1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1507, 75 L. Ed. 2d 936 (1983), denial of habeas corpus aff'd, 599 So. 2d 963 (Miss. 1992).

In a prosecution for murder the court did not err in failing to instruct the jury to restrict its verdict and find the defendant "guilty of manslaughter or not guilty," where the evidence was for the jury to resolve the issue of whether the defendant was guilty of murder, manslaughter, or no crime. *Polk v. State*, 417 So. 2d 930 (Miss. 1982).

Evidence presented jury question as to whether accused fired the shot in his necessary self-defense at a time when he was in danger, either real or apparent, of losing his life or sustaining great bodily harm at the hands of the victim. *Pickert v. State*, 234 Miss. 513, 106 So. 2d 681 (1958).

The testimony of accused, charged with murder of his wife, which contained many contradictions as to material matters, as well as the physical facts and the contradiction of the accused by other credible witnesses in particular matters, clearly established that the accused was not entitled to a peremptory instruction under the rule that where the defendant or his witnesses are the only eyewitnesses to the homicide their version must be accepted unless substantially contradicted in material particulars by credible witnesses, physical facts, or facts of common knowledge. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595 (1958).

In a prosecution of a husband for the killing of his wife, state's evidence, including testimony with reference to the accused's anger at being served with a summons in wife's divorce action, his prior purchase of a pistol and bullets, his entry without invitation into his father-in-law's home where the wife was living, the location of her body in the room with the fatal shot behind her right ear, and the accused's statements, made a jury issue as to whether accused shot his wife with an intentional design to do so, as against accused's contention that he had accidentally shot her while shooting at his father-in-law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

Where there was both circumstantial and direct evidence, and there was some

conflict in the testimony of the witnesses, the question of whether or not the accused was the man who fired the shot that killed the deceased was a question for the determination of the jury. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716 (1956).

State's proof that accused without cause or justification cruelly and brutally beat his wife with an ax handle and slab of wood and choked her to such an extent as to cause her death by strangulation was sufficient to take the question of the accused's guilt to the jury, where the accused's sole defense was intoxication, and the evidence as to this issue was in conflict. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956).

Evidence that accused without cause or justification cruelly and brutally beat his wife with an axe handle and slab of wood and choked her to such an extent as to cause her death by strangulation made a jury question as to the guilt of the accused, whose sole defense was intoxication, and the evidence as to this was conflicting. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956).

Testimony of doctor in response to hypothetical question, embodying the material facts in the case, to the effect that he did not believe accused knew the difference between right and wrong, was erroneously excluded, since it was for the jury to determine whether such testimony, and similar testimony of accused's father, was such as to be calculated to raise a reasonable doubt as to whether accused was of such mental condition as to be able to distinguish between right and wrong at the time he shot and killed his wife. *Lewis v. State*, 209 Miss. 110, 46 So. 2d 78 (1950).

Ordinarily, whether a homicide is murder or manslaughter is a question for the jury. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474 (1946).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to re-enter, used more force than reasonably appeared necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944),

overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

In prosecution for murder incident to defendant's alleged battering of infant, defendant's testimony as only witness to baby's death was materially contradicted by physical facts and circumstances in evidence, as indicated by photographs and medical testimony and, under *Weathersby v. State* (1933) 164 Miss. 898, 147 So.2d 481, matter became question for jury and court was not required to direct verdict for defendant. *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

Jury have wide discretion where quality of act in issue; verdict for manslaughter upon indictment for murder held authorized by the evidence. *Woodward v. State*, 130 Miss. 611, 94 So. 717 (1923).

Whether killing in quarrel was in self-defense, held question for jury. *Staiger v. State*, 110 Miss. 557, 70 So. 690 (1916).

15. Mutual combat; dueling.

A man commits murder when he kills another in a duel, whether formal or extemporaneous, and however fairly conducted. *Thomas v. State*, 61 Miss. 60 (1883).

To make the killing of an adversary in a duel necessarily murder, in such case the weapon must have been procured for the combat, or the accused must have provoked the difficulty or entered into it with an intention to use the weapon. *Long v. State*, 52 Miss. 23 (1876).

If a party enter into a mutual combat dangerously armed, and fight under an undue advantage and kill his adversary, it is murder. *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195 (1858).

The fact that the accused sought the difficulty and brought it about, being armed with a deadly weapon with which he killed the deceased, does not necessarily render him guilty of murder; for if he commence the contest, intending at the outset to inflict little or no violence on his antagonist, he may justifiably slay him if the danger of his own destruction be imminent and impending and otherwise unavoidable; or, when the necessity to kill does not exist, if the killing be done not in pursuance of a premeditated design, but on a sudden quarrel, it will, in such case, amount to manslaughter only. *Cotton v. State*, 31 Miss. 504 (1856).

16. Killing of one other than person intended.

Where there is an express intent to kill or do grievous bodily harm directed toward one person and another is killed unintentionally by the act, it is murder at common law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

The transferred intent doctrine does not apply where it appears that the accused in shooting or striking at another person with intent to kill, unintentionally kills another, if the accused has previously been acquitted of the death of the person at whom he was shooting or striking, and such acquittal will bar a subsequent prosecution of the accused for the murder of the other person, unless the killing of the other person was not accidental, but an independent separate offense arising out of the transaction. In the latter event the accused may be successively prosecuted for two offenses. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

Accidental killing of human being other than one intended constitutes "murder," where there is express malice and intent to kill. *Ross v. State*, 158 Miss. 827, 131 So. 367 (1930).

17. Death in consequence of improper treatment of wound.

Where act of accused contributed to death of victim, he was not relieved of responsibility by fact that other causes also contributed to death, such as mal-treatment by physician who administered treatment in emergency room. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

If death ensue from a wound given in malice, but not of its nature mortal, but of which, being neglected or mismanaged, the party die, this will not excuse the party who gave it; but he will be held guilty of murder, unless it clearly and certainly appear, either by the evidence of the state or defendant, that the neglect and want of care on the part of the deceased, and not the wound itself, was the cause of his death. *Quinn v. State*, 106 Miss. 844, 64 So. 738 (1914).

17.5. Murder for hire.

Where the jury is properly instructed to determine whether a secondary killing was reasonably anticipated to be neces-

sary in order to accomplish the contract killing, then that secondary killing is also part of the contract and the absent principal can be found guilty of capital murder. *Saunders v. State*, 733 So. 2d 325 (Miss. Ct. App. 1998).

18. Homicide by persons joining in commission of felony.

Where a shooting was committed during a robbery, the evidence supported the jury's finding of an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(d), even if defendant was not the shooter; whether or not defendant intended to kill the victim was irrelevant because Miss. Code Ann. § 97-3-19(2)(e) defines capital murder, in part, as the killing of a human being when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery. *Dycus v. State*, 875 So. 2d 140 (Miss. 2004).

State was not required to prove that murder was committed in furtherance of both underlying felonies to obtain conviction for felony murder, although indictment charged defendant with murder during course of kidnapping and robbery. *Wilcher v. State*, 697 So. 2d 1123 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, 522 U.S. 1154, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Capital murder defendant cannot be convicted of both capital murder and underlying felony, as defendant cannot be twice prosecuted for the same actions. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Fact that indictment charged defendant with murder during course of kidnapping and with robbery did not require state to prove that offense was committed in furtherance of both underlying felonies in order to support death penalty. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —.

—, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Aggravating factor of murder committed during course of robbery is constitutional. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Felony-murder aggravator is not disproportionate within meaning of Eighth Amendment even though unintentional felony-murder is punishable by death while premeditated murder, standing alone, is not, as not every defendant eligible for death penalty will have committed murder while in the course of statutorily enumerated felonies, so that felony-murder aggravator genuinely narrows class of defendants eligible for the death penalty. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at punishment stage to object to robbery aggravator on ground that aggravating circumstance unconstitutionally duplicated element of offense of capital murder because jury found that defendant committed capital murder in commission of crime of robbery; Supreme Court had already rejected that contention and, thus, there was no reason for counsel to object to underlying felony being counted as aggravator. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Capital murder defense counsel did not provide ineffective assistance of counsel in failing at sentencing phase to object to double use of robbery and pecuniary gain aggravating circumstances; defendant's trial took place before effective date of later state Supreme Court decision prospectively prohibiting double counting for same conduct and, thus, defense counsel had no basis to object. *Foster v. State*, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Existence of two separate statutes under which defendant could be prosecuted for killing during course of committing felonious child abuse, only one of which could result in capital murder conviction, did not give prosecutor impermissible discretion to impose death penalty, in violation of Eighth Amendment, where jury was instructed that it could impose life sentence. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Whether felonious child abuse statute was void for vagueness and whether jury instructions did not sufficiently narrow definition of child abuse was procedurally barred, where defendant failed to object at trial. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of

robbery, inasmuch as armed robbery is simply robbery with weapon. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Convictions for both murder during course of armed robbery and grand larceny violated double jeopardy prohibition against multiple punishments for same offense, where robbery charge, which was used to elevate case to capital murder, encompassed elements of grand larceny. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Sexual battery could be used as underlying felony, to elevate murder to level of capital murder, and could be used again

for sentencing purposes as an aggravator to support imposition of death penalty, without violating prohibition against cruel and unusual punishment. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Robbery is not a component of murder and is, therefore, not a lesser included offense of murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Use of robbery as both aggravating factor in sentencing and as essential element of crime of capital murder did not unconstitutionally fail to narrow class of death eligible offenders; required narrowing had been done legislatively. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under subsection (2)(e) of this section; since the defendant was indicted, tried and found guilty of capital murder under subsection (2)(e) of this section with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. *Meeks v. State*, 604 So. 2d 748 (Miss. 1992).

In a prosecution for murder while engaged in the crime of robbery, the jury could reasonably have found that the defendant intended the killings and intended that lethal force be used, for purposes of imposing the death penalty, where the defendant actually participated in the robbery with his accomplice and was present in some role while both murders were committed. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Defendant, who was indicted under subsection (2)(a) of this section, had no stand-

ing to argue that felony murder provision in subsection (2)(e) of this section was unconstitutional, as he was never charged with that crime. *Johnson v. Thigpen*, 449 So. 2d 1207 (Miss. 1984).

Subsection (2)(e) of this section is not constitutionally infirm even though it permits verdict of guilty absent finding of design to effect death and allows imputation of intent from one defendant to another, although applicable standard for determination of guilt must not be confused with constitutionally mandated standard for imposition of capital punishment, such standard precluding capital punishment based upon imputed intent. *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984), modified on other grounds and remanded, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986).

Under subsection (2)(e) of this section a defendant may apparently be convicted of capital murder if someone is killed during the course of a robbery in which he was participating. Furthermore, no murder committed during the course of a robbery can be simple murder. *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134 (1983).

Where evidence showed that defendant and his brothers kidnapped the deceased, and during the commission of this crime, she was killed by one of defendant's brothers alone without any participation by the defendant, defendant could be guilty of no greater crime than manslaughter. *Griffin v. State*, 293 So. 2d 810 (Miss. 1974).

Where the evidence proved a combination or conspiracy entered into by the defendant and others to commit armed robbery, and the victim was thereafter shot to death by a codefendant at a time when all conspirators were present and each was doing his or her assigned part in the conspiracy to rob, the defendant became an accessory to armed robbery before the fact, and under the specific provisions of Code 1942, § 1995 was deemed and considered a principal so that every essential element of the crime of murder listed in Code 1942, § 2215 was proved by the state against the defendant. *Alexander v. State*, 250 So. 2d 629 (Miss. 1971).

Where evidence showed that both defendant and his companion fired shots at deceased, defendant was properly convicted of murder, though fatal shot may have been fired by companion. *Wilkerson v. State*, 209 Miss. 360, 46 So. 2d 807 (1950).

Where the evidence disclosed that the murder took place during the robbery of deceased by accused and others, the fact that the accused did not himself strike the fatal blow but that it was struck by one of his confederates as an aid in carrying out the common purpose to rob, did not relieve him of responsibility therefore. *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938).

Evidence held to sustain conviction for murder of officer while attempting arrest of parties who had committed robbery; refusal of requested instruction that defendant could not be convicted of murder unless he fired fatal shot held not erroneous. *Hurd v. State*, 137 Miss. 178, 102 So. 293 (1924).

Where two parties aid in commission of homicide, it is not law that neither can be convicted unless shown beyond reasonable doubt that he, by his own act, did the killing. *McCoy v. State*, 91 Miss. 257, 44 So. 814 (1907).

19. Homicide by commission of dangerous act.

Depraved-heart murder as defined in subsection (1)(b) of this section and culpable-negligence manslaughter as defined in § 97-3-47 are distinguishable simply by degree of mental state of culpability, in that depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied; thus, an instruction on depraved-heart murder did not amount to a "denial, or substantial diminishing, of a manslaughter consideration" by the jury. *Windham v. State*, 602 So. 2d 798 (Miss. 1992).

The evidence justified an instruction on, and a finding of, depraved-heart murder where the defendant used a hammer to assault a 79-year-old, one-armed man, who was running away, and his 78-year-old wife, during a dispute over a debt he owed them. *Windham v. State*, 602 So. 2d 798 (Miss. 1992).

An act which poses a risk to only one individual and which results in that individual's death may be deemed depraved-heart murder within the meaning of subsection (1)(b) of this section; a distinction between the risk of death to one particular individual and the risk of death to more than one individual is senseless and outmoded and was properly discarded. *Windham v. State*, 602 So. 2d 798 (Miss. 1992).

The Weathersby rule applies with equal force in a case involving a killing "done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual" as well as one in which the defendant is charged with murder by deliberate design. *Blanks v. State*, 547 So. 2d 29 (Miss. 1989).

A defendant who seized an officer's gun and fired it recklessly and at random engaged in the type of conduct contemplated by subsection (1)(b) of this section, which provides that killing is murder when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual. *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988).

Having been indicted separately for both murder, under this section, and for felony of shooting into occupied building, under § 97-37-29, defendant who was tried on murder indictment alone, and who had been convicted only of manslaughter, could not be prosecuted in second trial for shooting felony, since, under circumstances of case, it was lesser offense that was included in murder charge. *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986).

Where the trial judge in a murder prosecution implied that no murder committed during the course of a robbery could be simple murder and implied that it became, by definition, capital murder under this section, the appellate court would hold that theory of trial judge was flawed since it determined what instruction would be granted at the request of a

capital murder defendant on the basis of a presumption that he had already been found guilty of the underlying felony. *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984).

Evidence showing killing by shooting with pistol sustained murder conviction under statutory provision defining murder as killing in commission of act eminently dangerous to others, and evincing depraved heart regardless of human life, though without premeditated design to effect death. *Jones v. State*, 169 Miss. 292, 152 So. 879 (1934).

Where defendant while drunk fired pistol in the highway and the bullet glanced and struck and killed deceased, it was not manslaughter unless killing was the natural or necessary consequence. *Dixon v. State*, 104 Miss. 410, 61 So. 423 (1913).

It was fatal error to refuse instruction that malice aforethought was necessary element of murder. *Burnett v. State*, 92 Miss. 826, 46 So. 248 (1908).

Under indictment for assault with intent to kill and murder a named person where proof showed defendant shot into wagon occupied by such person and others, instruction that jury may convict without proof of premeditated design to kill the person named is fatally erroneous. *Gentry v. State*, 92 Miss. 141, 45 So. 721 (1908).

20. Killing as manslaughter.

Where defendant was indicted for murder under Miss. Code Ann. § 97-3-19(1)(a), and the State failed to prove the charge, the trial judge should have been authorized to issue a limited directed verdict as to the murder charge and allow the State to proceed on the lesser undicted offense of manslaughter, under Miss. Code Ann. § 97-3-35. *State v. Shaw*, 880 So. 2d 296 (Miss. 2004).

Manslaughter indictment that stated the date and place of the crime, specifically named both victims, and alleged that defendant committed the crime with others while he and the others were committing the felony crime of aggravated assault was sufficient to inform the defendant of the charge against him. *Stevens v. State*, — So. 2d —, 2001 Miss. LEXIS 301 (Miss. Oct. 31, 2001).

Having been indicted separately for both murder, under this section, and for

felony of shooting into occupied building, under § 97-37-29, defendant who was tried on murder indictment alone, and who had been convicted only of manslaughter, could not be prosecuted in second trial for shooting felony, since, under circumstances of case, it was lesser offense that was included in murder charge. *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986).

Capital sentencing scheme in which prosecutor has discretion as to which murders he can try as capital offenses did not grant unfettered discretion to prosecutor and did not violate constitutional protections, where discretion was statutorily limited, manslaughter instruction had to be given if warranted by facts, and imposition of death penalty was channelled through weighing of aggravating and mitigating circumstances. *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter instruction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to

assist in the murder but that he did participate in kidnapping the victim. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

The trial court in a capital murder prosecution erred reversibly in refusing defendant's requested instruction on manslaughter, where, although a jury might have properly found that the threat of death or serious bodily injury had not been imminently pending and therefore might have rejected defendant's self-defense theory, the jury might nevertheless, from the same facts, have found defendant not guilty of capital murder on the basis that the fatal shot had been in response to a shot first fired at him by an officer in a tense, sudden confrontation arising without the design of either party, thereby reducing the offense to manslaughter with a corresponding reduction in sentence. *Lanier v. State*, 450 So. 2d 69 (Miss. 1984).

Manslaughter charge not error where parties engaged in fight immediately prior to killing done in heat of passion and without malice. *Springer v. State*, 129 Miss. 589, 92 So. 633 (1922).

One may have felonious design to kill and kill in the heat of passion, which is manslaughter. *Dye v. State*, 127 Miss. 492, 90 So. 180 (1922).

21. Indictment.

Indictment against defendant alleged the essential elements of murder, even though the initial indictment did not allege that he acted out of "deliberate design," because it alleged "malice aforethought." Amending the indictment from "malice aforethought" to "deliberate design" was one of form, not substance, and the two terms were synonymous. *Gilbert v. State*, — So. 2d —, 2006 Miss. App. LEXIS 241 (Miss. Ct. App. Apr. 4, 2006).

Defendant contended that the indictment failed to charge all of the elements necessary to impose the death penalty under Mississippi law, but his argument failed because (1) pursuant to Miss. Code Ann. § 99-19-101(7), a jury only needed to find that defendant killed, and did not need a true mens rea; (2) under Miss. Code Ann. § 99-19-101(5), aggravating circumstances existed; and (3) there was no increase in the maximum penalty because the maximum penalty for killing while engaged in the commission of sexual

battery was death as the crime was defined as capital murder under Miss. Code Ann. § 97-3-19(2)(e), and, pursuant to Miss. Code Ann. § 1-3-4, a capital murder was a crime punishable by death. *Havard v. State*, 928 So. 2d 771 (Miss. 2006).

Capital murder indictment was not deficient for failing to list the aggravating factors the State intended to prove at sentencing; the death penalty statute clearly states the only aggravating circumstances that may be relied upon by the prosecution in seeking the death penalty, so that every time someone is charged with capital murder he or she is put on notice that the death penalty may result. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Felony murder as a capital crime by definition requires that there be two felonies, the homicide being the intentional or unintentional product of the other felony. The elements set out in the indictment against defendant only charged one felony, that defendant killed the victim by setting the victim on fire, and that act was not a capital offense; thus, the indictment as written did not charge capital murder, and reversal and remand of defendant to the custody of the sheriff pending the calling of a new grand jury was required. *Buckley v. State*, 875 So. 2d 1110 (Miss. Ct. App. 2004).

Indictment charging defendant with murder using the language of the statute was not deficient; indictment did not have to allege which specific theory defendant was being charged under. *Capnord v. State*, 840 So. 2d 826 (Miss. Ct. App. 2003).

Indictment charging defendant with murder that generally tracked the relevant statutory language and contained each element of the crime charged was sufficient to charge defendant with murder even though it omitted the words “although without any premeditated design to effect the death of any particular individual,” as the lack of premeditated design was not an essential element of the offense of depraved-heart murder. *Montana v. State*, 822 So. 2d 954 (Miss. 2002).

Indictment for depraved-heart murder that replaced the statutory phrase “with-

out the authority of law” with the word “unlawfully” did not fail to charge defendant with an essential element of that crime, as the terms were synonymous. *Turner v. State*, 796 So. 2d 998 (Miss. 2001).

An indictment for capital murder was sufficient, notwithstanding the contention that it failed to identify the essential elements of the underlying felony offense of burglary, as the indictment adequately informed the defendant of the acts underlying the alleged burglary. *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000).

An allegation that the deceased victim was a human being is not an essential element of the indictment. *Coffield v. State*, 749 So. 2d 215 (Miss. Ct. App. 1999).

Only in capital murder cases predicated upon the felony of burglary will the Supreme Court require a more detailed indictment: to the extent of noticing the defendant with what felony was intended in the burglary. *Turner v. State*, 732 So. 2d 937 (Miss. 1999), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999).

Because the original indictment adequately charged the defendant with murder, an amendment including the statutory language of subsection (1)(a) and facts added concerning the weapon used by the defendant were amendments as to form and not of substance. *Greenlee v. State*, 725 So. 2d 816 (Miss. 1998).

Mississippi capital murder indictments alleging that defendant entered house “to unlawfully do violence to the persons situated therein” were fatally defective for their failure to state intended felony that comprised charged burglary; “intent to do violence” was not a crime, prosecutor based his argument to support charge of burglary upon that “non-crime,” and jury was instructed that burglary charge could be predicated upon defendant’s intent either to steal or to “unlawfully do violence.” *Lockett v. Puckett*, 988 F. Supp. 1019 (S.D. Miss. 1997).

Capital murder indictment predicated on burglary must state underlying offense that comprises burglary, and mere tracking in indictment of language of capital murder statute is insufficient; burglary is

only capital murder predicate offense having essential element of intent to commit another felony, and permitting state to indict for capital murder without specifying underlying offense of burglary could result in trial on theory never placed before grand jury and with respect to which defendant had no opportunity to prepare defense. *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997).

A capital murder indictment alleging that the murder was committed while the defendant was "engaged in the commission of the crime of robbery ..." gave the defendant sufficient notice of the nature and cause of the charges against him, even though the indictment did not specify the overt acts constituting the crime of robbery, where the indictment further read "contrary to and in violation of subsection (2)(e) of this section," which is the statutory provision for capital murder, so that the indictment was in compliance with § 99-17-20. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies in this section includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony. Thus, in a capital murder prosecution, involving the underlying felony of sexual battery, the fact that the actual moment of the victim's death preceded consummation of the underlying felony did not vitiate the capital charge. *Baker v. Baker*, 553 So. 2d 8 (Miss. 1989).

A multiple-count indictment, charging murder and aggravated assault, was permissible where both the murder and the aggravated assault arose from a single fusillade, the defendant presented the same self-defense defense to the 2 charges, almost all of the evidence admissible against the defendant on the murder count was also admissible against him on the assault count and visa-versa, and no legally cognizable prejudice could be said to have resulted from the consolidation at trial of the 2 charges. *Blanks v. State*, 542 So. 2d 222 (Miss. 1989).

When indictment charges defendant with capital murder in course of rape and robbery and trial judge's instructions, as

requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Murder indictment which follows language of "depraved heart" provision of this section need not use words "malice aforethought." *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of Mississippi Constitution. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

In a prosecution for capital murder under this section, even though a technical error in the indictment charged the defendant under a different subsection of statute, the indictment was sufficient and the requirements of due process were met since the defendant and his attorney understood well in advance of trial that the charge was capital murder and that he was in jeopardy of the possible imposition of the penalty of death. *Jones v. State*, 461 So. 2d 686 (Miss. 1984).

A person who intentionally sets fire to a building, with or without knowledge that it is occupied, may properly be charged with capital murder under subsection (2)(e) of this section, if the fire results in the death of an occupant of the building. *Dycus v. State*, 440 So. 2d 246 (Miss. 1983).

The trial court had jurisdiction over a prosecution for capital murder, a violation of subsection (2)(e) of this section, where the essential underlying element of the crime, kidnapping, started in Mississippi when defendant forcefully took the victim from her place of employment, notwithstanding the fact that the actual murder took place in Alabama. *Pruett v. State*, 431 So. 2d 1101 (Miss. 1983), cert. denied, 464 U.S. 865, 104 S. Ct. 201, 78 L. Ed. 2d 176 (1983), habeas corpus granted, 665 F. Supp. 1254 (S.D. Miss. 1986), aff'd, 805

F.2d 1032 (5th Cir. 1986), cert. denied, 481 U.S. 1033, 107 S. Ct. 1964, 95 L. Ed. 2d 535 (1987).

In a prosecution for capital murder committed in the course of a robbery, the defendant's demurrer to the indictment on the grounds that it did not set forth the necessary and essential elements of the crime of robbery and did not refer to the proper statute was properly denied where the indictment was sufficient to give the accused fair notice of the crime charged in clear and intelligible language. *Bullock v. State*, 391 So. 2d 601 (Miss. 1980), cert. denied, 452 U.S. 931, 101 S. Ct. 3068, 69 L. Ed. 2d 432 (1981).

The indictment in a murder prosecution was not defective for failure to adequately describe and define the offenses charged where the statutory language used in the indictment adequately defined the offense so as to give the defendant fair notice of the crime charged in clear and intelligible language. *Bell v. State*, 360 So. 2d 1206 (Miss. 1978), cert. denied, 440 U.S. 950, 99 S. Ct. 1433, 59 L. Ed. 2d 640 (1979).

Trial court in prosecution for capital murder committed during armed robbery properly refused to quash indictment, which failed to cite section and subsection of code defining offense as required by § 99-17-20, where indictment was amended prior to trial so as to cite applicable statutory offense involved. *Bell v. State*, 353 So. 2d 1141 (Miss. 1977).

The court properly permitted the state to amend a murder indictment by striking from it the language "while engaged in commission of armed robbery or in violation of this section, Mississippi Code Annotated (1972)", since all the ingredients charged by the amended indictment were there before the amendment, and thus no additional burden was placed on the defendant, and, though the indictment before amendment failed to specify that the charge was under subsection (2), which defines capital murder, this was not a fatal error or ground for demurrer, such as to prevent amendment, but rather the indictment thereby had merely charged defendant with murder (not capital). *Porter v. State*, 339 So. 2d 564 (Miss. 1976).

Defendant's indictment for murder was sufficient despite its failure to apprise him

of whether he was charged under the capital murder section of the homicide statute [subsection (2) of this section] or under the section pertaining to murder [subsection (1) of this section], since, in light of the requirement of § 99-17-20 that one can only be tried for capital murder if such offense was specifically cited in the indictment, defendant could only have been charged with and convicted of murder, and since § 99-7-37, concerning requirements for indictments for homicide, does not require that the defendant be specifically apprised of whether he is being charged with murder or capital murder. *Varnado v. State*, 338 So. 2d 1239 (Miss. 1976).

Where it was shown by direct evidence that the deceased was one and the same person as charged in the indictment to have been killed, the fact that the name of the deceased was shown by inference and hearsay would not render the conviction void. *Duke v. State*, 243 Miss. 606, 140 So. 2d 863 (1962).

Murder indictment held not demurrable as not charging wilfulness and accused's malice aforethought. *Wexler v. State*, 167 Miss. 464, 142 So. 501 (1932).

Indictment charging defendant with killing unnamed infant, child of named parent, is sufficient. *State v. Peek*, 95 Miss. 240, 48 So. 819 (1909).

22. Variance between pleading and proof.

An indictment charging a defendant with intentional murder and assigning a maximum penalty of life was sufficient to give the defendant fair notice of the crime charged, even though the jury instructions in the ensuing prosecution failed to include a charge that the murder was intentional. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

In a prosecution for capital murder, the indictment charging defendant with willful murder in the commission of the crime of robbery sufficiently informed defendant of the constituent offense with which he was charged, despite his contention that the testimony at trial only related to attempted robbery, since the statutory language "engaged in the commission of" includes an attempt to commit the constit-

uent felony, the completed constituent felony, as well as immediate post-felony acts. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831 (1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992).

Where the accused's contention that he was incapable of forming a criminal intent or a deliberate design to effect the death of the deceased was submitted to the jury with an instruction that the claimed state of intoxication would constitute a defense, there was not a fatal variance between the indictment charging that the accused wilfully, feloniously and with malice aforethought killed his wife and the proof, showing that the evidence upon the question of the extent accused's intoxication was in conflict. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956).

Where the record discloses that the witnesses, although calling the slain man by various names, were obviously referring to the person named in the indictment as having been killed, the rule is satisfied that it is necessary for the proof to show that the person killed is the same person as the one charged in the indictment as to have been killed. *McDaniels v. State*, 203 Miss. 239, 33 So. 2d 785 (1948).

Variance between indictment charging defendant with the murder of "Myrtle" McCune and proof that defendant killed "Nettie" McCune, could not be availed of for the first time in the supreme court to reverse conviction of murder. *Childress v. State*, 188 Miss. 573, 195 So. 583 (1940).

23. Deliberations of jury; verdict.

Inmate's claim concerning error on a verdict form in connection with the inmate's capital murder trial was found to be without merit on direct appeal, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the inmate raised nothing new before the court. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate failed to show, in connection with the inmate's capital murder trial,

any prejudicial jury misconduct as alleged in an affidavit submitted under Miss. Code Ann. § 99-39-9(1)(e); while the affidavit stated that some jurors heard that the inmate's co-defendant had committed a rape in the past, there was no allegation that the jurors came to their decision based on a rape allegation against co-defendant. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Jurors were not prohibited, in connection with the sentencing phase of an inmate's capital murder trial, from discussing among themselves whether parole was a possibility because they were instructed correctly; furthermore, the jury knew that if the inmate was sentenced to life, the inmate would never be paroled, and thus little stock could be put in the affidavits, submitted under Miss. Code Ann. § 99-39-9(1)(e), that said that the jurors were concerned that the inmate would be paroled one day. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

In defendant's conviction for murder of the child while in the commission of felonious abuse and/or battery of the child, there were two notes passed to the trial judge by the bailiff from the jurors, but neither of the notes indicated that the jury had reached a conclusion or that they were deliberating; thus, defendant was not denied the right to an impartial jury. *Seeling v. State*, 844 So. 2d 439 (Miss. 2003).

That murder was committed (1) while engaged in crime of robbery and (2) for pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at state, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggravators. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

The Weathersby rule is not a jury instruction, but is a guide for the circuit judge in determining whether a defendant is entitled to a directed verdict. *Blanks v. State*, 547 So. 2d 29 (Miss. 1989).

If, after day and one-half of hearing trial of murder and manslaughter case, jury deliberates from 3:21 p.m. until 10:38 p.m., 3 jurors express desire to recess

deliberation, but trial court nonetheless sends jury back for further deliberations, verdict comes at 11:07 p.m., special interrogatory confines jury until 11:35 p.m., and there has been excessive deliberation time. *Isom v. State*, 481 So. 2d 820 (Miss. 1985).

Capital murder defendant is not entitled to have jury separately instructed and separately to consider whether or not defendant is guilty of being accessory after fact. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Mistrial is appropriate in capital murder prosecution in which, while jury is deliberating during sentencing phase, juror is given message by spouse that juror's mother has died. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

Trial court does not improperly communicate with individual juror by replying to juror in response to juror's request to be excused that court will not excuse juror for reason expressed by juror. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

Juror's receipt of telephone call from unidentified third party in middle of murder prosecution does not constitute jury tampering for which new trial will be ordered where defendant has failed to request that jury be sequestered and where defendant fails to place in record any objection upon learning that juror has received telephone call and where record reflects that defense counsel says nothing about matter until several days later when jury's guilty verdict is returned. *Gerlach v. State*, 466 So. 2d 75 (Miss. 1985).

Where, in a prosecution under subsection (2)(e) of this section, for murder while engaged in the commission of the crime of rape, there was evidence that a crime had been committed and that the defendant and two other persons had been present, the only conclusion that could be drawn was that one or more of them had committed the crime, and when each of such persons proceeded to blame the other for the actual perpetration of the crime, it

was up to the jury to determine which person or persons were guilty. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

A guilty verdict in a murder prosecution need not be signed by the jurors. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

Fact that death of victim was caused by a single stab wound does not entitle one of two defendants to directed verdict of acquittal when both defendants by concerted action did all within their power to effect death of victim with common design toward that end, and it is immaterial as to which of them proved to be successful in the effort. *Riley v. State*, 208 Miss. 336, 44 So. 2d 455 (1950).

Where evidence disclosed that jury after twenty-three hours of deliberations stood 11 to 1 for verdict for guilty of murder when bailiff stated to jury that judge told him he had until next convening of court to wait until they reached verdict and that as far as he was concerned they could stay there until they rotted and that shortly thereafter the jury returned a verdict of guilty, such conduct constituted a coercive inference on the jury prejudicial to the defendant, it being immaterial whether the judge actually made such statement. *McCoy v. State*, 207 Miss. 272, 42 So. 2d 195 (1949).

24. Conviction of lesser offense.

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. *State v. Shaw*, — So. 2d —, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003).

Where respondent was charged with capital murder for participating in assault during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be

employed, court on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

In a prosecution for murder in which evidence was insufficient to support a conviction for capital murder, since it was not shown beyond a reasonable doubt that the defendant murdered the victim while committing a kidnapping, the indictment for capital murder was sufficient to charge defendant with murder as a lesser included offense, and the jury could have been instructed that it could find the defendant guilty of such lesser included offense if the evidence justified such a finding; defendant's conviction of capital murder was reversed, the jury's verdict was affirmed as to guilt, and the case was remanded for resentencing of defendant for murder. *Biles v. State*, 338 So. 2d 1004 (Miss. 1976), cert. denied, 431 U.S. 940, 97 S. Ct. 2655, 53 L. Ed. 2d 258 (1977).

Unwarranted conviction of manslaughter held harmless error under indictment for murder supported by evidence. *Calicoat v. State*, 131 Miss. 169, 95 So. 318 (1923).

Conviction of manslaughter in prosecution for murder is an acquittal of murder. *Walker v. State*, 123 Miss. 517, 86 So. 337 (1920).

On an indictment for murder the accused may be convicted of manslaughter. *Dyson v. State*, 26 Miss. 362 (1853).

25. Trial; generally.

In defendant's trial for capital murder, the State, for reasons that did not appear in the record, elected not to offer the subject incriminating statement into evidence, and it was purely speculative to suggest that the State would have attempted to belatedly offer the statement after ending its case in chief and then only if defendant took the stand. Thus, because the trial court determined the statement

to be admissible as bearing directly on the central issue of defendant's guilt, rather than for some alternate and limited purpose such as witness impeachment, the trial court's ruling could not be seen as having had any chilling effect on defendant in deciding whether or not to take the stand. *Bernardini v. State*, 872 So. 2d 690 (Miss. Ct. App. 2004).

Trial court's cautionary admonition to defendant in prosecution for murder of African-American leader of civil rights organization to avoid racially inflammatory language during voir dire questioning was not unduly restrictive of defendant's inquiry into racial prejudice; court permitted extensive questioning of jurors regarding racial matters, including civil rights activities. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Testimony of accomplice, which was partially corroborated by fellow inmate of defendant and by state's ballistics expert, presented question of fact to be determined by jury as to whether defendant was guilty of robbery and subsequent shooting of store clerk. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Experts who rendered diagnosis of "no mental disorder" for low intelligence quotient for capital murder defendant, after being appointed to perform mental examination of him to determine his competency to stand trial, afforded defendant constitutionally adequate evaluation and furnished constitutionally adequate report. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

The trial court in a capital murder prosecution did not err in permitting 3 off-the-record bench conferences and a jury instruction conference to be conducted when the defendant was not present where the defendant was represented by counsel at every critical stage of the proceedings, and he was not prejudiced by his absences at the conferences. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial court's refusal to permit a capital murder defendant to impeach an eyewitness

ness regarding his statement that he had been employed by his cousin for part of the previous year did not deprive the defendant of his constitutional right to confront witnesses against him since the issue of the witness' employment was a collateral matter; the constitutional right to confront witnesses applies only to issues pertinent to the crime charged, and the general rule that a party may not impeach a witness on collateral matters is applicable. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In a prosecution for murder, an exclamation from the audience by the victim's mother that the defendant "cold blooded killed my child" did not prejudice the defendant's right to a fair trial where the victim's mother was immediately escorted from the courtroom after her outburst, and the judge then properly admonished the jury to disregard the incident and questioned the jurors to determine whether they could disregard the comments. *Bell v. State*, 631 So. 2d 817 (Miss. 1994).

In a capital murder trial, the phrase "they haven't shown it" used by the prosecutor in his closing argument with respect to the defendant's alibi defense did not shift the burden of proof from the State to the defendant and deprive him of his right to a presumption of innocence where the prosecutor stated that the alibi instruction required the defendant to be in a place so remote and distant that he could not have committed the offense and "they haven't shown it"; the prosecutor did not tell the jury that the defendant's failure to establish his alibi should automatically translate into a verdict of guilty, but merely stated that the defense had not proven or "shown" that the defendant was "in a place so remote and distant that he could not have committed the offense" at the time when the crime occurred. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief

denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

A trial court in a murder prosecution erred in allowing the prosecutor to cross-examine a witness about a certified lab report of results of the defendant's drug screen test, where the test results were never offered into evidence during the trial and the witness had no actual knowledge of the drug screen analysis; without the testimony of a sponsoring witness with personal knowledge of the facts contained therein, the drug screen report was inadmissible hearsay, and without the opportunity to cross-examine the person responsible for the information contained in the report, the defendant's right to confront witnesses secured by the Sixth Amendment and Article 3, § 26 of the Mississippi Constitution were violated. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

A trial court's denial of a capital murder defendant's request for a private mental examination did not violate the Eighth and Fourteenth Amendments, where the defendant did not attempt to use an insanity defense, the State did not produce psychiatric testimony against him, and he did not demonstrate that sanity was to be a significant factor at trial. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A trial court in a capital murder prosecution did not abuse its discretion in declining to grant a mistrial or a new trial on the ground that the victim's daughter, who found the body of her mother, began to weep while testifying on direct examination, where the daughter's testimony was elicited not as a family impact statement but to prove the conditions at the crime scene. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A trial court erred in not permitting a murder defendant himself to make an opening statement even though the judge had not been forewarned that the defendant wished to make the opening statement himself. A defense attorney who is

made aware by his or her client that the client wishes to personally conduct his or her own defense first has an obligation to fully advise the client of the constitutional right to represent himself or herself, and also of the responsibility and risk entailed. The defense counsel also has an obligation to inform the judge prior to exercise of the right, of the client's desire to do so, in order to give the judge an opportunity to instruct as well as warn the defendant outside the presence of the jury of his or her rights and responsibilities. *Bevill v. State*, 556 So. 2d 699 (Miss. 1990).

Defendant was not denied right to a speedy trial where, although almost 7 years elapsed between his indictment on charges of murder and aggravated assault and his arraignment, substantially all of the delay was due to defendant's confinement in a state mental institution pursuant to court order, issued shortly after the indictment, finding defendant insane and not competent to stand trial, and trial was set in less than 6 weeks after the court was notified by institution's staff of defendant's competence to stand trial. *Smith v. State*, 489 So. 2d 1389 (Miss. 1986).

Judge is not disqualified from hearing homicide case on basis of fact that homicide defendant's former attorney, against whom defendant has filed bar complaint, has at one time been law partner of judge. *Ruffin v. State*, 481 So. 2d 312 (Miss. 1985).

Refusal to provide indigent criminal defendant with free transcript of prior trial which ended in mistrial does not violate equal protection where defendant makes no showing that transcript would be useful or necessary to case or that alternative devices are unavailable. *Ruffin v. State*, 481 So. 2d 312 (Miss. 1985).

Defendant in capital murder case is not entitled to compulsory process, attendance fees, and travel expenses for out of state prospective character witnesses, particularly in case in which only thing presented to judge as to testimony of proposed witnesses is summary by counsel, not sworn to, as to what witnesses might testify. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986),

reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Refusal to grant capital murder defendant's request for change of venue impermissibly deprives defendant of right to impartial jury where defendant has made prima facie showing of community prejudice by submitting affidavit signed by 2 witnesses with knowledge; furthermore, testimony of 15 defense witnesses who state specific reasons why defendant cannot receive fair trial in county in which offense has been committed raises irrebuttable presumption of prejudice. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

Trial court's refusal to summon prisoners to testify in capital murder case, as requested by defendant, does not violate defendant's right to compulsory process where testimony by prisoners would be inadmissible hearsay. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

One on trial for life or liberty may be handcuffed or otherwise shackled in presence of jury only by reason of clear and present danger to order or security. *Hickson v. State*, 472 So. 2d 379 (Miss. 1985).

Presence of law enforcement officers behind bar of court during trial of capital murder defendant is permissible so long as trial judge takes care to avoid appearance of intimidation. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

When trial court improperly refuses to order production of clearly discoverable witness statements which to the heart of credibility of state's principal witness in murder prosecution, reviewing court does not engage in nice calculations regarding amount of resulting prejudice but reverses and remands for new trial. *Barnes v. State*, 471 So. 2d 1218 (Miss. 1985).

Where a physician had made a sufficient examination of the body on the morning following the assault so as to be able to testify that whoever had inflicted the wounds was the person who had killed the deceased, and according to the testimony of the sheriff and undertaker the deceased had suffered approximately 21

wounds inflicted by a blunt instrument, his skull had been cracked and considerable blood was found at the scene of the assault, the trial court did not err in overruling defendant's motion for an autopsy. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337 (1957).

Trial court in murder prosecution has right to give his reasons for rulings during course of trial and to show why, in his opinion, reasons advanced for contrary ruling are unsound, provided he does not encroach upon province of jury or try to influence their verdict. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

Remark of trial court in ruling on right of prosecution to cross-examine accused in murder case concerning insurance on victim that matter of insurance was wholly immaterial and that nothing about insurance is to be considered in any way derogatory to defendant, or derogatory to anybody else, is not equivalent to oral instruction to jury upon law of case contrary to express provisions of Code 1942, § 1530, Code requiring all jury instructions upon the law to be in writing, and is not prejudicial to defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh'g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

26. —Prosecutorial misconduct.

Defendant cited seven instances of misconduct by the State in its closing argument, including references to the victim's family and their attendance at the trial, the State's actions as the "last voice" for the victim, references to the victim's last thoughts, and the grief of the victim's family members. However, the trial court alleviated any prejudice in properly sustaining the objections of counsel and admonishing the jury and the appellate court could not say that the improper arguments led to a verdict that was based upon prejudice and not upon the evidence so as to have justified a mistrial. *Smith v. State*, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Prosecutor did not overstep his bounds when he asked the jury not to let the defendant get away with the murder with which he was charged. Furthermore, the trial court instructed the jury that arguments and statements of counsel were not evidence and that if any argument, statement or remark had no basis in the evidence, then the jury was to disregard that argument, statement or remark; in any event, there was no prosecutorial misconduct and no grounds for reversal in light of said instructions. *Davis v. State*, 904 So. 2d 1212 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Prosecutor's closing argument that defendant's accomplices were not being tried because they had been exonerated in prior judicial hearing was proper response to defense counsel's references to the fact that no action was being taken against defendant's accomplices. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's closing argument during guilt phase that "This man deserves everything that he can get for the most brutal murder" and "He's guilty" were not personal opinion comments, as prosecutor never said that she believed that defendant was guilty or that she believed that defendant deserved the death penalty. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence, but arguing statements of fact which are not in evidence or necessarily inferable from it and which are prejudicial to the defendant is error. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecuting attorney should refrain from commenting upon appearance of defendant when he has not been introduced as a witness. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecuting attorney should refrain from doing anything or saying anything that would tend to cause jury to disfavor

defendant due to matters other than evidence relative to the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecutor's comment on defendant's demeanor and appearance may have highlighted his failure to testify, which is plainly prohibited, and the remark should not have been made. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecution did not improperly comment on capital murder defendant's failure to testify, when he stated that accomplice's testimony regarding a ripped shirt was the "only testimony" and the "only reliable information" made available; reading of full remarks made it plain that prosecutor was simply summarizing account of night's events as told by accomplice and rebutting defense efforts to show that accomplice was lying. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Capital murder defendant was not prejudiced by comment of prosecution, during guilt phase closing argument, inviting jury to notice that on each of several situations in which state was prepared to go forward with proof "that the defense would just as soon not be before you," a stipulation was entered into; immediately thereafter the court instructed prosecutor "don't raise a comment on why the stipulations were made," and defense counsel did not request any further action. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

The prosecutor's closing argument in the guilt phase of a capital murder prosecution did not constitute an improper comment on the defendant's right to remain silent following arrest where the prosecutor, while discussing a county jail inmate's testimony as to statements made by the defendant while he was in the jail, referred to the relationship between the defendant and the witness, and described the circumstances under which the statements were made. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S.

1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's closing argument in a capital murder case did not constitute a comment on the defendant's failure to testify at trial, in spite of the defendant's argument that the prosecutor's comments highlighted the fact that the only people alive who could have testified as to the events surrounding the murders were the defendant and his accomplice, where the prosecutor merely stated that the defendant and his accomplice saw to it that there were no eyewitnesses, and that "people who kill their victims and kill their eyewitnesses cannot be set free." *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor improperly commented during closing argument on a capital murder defendant's failure to testify where the prosecutor stated that the defendant "hasn't told you the whole truth yet," that "you still don't know the whole story," and that the defendant was the only person alive who could give the whole story. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

In a capital murder prosecution, the prosecutor's statement that there had not been any testimony that the defendant acted in self-defense did not constitute an impermissible comment upon the failure of the defendant to testify, where the prosecutor's statement was made in connection with his argument that the State had proved the required element that the defendant's actions were not done in necessary self-defense. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

In a capital murder prosecution, the prosecutor's references to a second victim did not violate the Eighth and Fourteenth Amendments, since these references were

necessary to tell the complete story of the crime where both victims were killed in the same mobile home with the same gun. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

Comments made by a prosecutor during his closing argument in a capital murder prosecution did not constitute prosecutorial misconduct, where the prosecutor stated that the victim was a human being and had a right to be protected by the law even though he may not have been wealthy or prominent or a leader in his community, in spite of the defendant's argument that the "value" of the victim's life should not be a factor in considering whether the defendant should live or die and that such a consideration introduces an arbitrary factor into the process, since the prosecutor's statement was innocuous. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In a capital murder prosecution in which the defense counsel had argued that "there is only one person who can tell you if a reasonable doubt exists insofar as this case, and that's each and every one of you," the prosecutor's rebuttal constituted an improper comment on the defendant's failure to testify where it included a statement that "they tell you, there's one man alive today who can tell you what happened, and I agree with that. There is one person who could tell you what happened and we have ... a statement from him. We have a confession, an oral confession, we have a written confession." Such remarks directed the jury's attention to the failure of the defendant to take the stand and admit or deny the contents of the confession. *Griffin v. State*, 557 So. 2d 542 (Miss. 1990).

Closing argument in which prosecuting attorney attempts to describe for jury in less than complimentary terms sort of person who would commit sort of crime involved in capital murder case is perfectly legitimate. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Complaint regarding prosecution's argument which includes calling upon diety, making reference to personal friendship of district attorney and homicide victim, personal remarks directed to defense counsel,

personal belief in defendant's guilt, and frustration in prosecuting homicide cases can quickly be dissipated by contemporaneous objection and ruling by circuit judge; if defense counsel chooses to wait until conclusion of argument to object, error may not be assigned on basis of argument. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Presence of daughter of murder victim at counsel table and open display of emotion by daughter which presents jury with image of prosecution acting on behalf of daughter is impermissible. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

Supreme court will not, on appeal from murder conviction, consider objection to remarks made by district attorney in his argument to jury, when no objection was offered to remarks at the time they were made, no bill of exceptions was taken, no motion for mistrial was asked by defendant, and trial judge was not asked for ruling. *Woods v. State*, 37 So. 2d 319 (Miss. 1948).

27. —Selection and removal of jurors.

Issue raised at trial and on direct appeal from an inmate's capital murder conviction concerning the exclusion of a juror for failing to meet the qualifications of Miss. Code Ann. § 13-5-1 was found to be without merit, and the issue was therefore barred pursuant to Miss. Code Ann. § 99-39-21(2); because the trial court committed no error in excusing this juror and another juror for not meeting the qualifications under Miss. Code Ann. § 13-5-1, then the attorneys were not ineffective for failing to object to the jurors' dismissal, and in any event, the attorneys' decisions regarding the final composition of the jury were generally determined to be matters of trial strategy. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Under the Batson test, the prosecutor satisfied the burden of articulating a non-discriminatory reason for striking a black juror where he explained that he struck the juror because the juror had long unkempt hair, a mustache and a beard, since the wearing of beards and long unkempt hair are not characteristics that are par-

ticular to any race. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), reh'g denied, 515 U.S. 1170, 115 S. Ct. 2635, 132 L. Ed. 2d 874 (1995), on remand, 64 F.3d 1195 (8th Cir. Mo. 1995).

Prosecutor's question to potential jurors asking whether they could conceive of imposing death penalty in murder case with no eyewitness was proper means of probing into their prejudices to get insight into their thoughts. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need "a lot stronger proof" to change their position. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she absolutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror's firm position will suffice. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S.

994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant's guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Dismissal of doctor and 2 attorneys from jury did not deny defendant his rights to due process and to fair cross section of community; doctor was an emergency room physician who was working night shift, and attorneys were excused because they operated small businesses that could not afford to be closed. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's questioning and dismissal of 6 venire members who expressed opposition to the death penalty was adequate, even though defense counsel was not allowed to repeat questions in his own words to prospective jurors during court's voir dire, where the trial court rephrased questions as requested, defense did not request permission to ask further questions, and there was no showing that further questioning would have rehabilitated dismissed venire members. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996),

republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defense counsel's extensive voir dire of venire members regarding attitudes toward death penalty precluded claim on appeal that trial court's inadequate voir dire questioning permitted seating of jurors with bias in favor of death penalty. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Fact that 10 of 14 jurors and alternates were women precluded claim that prosecution engaged in improper gender based discrimination when exercising peremptory challenges. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court could excuse prospective juror from serving on panel hearing capital murder case, on grounds that prospect was mother of 8-year-old boy and that she would feel apprehensive and be distracted if required to be away from child in event jury was sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not improperly excuse prospective juror from service in capital murder case; prospect tailored her response to question whether she could follow the law at both phases of trial to whichever counsel was questioning her, and she indicated she did not want to be involved in jury service and only "guessed" that she would "try" to listen to evidence and be fair to both sides. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to be removed through use of complementary challenge for cause. *Walker v. State*,

671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death penalty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed from capital murder panel, even though during initial voir dire he had raised his hand and commented, regarding death penalty, that "if the jury reached a decision of guilty, I would automatically vote" for death; when questioned individually, prospect stated that he would weigh evidence and that he could put aside his views and listen to evidence and instructions. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence pointed, would be fair and impartial and would follow law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed for cause from jury panel in capital murder case, even though he initially

stated he would vote for death penalty upon capital conviction, and later that he would be predisposed to vote for death all things being equal; prospect also stated that he would follow instructions given by court and review facts before reaching decision, and that his decision would be based upon how evidence "came about" in penalty phase of trial. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court was not required to grant capital murder defendant additional peremptory challenges, for use in eliminating prospective jurors that trial court refused to remove for cause despite their avowed favoritism toward death penalty; defendant had not supported his claim that there were an unusual number of persons favoring death penalty among venirepersons, those that court had declined to remove for cause had been rehabilitated and those whose views on subject remained "unwavering" had been removed. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution presented race-neutral reason for peremptory strike of prospective juror in capital murder case; prospect had teenage daughter, and manner in which she responded to questions led prosecutor to feel that she was dealing with some problem prosecutor was unable to reach, and court indicated that prospect's demeanor was different from that of other prospects who had children. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory strike of black prospective juror in capital murder case; prospect took care of approximately 30 hogs and between 30 or 40 chickens, and would not be able to maintain her responsibilities if jury was required to be sequestered. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution gave race-neutral reason for peremptorily striking black prospective juror in capital murder case; juror had indicated unwillingness to serve and

had stated that she might have difficulty in coming to any definite conclusion. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecution provided race-neutral reason for peremptory challenge of black prospective juror in capital murder case; prospect was on board of directors of organization devoted to providing back-up for defense attorneys in capital cases. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sentence, and did not know if she could base her decision on evidence and law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Circuit court should take substantial role in conducting voir dire to determine whether prospective jurors would vote automatically for death penalty regardless of aggravating and mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In a prosecution for capital murder and conspiracy to commit capital murder, the trial court committed reversible error in failing to place the initial burden on the State to establish a prima facie case of racial discrimination in the defendant's use of his peremptory challenges, before concluding that the defendant failed to offer a race-neutral reason for challenging one of the jurors, since the defendant was arbitrarily and erroneously denied the use of one of his peremptory challenges, and the composition of the jury was directly altered as a result. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

A prosecutor's race-neutral explanation for peremptorily striking a potential juror need not rise to the level of justifying the exercise of a challenge for cause. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134

L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In a capital murder prosecution in which a black defendant was convicted and sentenced by an all-white jury for the murders of 4 white victims, the trial court did not err by allowing the State to peremptorily strike the sole potential black juror, since the reason stated by the prosecution for the peremptory challenge—that the juror indicated she would have difficulty finding suitable child care during the trial—was sufficiently race-neutral. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The trial court in a capital murder prosecution erred by not requiring the State to give racially-neutral reasons for exercising peremptory challenges against 7 out of 13 black jurors on the venire, even though there was no showing that the defendant was of a minority class, and therefore the case would be remanded for a hearing on whether the Batson criteria were violated by the State's exercise of its peremptory challenges. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d

1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. *Russell v. State*, 607 So. 2d 1107 (Miss. 1992).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Statute Supreme Court's judgment cannot stand insofar as it imposes the death sentence. The State Supreme Court's analysis is rejected if and to the extent it is based on the reasoning that the trial judge restored one of the State's peremptory challenges by determining that he had erred in denying one of the "Witherspoon" motions, and that erroneous removal of juror for cause was therefore harmless since the State would have used its restored challenge to remove her in any case. "Unexercised peremptory" argument wrongly assumes that crucial question is whether a particular prospective juror is excluded due to the court's erroneous ruling. Rather, relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the error. However, jury selection process requires a series of on-the-spot decisions weighing the relative objectionableness of a particular venire member against the number of peremptory challenges available at that time. Thus, the nature of the selection process defies any attempt to establish that an erroneous "Witherspoon" exclusion is harmless. Further, State's argument that jurors exclusion was a single technical error that should be considered harmless because it did not have any prejudicial effect is unavailing, under *Davis v. Georgia*, regarding application of *Witherspoon* decision. *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987).

Any prejudice resulting from judge's reading of wrong indictment during voir dire of jury in homicide prosecution is removed when judge immediately admonishes jury to disregard such indictment. *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Jurors who indicate inability to vote for death penalty under any circumstances

may be excluded from guilt phase of capital murder prosecution. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

When bailiff excuses juror on last day of murder trial on basis of death of juror's grandmother, rather than escorting juror back to court and informing trial judge of situation so judge can determine whether juror is unable to perform duty and order excusal, and trial court subsequently impanels alternate juror without objection by defense, and defendant fails to show prejudice resulting from impaneling of alternate, conviction is not subject to reversal on basis of improper excusal of original juror. *Fuller v. State*, 468 So. 2d 68 (Miss. 1985).

Merely because potential jurors in capital murder case would be hesitant to inflict death penalty in case based entirely on circumstantial evidence does not constitute grounds to excuse jurors for cause. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

The trial court did not commit reversible error in overruling defendant's motion for a mistrial, or that a new panel of jurors be tendered to the defendant, where, after ten jurors had been finally accepted to try the defendant, the court, out of the presence of defendant or his counsel, excused one of the jurors because illness required the juror's presence at home, where the court had allowed the defendant one additional peremptory challenge. *Upshaw v. State*, 231 Miss. 158, 94 So. 2d 337 (1957).

28. —Ineffective assistance of counsel.

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior bad acts testimony from the victim's family members (eyewitnesses), and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of *Strickland*; defendant's account of the events that led to the victim's death was not corroborated by

any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. *Jones v. State*, 911 So. 2d 556 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Even if defendant's trial counsel was deficient in allegedly failing to make numerous potential objections to hearsay and other improper evidence, there was no reasonable probability that the proceeding would have been different given the plethora of evidence against defendant, including his confession that he "killed the bitch." While trial counsel's performance might have been less than perfect, there was nothing in the record that proved that trial counsel's performance was not in the "wide range of reasonable professional assistance." *Gibson v. State*, 895 So. 2d 185 (Miss. Ct. App. 2004).

Claims that defense counsel was unprepared because he only had two meetings with defendant were rejected, as counsel filed pretrial motions, conducted voir dire, offered challenges for cause, provided compelling opening and closing statements, objected to the admission of certain evidence, and cross-examined witnesses. Under the Sixth Amendment, defendant was entitled to and received minimum competence and loyal assistance. *Rinehart v. State*, 883 So. 2d 573 (Miss. 2004).

Court found no ineffective assistance of counsel in the failure of attorneys for an inmate to object to the State's use of peremptory strikes in connection with the inmate's capital murder trial because (1) the inmate failed to show any prejudice, and (2) the attorneys could well have thought that the State had adequate race neutral reasons for the State's strikes, and there was no requirement that the attorneys had to make motions that they did not believe would succeed. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for failing to impeach a material witness with an alleged prior inconsistent

statement concerning the inmate's height because (1) there was little room for impeachment in the relative heights of the inmate, co-defendant, and the witness, and (2) it was a matter of trial strategy not to ask the witness additional questions on cross-examination. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for not objecting to the presence of a county sheriff during trial proceedings because (1) the inmate cited no authority to support the claim that the sheriff was able to tailor the sheriff's testimony after hearing other witnesses and (2) there was no abuse of discretion in the trial court's decision to permit the sheriff to remain in the courtroom. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorney was not ineffective, in connection with the inmate's capital murder trial, for allowing the inmate to be tried jointly with co-defendant at both the guilt and penalty phases because (1) this issue was substantially addressed on direct appeal, and thus was barred in post-conviction proceedings under Miss. Code Ann. § 99-39-21(2), and (2) in any event, the issue was without merit because the inmate and co-defendant insisted on being tried together. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not objecting to the trial judge's decision to excuse potential jurors after unrecorded bench conferences because even though the bench conferences should have been recorded, and even if the attorneys were negligent in failing to see that the conferences were recorded, there was no showing of prejudice to the inmate and the reasons for the excusal of the jurors were clearly in the record. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to object to certain prosecutorial statements made during closing argument at the guilt phase because (1) the issue was raised on direct appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any

event, the comments made were within the wide latitude granted in an attorney's closing argument. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Counsel for capital murder defendant was not ineffective for failing to investigate and develop fact of defendant's low intelligence quotient, where absence of that evidence did not reasonably undermine confidence in outcome of trial, in that it was merely additional evidence of defendant's mental aptitude, since counsel argued that defendant had very minimal education and deprived childhood. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after prosecution called so-called "surprise" witness who subsequently identified defendant, where counsel interviewed witness for 25 minutes during recess called specifically for that purpose, and defendant showed nothing that continuance would have further gained. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to file certain motions, call certain witnesses, ask certain questions, and make certain objections, where counsel's actions fell within ambit of trial strategy. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to request continuance after State introduced into evidence during sentencing phase 2 prior convictions for manslaughter and attempted rape, where there was no prejudice to defendant, in that the prior convictions were valid and not subject to collateral attack. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to transitional jury instruction stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, where defendant was granted lesser included offense instruction defining crime of murder less than capital, and defendant showed no prejudice flowing from transitional instruction. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to introduction of defendant's prior convictions of grand larceny and simple robbery, where both were relevant to aggravating circumstances set forth under capital sentencing statute, and thus objection would have been futile. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to make offer of proof concerning excluded mitigation-of-sentence testimony about defendant's religious convictions and effect on him of death of his stepchild, where the evidence was adequately established via testimony of other witnesses. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for failing to object to jury instruction that the murder was "especially heinous, atrocious and cruel," where, at time of trial, there was no viable basis under state law for objecting to this instruction. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Counsel for capital murder defendant was not ineffective for conducting cross-examination of witness that produced responses which allegedly strongly suggested to jury that defendant could not be rehabilitated, where most of the cross-examination was in abstract and was not related directly to defendant, and defendant had previous convictions for rape, manslaughter, robbery and grand larceny based upon which jury could have easily reached conclusion that there was little hope for defendant's rehabilitation. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Mere fact that counsel for capital murder defendant shared office space with prosecutor who prosecuted defendant's preliminary hearing was not sufficient to demonstrate actual conflict of interest causing prejudice to defendant in violation of defendant's right to counsel. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel by her attorney's refusal of a manslaughter instruction, even though there was a strong evidentiary basis for the submission of such an instruction, where the attorney's decision

to refuse a manslaughter instruction coupled with his decision to employ a defense based entirely on self-defense was a calculated trial strategy. *Hiter v. State*, 660 So. 2d 961 (Miss. 1995).

A murder defendant was not denied her Sixth Amendment right to the effective assistance of counsel due to her attorney's failure to object to statements made by the prosecution in their closing argument, referring to the fact that the victim was not present at trial to explain the events surrounding the killing, since it was reasonable for the prosecution to argue that the victim was no longer in existence in a murder trial in which the jury was required to determine whether the killing was justified. *Hiter v. State*, 660 So. 2d 961 (Miss. 1995).

A murder defendant was not denied effective assistance of counsel by his attorney's admission of his guilt of the crime where the evidence of guilt was overwhelming, and the attorney admitted that the defendant was guilty of simple murder, not capital murder, and submitted a lesser-included offense instruction in accordance with the argument. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

A capital murder defendant was denied effective assistance of counsel at the penalty phase where his attorneys presented almost no facts in mitigation upon which the jury could have acted to spare the defendant's life, they failed to make the most of the available evidence in mitigation, and in closing argument one of the defendant's attorneys stated that the only way the jury could spare the defendant's life was on "redeeming love," which was not one of the factors which the jury could have considered under the court's instructions. *Woodward v. State*, 635 So. 2d 805 (Miss. 1993).

A defendant's counsel was not ineffective at the guilt phase of a capital murder trial where the defense counsel adequately investigated, filing discovery motions and obtaining the State's entire file, and there was no reasonable probability that the outcome of the trial would have been different had evidence been presented that the defendant's accomplice, rather than the defendant, delivered the fatal injuries, because it was clearly estab-

lished that the defendant was present at the planning and execution of the murder and was therefore a principal. *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

In order to prove that he received ineffective assistance of counsel during the guilt phase of a capital murder prosecution, the defendant was required to show deficient performance and that his counsel's errors were so serious as to deprive him of a fair trial with a reliable result; unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

Defendant convicted of capital murder is not entitled to reversal on basis of refusal of trial court to appoint experienced trial counsel where defendant is unable to point to specific lapses by trial counsel. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

29. —Continuance.

Trial judge did not abuse his discretion in refusing defendants request for a continuance which was made at 4:30 p.m., where there was no evidence of undue burden upon counsel in continuing the case to conclusion and no indication in the record that the jury, which returned a verdict at 10:10 p.m., had difficulty in proceeding with their deliberations. *Dye v. State*, 498 So. 2d 343 (Miss. 1986).

It is contemptuous of obligation every trial counsel owes court to wait until 10 days before predetermined trial date in capital murder case to inform circuit judge of unavailability of defense expert witnesses in case in which at least 30 pretrial motions are made by thorough and aggressive defense counsel; in such case, motion for continuance on basis of absence of witnesses is properly denied. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Trial court may deny capital murder defendant's request for continuance due to unavailability of defense fingerprint expert where court concludes that fingerprint expert would testify that finger-

prints of murder victim and no one else had been found at scene of crime. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

30. Prejudicial or harmless error; generally.

Inmate's cumulative effect argument in connection with the inmate's capital murder trial was procedurally barred under Miss. Code Ann. § 99-39-21(3) as res judicata, and in any event, the issue was without merit because the cumulative errors, in any, did not require relief. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

In capital cases, although there is no error which, standing alone, requires reversal, aggregate effect of various errors may create such an atmosphere of bias, passion, and prejudice that they effectively deny defendant a fundamentally fair trial. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A washcloth found at the site where the defendant had buried the victim's body should not have been admitted into evidence in a murder prosecution, where the washcloth was not identified as belonging to the defendant or deriving from the defendant's home; absent a sufficient connection between the cloth and the defendant and/or the crime, it should have been excluded. However, admission of the cloth was harmless in view of the overwhelming evidence of guilt presented. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

In a homicide prosecution, the prosecution's failure to disclose 2 tape-recordings pertaining to the homicide which had been made on the morning of the homicide by the police department radio dispatcher was harmless error where the recordings did not contain any exculpatory information. *Fowler v. State*, 566 So. 2d 1194 (Miss. 1990).

Permitting murder weapon, which has not been introduced in evidence, into jury room is harmless error beyond reasonable doubt where it is manifest that parties, court officials and court have overlooked fact that weapon has not been again offered in evidence after chain of custody has been established in response to defense objection and has been referred to

throughout trial without objection by defense and defense does not object to weapon being taken as part of exhibits to jury room. *Williams v. State*, 481 So. 2d 839 (Miss. 1985).

When trial court improperly refuses to order production of clearly discoverable witness statements which to the heart of credibility of state's principal witness in murder prosecution, reviewing court does not engage in nice calculations regarding amount of resulting prejudice but reverses and remands for new trial. *Barnes v. State*, 471 So. 2d 1218 (Miss. 1985).

Although, in the prosecution of a state penitentiary trustee for murder in connection with the death of a prisoner allegedly beaten by the defendant and another, it was improper to permit a member of the coroner's jury to testify, the admission of that testimony as to what he had seen and as to what the penitentiary physician had stated, that the prisoner had died of heat stroke as shown on the death certificate, was harmless error, where the only issue in the case was the cause of death, and that issue was presented squarely to the jury, which found that death was caused by trauma. *McLaurin v. State*, 260 So. 2d 845 (Miss. 1972).

In prosecution for murder, on preliminary hearing to determine competency of alleged confession, it is error for court to limit defendant to cross-examination of state's witnesses, as failure to hear defendant and his witness imposes upon him an extra and unfair burden. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751 (1948).

Asking accused if he testified at committal trial which he answered in negative, while improper, was harmless. *Wells v. State*, 96 Miss. 500, 51 So. 209 (1910).

31. —Comment or act of counsel.

Any error in prosecutor's comment on defendant's demeanor, which might have been taken as a comment on failure to testify, was cured by instructions to jurors to disregard remarks of counsel which have no basis in the evidence and to not draw any unfavorable inference against defendant because of his failure to testify. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In a prosecution for capital murder committed during the commission of a rape, the conviction and sentence would be reversed where, in response to the defendant's request for disclosure of expert reports or statements, the prosecution responded only by providing a copy of the pathologist's autopsy report, and the undisclosed opinion of the pathologist that the victim was raped was the only evidence offered to prove this critical aspect of the State's case. In re Turner, 635 So. 2d 894 (Miss. 1994).

The production of accomplices' statements at a murder trial during the cross-examination of a police officer who investigated the accomplices was not sufficient since receipt of these statements during trial did not give the defendant a "meaningful opportunity" to make use of them. Defense counsel was entitled to have access prior to trial, and since he was not given such access, a reversal of the defendant's conviction was warranted. Welch v. State, 566 So. 2d 680 (Miss. 1990).

In a murder prosecution, the prosecutor's comment during closing argument that the defendant was "clothed in the full protection of the Constitution of the United States and he has got what [the victim] never got. And that is a jury of 12 good people to decide his fate," did not warrant reversal of the jury's verdict where the comment was an isolated statement and no other portion of the closing argument focused on the exercise of constitutional rights by the defendant. Shell v. State, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

Although the trial court properly condemned the conduct of a district attorney in asking jurors during voir dire whether or not they would vote guilty if the state proved its case and whether they would vote for death if the state proved that the aggravating circumstances outweighed the mitigating circumstances, the district attorney's conduct did not constitute reversible error where, in context with the jury instructions given to the jury by the trial judge, it was clear that the jurors were aware of their proper role in determining guilt and sentence. Williams v.

State, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

In a capital murder prosecution arising out of the murder of a husband and wife, on appeal from conviction and death sentence for the murder of the husband by defendant, who previously had been convicted and sentenced to life for the killing of wife, conviction was affirmed but death sentence was reversed and remanded where defendant did not receive a fair sentencing hearing due to admission of photographs of wife's body during trial and during closing argument, state's attempt to prevent defendant from calling a co-indictee as a witness, prosecutor's attempt during voir dire to get commitment from jury to exclude certain mitigating factors from its consideration of the death penalty, and prosecutor's comment on defendant's failure to testify. Stringer v. State, 500 So. 2d 928 (Miss. 1986).

On the cross-examination of a capital murder defendant who had testified that the trouble between victim and him had arisen over a named woman whom defendant regarded as being his wife, question posed to the defendant as to why had killed the named woman, was reversible error, despite court's admonishments to the jury, where, at the time the question was asked, there was no evidence in the record concerning the killing or death of the named woman, nor was there any evidence in the record that the defendant had ever been convicted of a previous crime. Smith v. State, 499 So. 2d 750 (Miss. 1986).

At trial of murder charge to which defendant's sole defense was self-defense, remarks by prosecutor, in closing argument, that the only reason defendant married his wife because he wanted to marry the only eyewitness to the murder he had committed, constituted an impermissible comment upon defendant's failure to call his wife to testify, and the trial court's refusal to sustain objections to such remarks was reversible error. Simpson v. State, 497 So. 2d 424 (Miss. 1986).

An accused sentenced to death on a capital murder charge was denied a fair trial by prosecutor's comments in closing argument as to accused's failure to testify,

and by defense counsel's attempted "explanation" in closing argument as to the reason his client had failed to testify. *West v. State*, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

An accused who had failed to testify or to put on proof at his capital murder trial was not entitled to a mistrial because of remarks by prosecutor in closing argument asking jury to recall defense's assertion in opening statement as to witnesses to be called. *West v. State*, 485 So. 2d 681 (Miss. 1985), cert. denied, 479 U.S. 983, 107 S. Ct. 570, 93 L. Ed. 2d 574 (1986).

Failure of district attorney to produce statement of homicide defendant for inspection and use by defendant and defendant's counsel does not prejudice defendant where statement, made to deputy sheriff, admitting killing of deceased, is not admission of guilt or inconsistent with defendant's plea of self-defense, and circumstances surrounding statement do not indicate that defendant was fleeing or acting in manner inconsistent with defense. *Buckhalter v. State*, 480 So. 2d 1128 (Miss. 1985).

Testimony from prosecution investigator concerning record of collect telephone call from murder victim to third party is inadmissible where state makes no effort to introduce telephone records and offers no explanation for absence of records; where admission of testimony has strong potential for prejudice in that it allows official endorsement of third party's already damaging testimony regarding telephone calls, admission of testimony is harmful error requiring reversal. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

Single reference by prosecution witness to capital murder defendant's intention to remain silent which is neither repeated nor linked with defendant's exculpatory statement is harmless error where there is overwhelming evidence of guilt and trial judge charges jury at conclusion of trial that no adverse inference may be drawn by invocation of right to remain silent. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Prosecutor's comment during closing argument in murder prosecution that he is not going to apologize for striking plea bargain deal with witness against defendant because murder victim is friend of prosecutor do not constitute such egregious error as to necessitate reversal of conviction where judge admonishes jury to disregard comments and there is no indication that comments prejudiced jury. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

Arguments of prosecuting attorney, approved by the court, in a murder prosecution that there was no use for the jury to return a manslaughter verdict, or one for a life sentence, because of the fact that the defendant was then serving a life sentence in the state penitentiary, was reversible error. *Hartfield v. State*, 186 Miss. 75, 189 So. 530 (1939), overruled in part by *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982), superseded by statute as state in *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

32. —Instructions.

Defendant, citing *Tran v. State*, 681 So. 2d 514 (Miss. 1996), argued that the circuit court erred in giving the jury written instruction which stated: "the court instructs the jury that if wounds are inflicted upon a person with a deadly weapon in a manner calculated to destroy life then intent may be inferred from the use of the weapon." The instruction did not run afoul of the condemned instruction in *Tran*, but even if it did, any error was harmless, for based on defendant's admissions to two witnesses (family members), there was no doubt that the State proved that he committed the murder with deliberate design. *Gibson v. State*, 895 So. 2d 185 (Miss. Ct. App. 2004).

Supreme Court ruled that there was no merit to defendants' argument that the trial court failed to instruct the jury on the element "without authority of law," even though an acceptable synonym of that phrase did not appear in a separate enumerated paragraph; when the instructions are read in their entirety, it becomes clear that the trial court properly charged the jury on the issues of law that defendants claimed were omitted. Although the exact language from the statute was not

used, this oversight was forgiven because the jury was adequately instructed through other language and the the trial court adequately covered the issue of self-defense. *Harris v. State*, 861 So. 2d 1003 (Miss. 2003).

Instructing jury on armed robbery, after indictment charged robbery, constituted formal rather than substantive amendment to indictment, and thus any variance which existed between indictment and proof was harmless error, where all defenses and evidence available to defendant remained equally applicable, and jury could not have convicted defendant of armed robbery and found him not guilty of robbery, inasmuch as armed robbery is simply robbery with weapon. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Defendant convicted of murder is in no position to argue that prejudice has resulted from court's giving of manslaughter by culpable negligence instruction. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

Jury instruction which contains surplus language serving only to raise state's burden of proof does not prejudice capital murder defendant. *Swanier v. State*, 473 So. 2d 180 (Miss. 1985).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Erroneous instruction as to manslaughter held not prejudicial to accused who was convicted of murder. *Busby v. State*, 177 Miss. 68, 170 So. 140 (1936).

Erroneous instruction held not prejudicial where defendant could not be convicted of manslaughter. *Dye v. State*, 127 Miss. 492, 90 So. 180 (1922).

Refusal of instruction that malice aforethought was necessary element of murder, and where there was reasonable doubt of its existence jury should find not guilty, was reversible error. *Burnett v. State*, 92 Miss. 826, 46 So. 248 (1908).

33. —Self-defense.

Under claim of self-defense, it was prejudicial error to admit evidence that a man wearing clothes similar to defendant's was seen watching place where decedent worked the night before killing. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Where self-defense claimed, and defendant testified he did not know deceased's position when he shot last three times because of smoke, instruction to find accused guilty if he fired after deceased turned his back and accused was in no danger at his hands, is prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Refusal to give instruction that jury might consider previous threat by decedent to kill accused next time they met was prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Exclusion of threats by decedent held reversible error. *Burks v. State*, 101 Miss. 87, 57 So. 367 (1912).

II. EVIDENTIARY MATTERS.

34. Evidence; generally.

Defendant's conviction for capital murder and arson were proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. *Fuqua v. State*, — So. 2d —, 2006 Miss. App. LEXIS 164 (Miss. Ct. App. Mar. 7, 2006).

Where defendant was charged with murder, the State's witnesses all testified that defendant approached the victim from behind and began shooting at him. The evidence was sufficient to enable a reasonable juror to reject defendant's self-defense theory and find him guilty of murder. *Amos v. State*, 911 So. 2d 644 (Miss. Ct. App. 2005).

In defendant's trial for capital murder, it was error for the trial court to have prevented defendant from using a State witness' recent grand larceny conviction for impeachment on the basis that said offense was not a "crimen falsi crime." Said conviction could have been used to impeach the witness under Miss. R. Evid. 609, since said crime was punishable by imprisonment in excess of one year, and because the probative value of that evidence was not substantially outweighed

by the danger of unfair prejudice. On the other hand, because the evidence against defendant was overwhelming, and because said witness' testimony was cumulative to that of another witness, the trial court's error was harmless. *Hammons v. State*, 918 So. 2d 62 (Miss. 2005).

State did not fail to prove beyond a reasonable doubt defendant's involvement in the crime; the testimony was undisputed that the victim and defendant had encountered one another at the nightclub early in the night and that the victim shook hands with all of defendant's friends; evidence was presented that the exact type of spent shell casings found in the parking lot area of the nightclub where defendant fired the weapon, were found at defendant's residence. *Smith v. State*, 904 So. 2d 1217 (Miss. Ct. App. 2004).

Defendant admitted that he took crystal methamphetamine earlier that evening, and he testified that the drug made him paranoid. Defendant hit the victim (who was trying to intervene), in the head with a "mag light" twice without saying a word to him, and after defendant and the victim's friend (who was the real object of defendant's wrath), argued about defendant's wife, defendant immediately pulled a loaded gun and shot the victim who was then disabled; such an act was a depraved heart act and defendant's conviction for first degree murder was supported by the evidence. *Conway v. State*, 915 So. 2d 521 (Miss. Ct. App. 2005).

In defendant's murder trial, the presence of fingerprints on the beer bottle and the "mag light" defendant used to attack the victim with, were irrelevant as to whether he acted in self-defense. Before trial, several witnesses had proffered testimony as to how the attack occurred, and there was no question that defendant struck the victim before shooting him moments later; thus, the circuit court judge did not abuse his discretion in denying defendant's motion for discovery and a continuance in that respect. *Conway v. State*, 915 So. 2d 521 (Miss. Ct. App. 2005).

Defendant's convictions for murder and for being a felon in the possession of a firearm were proper where he admitted

during cross-examination that he had lied when he was interrogated by police. Further, the State produced witnesses who testified that defendant had a gun in his possession before the shooting and that defendant was angry and desired to get even with the victim. *Hayes v. State*, 907 So. 2d 385 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Even if the jury had believed defendant's story that the gun went off by accident, they could have found him responsible for his wife's murder using a deadly weapon in a manner likely to kill or seriously injure his victim. Hitting a person in the head with a loaded gun was enough to indicate an intent to act in an extremely dangerous manner and the use of a pistol, a deadly weapon, in such a manner could have produced injury or even death without it's necessarily being fired; thus, defendant's motions for directed verdict and for a new trial were properly denied. *Marbra v. State*, 904 So. 2d 1169 (Miss. Ct. App. 2004).

In defendant's murder trial, where the victim had been found in a burned out car, the primary investigator did not have to be an expert in analyzing deoxyribonucleic acid (DNA), to testify as to whether DNA would have been present on objects found at such a crime scene. Further, since the investigator was first questioned about DNA by the defense attorney during cross-examination (opening the door), the district attorney was entitled to elaborate on the matter in rebuttal. *Davis v. State*, 904 So. 2d 1212 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Denial of defendant's motion for directed verdict was proper as sufficient evidence existed to justify his murder conviction; an eyewitness saw the shooting, another witness heard defendant admit to committing the crime, three other witnesses saw defendant kick the victim after the shooting, and a doctor's testimony corroborated the eyewitness testimony that the victim had been shot at close range. *Hall v. State*, 892 So. 2d 261 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

Where defendant's wife testified that defendant killed her ex-boyfriend, set his house on fire, and threw the pistol into the

Tennessee River, the evidence was sufficient to convict defendant of murder, arson, and possession of a firearm by a felon. The trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Roland v. State*, 882 So. 2d 262 (Miss. Ct. App. 2004).

Defendant's capital murder convictions and death sentence were proper where the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses, Miss. Code Ann. § 97-3-19(2)(f); further, shooting his child fit the description of felony child abuse in that it was a strike to the child in such a manner as to cause serious bodily harm, Miss. Code Ann. § 97-5-39. *Brawner v. State*, 872 So. 2d 1 (Miss. 2004).

Where defendant was charged with capital murder, defendant testified at trial that defendant was not promised, threatened or coerced to give the videotaped statement, and also testified to giving the statement of defendant's own free will, even though defendant's father told defendant not to speak to anyone until a lawyer arrived. Based on the totality of the circumstances, defendant's constitutional rights were not violated because defendant's statement was given freely without coercion, and the fact that defendant was 18 years old at the time of the arrest had no bearing on defendant's ability to comprehend the questions and waive defendant's rights. *Jacobs v. State*, 870 So. 2d 1202 (Miss. 2004).

Evidence did not support murder defendant's proposed instructions on culpable negligence; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, defendant shot door knob off with first shot, and defendant then loaded and fired three more shots through door while former paramour screamed and frantically attempted to summon help. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

State established proper chain of custody of handgun, live rounds of ammuni-

tion, and spent cartridges, despite fact that there may have been inconsistent statements by officer concerning number of live and spent shells exchanged, where there was no inference that evidence that was admitted had been tampered with or substituted, there was testimony from officers and crime lab concerning chain of custody, and defense counsel never asked that evidence be withdrawn or stricken from record. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Although suggested procedure to limit prejudicial effect of evidence of defendant's prior conviction would have been to allow defendant to stipulate to prior conviction and sentence when state sought capital murder conviction based on fact that defendant was under sentence of life imprisonment when he committed murder, introduction of evidence of prior conviction did not require reversal. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

There was no violation of the statute concerning spousal competency, § 13-1-5, or the evidence rule concerning the husband-wife privilege, Rule 504, Miss.R.Ev., where a defendant's wife told the police where to locate certain items which were subsequently used as physical evidence in the prosecution of the defendant for capital murder committed during the commission of a robbery, since the location of the items did not fall within any protected class of communication, and no out-of-court statements or trial testimony of the wife was admitted against the defendant. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

A state's witness was not incompetent to testify at a capital murder trial on the basis that he was a conceded perjurer where he had not been convicted of perjury. *White v. State*, 532 So. 2d 1207 (Miss. 1988).

In a murder prosecution, a State medical examiner should have been permitted to give his expert opinion that the dece-

dent's cause of death was due to the accidental ingestion of rubbing alcohol since his opinion would have been helpful to the jury in determining that the decedent drank the rubbing alcohol of his own accord, that the defendant was not responsible for the decedent's actions, and that she was not guilty of murder. *Kniep v. State*, 525 So. 2d 385 (Miss. 1988).

At trial of capital murder charge arising out of death of victim during the course of a burglary, defendant was not entitled to a directed verdict on the ground of the state's failure to prove that there was a "breaking", a necessary element of burglary, in view of witness' testimony that defendant had entered her house trailer through the front door over her protest after overpowering her by knocking her down as she tried to block his way and prevent his entry. *Smith v. State*, 499 So. 2d 750 (Miss. 1986).

Defendant and counsel in death penalty case may not sit idly by and make no objection to questionable testimony, exacerbate matter still further by ignoring testimony in motion for new trial, and argue against admission of testimony for first time on appeal, especially where there has been change in defense counsel on appeal. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

If defense counsel wishes to withhold from jury in capital murder case fact that coindctee testifying for state has pleaded guilty and received lesser sentence, counsel has duty to object to testimony offered by state and failure to object waives any assignment of error on appeal. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

State's case in murder prosecution is unusually strong where supported by testimony of 2 disinterested eye witnesses. *Holmes v. State*, 475 So. 2d 434 (Miss. 1985).

While prosecutor's remark that he did not expect state witness to lie while testifying is improper, trial judge may correct

matter by instantly admonishing jury to disregard comment. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Prosecuting attorney's display to jury of deformed hands of murder victim, pickled in jar of formaldehyde, is so prejudicial as to deprive defendant of fair trial. *Hickson v. State*, 472 So. 2d 379 (Miss. 1985).

Testimony which not only places murder defendant at scene of murder but involves defendant in procuring butcher knife with which assault on murdered police officer was initiated and which further shows participation of defendant in beating up officer so that officer's weapon could be taken from him and subsequently used to murder him is sufficient to support conviction for murder. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

Relevance of lead projectile removed from murder victim is adequately established by showing that projectile came out of metal jacketing which has been positively traced to murder weapon. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

In a prosecution for capital murder, the verdict in the guilt phase was within the law and the weight of the evidence, despite defendant's contention that the record did not show which of two co-felons wielded the blows causing the victim's death; capital murder is defined as an act done by any person engaged in committing robbery, and thus rendered unnecessary a factual determination of which co-felon caused the death. *Rigdon v. Russell Anaconda Aluminum Co.*, 381 So. 2d 983 (Miss. 1980), cert. denied, 449 U.S. 864, 101 S. Ct. 170, 66 L. Ed. 2d 81 (1980).

Although the prosecution is required to prove beyond a reasonable doubt the commission of the homicidal act, there is no obligation to prove a cause or reason that induced the accused to commit the act, if, without such proof, the evidence is sufficient to show that the act was done by him. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716 (1956).

In prosecution for murder, state is required to carry burden of proving defendant guilty, by competent evidence, beyond reasonable doubt, and competency of evidence is solely the responsibility and power of judge. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751 (1948).

The killing with a deadly weapon is assumed to be malicious, and therefore murder, and before the presumption disappears the facts of the killing must appear in the evidence and must change the character of the killing, either showing justification or necessity, before it is reduced from murder; if the facts relied upon to change such presumption are unreasonable and improbable, or if they are contradicted by physical facts and circumstances in evidence, then the jury may find a verdict either of murder or manslaughter according to the circumstances and facts in evidence. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417 (1947).

Accused charged with murder held not entitled to bail where facts disclosed that accused leveled gun and shot and mortally wounded father with whom he had been conversing while father's hands were held up, and no justification or explanation of killing was made. *Motley v. Smith*, 172 Miss. 148, 159 So. 553 (1935).

35. Witnesses—defendant as only witness to offense.

Weathersby rule, requiring that, if defendant is the only eyewitness, and if his version is reasonable, it must be accepted as true unless substantially contradicted in material particulars by credible witness or witnesses, or by physical facts or facts of common knowledge, was inapplicable in murder prosecution in which defendant claimed self-defense; defendant's version was contradicted by codefendant's testimony as to whether victim was drawing gun or merely had his hand on gun while in his pants, there was contradictory testimony from state's witness as to whether defendant was in front or back seat when he fired gun, and there was contradictory testimony from state's witness and defense witness as to whether victim was alone or with another person. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Weathersby rule, requiring directed verdict for defendant under particular cir-

cumstances, does not apply to situations where defendant's version has been contradicted, or where defendants were not the only eyewitnesses. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

The Weathersby rule was not applicable in a murder prosecution where the defendant's contention that he was guilty only of an excusable homicide was refuted when the statutory definition of that offense was considered, and many physical facts and circumstances contradicted or failed to support his version of the incident. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

A murder defendant was not entitled to a Weathersby instruction where the defendant's argument that his version of the facts was not contradicted by any credible evidence was based on his discounting the testimony of an eyewitness because her trial testimony differed from the initial statement she gave police and because of her "substantial bias" as the former wife of the victim, the eyewitness' testimony clearly conflicted with the defendant's version of the facts, and statements made by the defendant after the homicide were not consistent with his testimony at trial. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

The Weathersby Rule is applicable only in the context of whether or not the defendant killed with malice or intent, i.e., whether there is sufficient evidence to prove that the defendant killed with malice or intent where his or her version of the incident as the only eyewitness, says otherwise. Where the trial on a capital offense has reached the sentencing phase, the defendant's guilt has been found and Weathersby considerations are no longer applicable. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

Where the accused, following the slaying, gives conflicting versions of how the killing took place, or initially denies the act, the Weathersby rule does not apply. *Blanks v. State*, 547 So. 2d 29 (Miss. 1989).

Rule that where defendant or his witnesses are only eyewitnesses to homicide,

their version of what occurred if reasonable and not substantially contradicted in material particulars by credible evidence, physical facts, or facts of common knowledge, does not apply in case where there were eyewitnesses who supported both state's theory and defendant's theory with conflicting testimony; also physical facts substantially contradicted defendant's version. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

Where accused in murder prosecution is only witness, and his version is reasonable, and is not contradicted by credible witness, or by physical facts, or facts of common knowledge, such version must be accepted as true. *Simmons v. State*, 208 Miss. 586, 45 So. 2d 149 (1950).

Where defendant or defendant's witnesses are the only eyewitnesses to homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by credible witness or witnesses for state, or by physical facts or by facts of common knowledge. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61 (1950).

Where the defendant is the only surviving witness to a homicide his version of what occurred must, if reasonable, be accepted as true unless substantially contradicted in material particulars by the physical facts or by the facts of common knowledge, and it is not enough to contradict that version in mere matters of detail which do not go to the controlling substance. *Westbrook v. State*, 202 Miss. 426, 32 So. 2d 251 (1947).

In prosecution for murder incident to defendant's alleged battering of infant, defendant's testimony as only witness to baby's death was materially contradicted by physical facts and circumstances in evidence, as indicated by photographs and medical testimony and, under *Weathersby v. State* (1933) 164 Miss 898, 147 So. 2d 481, matter became question for jury and court was not required to direct verdict for defendant. *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

36. —Defendant's family members.

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant and his wife's history of domestic

violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony. *Marbra v. State*, 904 So. 2d 1169 (Miss. Ct. App. 2004).

State is not prohibited from calling children of defendant in capital murder case as witnesses; furthermore, state may be permitted to use leading questions in examining child who is primary witness against parent. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

State may be permitted to call son of defendant in capital murder case as witness notwithstanding failure of state to comply with discovery rule requiring prior disclosure of witnesses expected to be called where defendant is given opportunity to interview newly discovered witness, defendant has made no request for continuance on basis of unfair surprise, and where, additionally, defense counsel has been notified that witness has previously testified against another person involved in crime, and in normal flow of legal events would be expected to testify against father as to fact arising out of same crime. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

37. Admissibility; generally.

Defendant murdered the victim, a relative, outside his home some four years after the subject drive-by shooting. Furthermore, neither defendant nor his wife knew the identity of the individuals involved in the drive-by, but both merely associated the incident with the victim; although that information may shed light on why defendant owned the gun, it had little relevance for explaining why defendant approached the victim, who was not associated with the drive-by shooting, and the trial judge did not abuse his discretion in excluding it. *Smith v. State*, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008 (Miss. 2005).

In a murder trial, the investigating police officer testified that if a pistol had been fired when held by the handle, no gunpowder residue would have been

present on one's hand, while if one fired a pistol and held it the way defendant claimed he had held the pistol, there would have been powder burns on one's person or clothing; while the officer was not designated as an expert, the latter testimony was admissible as it was based on his experience and perception as a law enforcement officer and he did not state his opinion of whether or not defendant held the pistol in the manner he claimed. *Marbra v. State*, 904 So. 2d 1169 (Miss. Ct. App. 2004).

Defendant's capital murder trial was not a case where co-indictee was called as State's witness and defendant sought to use co-indictee's guilty plea to the lesser offense of manslaughter as a method of impeachment during cross-examination, nor was it a case where co-indictee was called by defendant and the State introduced co-indictee's plea as impeachment evidence. In either of those situations, the co-indictee's guilty plea would have been admissible as relevant evidence that might have affected the co-indictee's credibility in the eyes of the jury; however, defendant could not simply take advantage of co-indictee's plea to manslaughter and use this as substantive evidence that defendant had not committed capital murder. *Stewart v. State*, 881 So. 2d 919 (Miss. Ct. App. 2004).

Where defendant was tried for murdering his wife, having 2 out of more than the 20 witnesses who testified at trial briefly mention that the victim had bruises at various times prior to death did not violate Miss. R. Evid. 404(a)(1). Defendant never objected to the substance of the testimony, but only asked that the State show a time frame in which the bruises had occurred; the State did so and the trial court properly found the testimony was relevant and admissible. *Ross v. State*, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Because the laboratory director testified to having trained the technician who performed the DNA testing, having examined the technician's proficiency, and having checked the protocols and checked and signed all DNA test results, the laboratory director's testimony as to the DNA test

results was properly admitted; further, where the trial court found the laboratory followed the guidelines on the admissibility of DNA evidence as outlined in *Polk v. State*, there was no due process violation simply because the laboratory had not gained national certification at the time of the first set of tests. *Morris v. State*, 887 So. 2d 804 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed as caselaw mandated; thus, the trial judge did not find defendant's claim that defendant was forced to give a statement that defendant had committed murder of the child while in the commission of felonious abuse and/or battery of the child because the officers beat defendant. *Seeling v. State*, 844 So. 2d 439 (Miss. 2003).

Defense's objection in murder prosecution attacking authenticity of transcript of earlier prosecution of same murder, based on affidavit of defense team from that trial stating that transcript was hastily prepared and full of errors, was insufficient to raise genuine issue as to authenticity of transcript, especially where objection was not raised during trial, but only after state rested its case-in-chief. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Former testimony of unavailable witnesses read from transcript of earlier prosecution of same offense was admissible in murder prosecution under former testimony rule, despite alleged lack of meaningful opportunity to develop testimony of prosecution witnesses on cross-examination by use of impeachment material available to defense counsel in current trial; transcript of the former testimony of unavailable prosecution witnesses reflected extensive cross-examination. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

In capital murder prosecution, fellow inmate of defendant was properly allowed to testify regarding inculpatory statements defendant made to him while both were in jail, where inmate testified that he

received no favorable treatment in exchange for his testimony, there was no indication that inmate's testimony was inherently unreliable, and defendant did not cross-examine inmate. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Trial court did not abuse its discretion in permitting testimony of witness who had violated invoked rule of sequestration; witness heard two or three minutes of trial testimony, witness did not deliberately attempt to circumvent rule, and trial court conducted investigation and permitted defendant "full bore" cross-examination regarding technical violation by witness, but defense counsel chose not to cross-examine witness at all. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Handgun was properly admitted into evidence in capital murder prosecution where accomplice testified that handgun was same as used during robbery, and although not definitive on issue of whether handgun in question fired projectiles that killed victim, testimony of ballistics expert linked handgun to victim's injuries. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Letters written by defendant to accomplice after he had asserted his constitutional rights to silence and to counsel were properly admitted into evidence in capital murder prosecution; accomplice did not produce letters in attempt to get favorable treatment from state given that state was not aware of their existence until after accomplice had pled guilty, there was no evidence that accomplice was acting as agent of state when letters were received, and there was no evidence that accomplice deliberately attempted to elicit incriminating statements from defendant. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

At defendant's trial for murdering her husband, trial court acted within its discretion in admitting gun that had been retrieved from attic in home where victim was shot, even though gun could not be

positively identified as gun that caused victim's death; gun could not be excluded as cause of death, and defendant had dominion and control over gun when she placed it in attic and thereafter requested that another individual retrieve gun and bring it to defendant. *Rhodes v. State*, 676 So. 2d 275 (Miss. 1996).

Evidence that defendant purchased life insurance on her husband before his death was relevant to state's theory that defendant intended to murder her husband and to profit from it by setting him up for an accident and then proceeded to kill him and make it appear to be a suicide when her plan failed; suicide exclusionary clause in policy did not render evidence irrelevant. *Rhodes v. State*, 676 So. 2d 275 (Miss. 1996).

A trial court in a murder prosecution correctly disallowed the viewing of a videotape of the defendant being interviewed while hypnotized where the defendant was present and able to testify before the jury. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

A trial court in a murder prosecution correctly disallowed the viewing of a videotape of the defendant being interviewed while under the influence of sodium amytal where the defendant was present and able to testify before the jury. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

The trial judge in a capital murder prosecution did not err by excluding laboratory results showing that semen found in the victim's body did not come from the defendant where the judge reasoned that the defendant was not charged with rape and that the result of the test would tend to confuse or mislead the jury, the defendant's confession was corroborated by extensive physical evidence, and the fact that the semen found in the victim's body did not come from the defendant was explainable in several ways other than the supposition that he did not rape her as he confessed to doing. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A murder victim's verbal identification of the defendant, which was made 5 or 6 hours before the victim died, was admissible under the dying declaration exception to the hearsay rule, even though

there was nothing in the record which directly established the victim's consciousness of his impending death, since the fact that the victim was 76 years old and was shot in the heart indicated that his statements were made "while believing that his death was imminent." *Ellis v. State*, 558 So. 2d 826 (Miss. 1990).

It was proper for state to introduce pliers because there was competent evidence to show that blow by pliers could have caused type of injury pathologist observed on victim's head, despite claims by defendant that pliers were in his car, not on his person, and there was no proof that pliers were weapon which struck victim. *Stokes v. State*, 518 So. 2d 1224 (Miss. 1988).

Conversations recorded by undercover agent for State with defendant were admissible, despite contention that because tapes were subject to erasure or deletion and were partially inaudible they should not have been admitted into evidence. *Williamson v. State*, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, *Jasso v. State*, 655 So. 2d 30 (Miss. 1995), *Walton v. State*, 678 So. 2d 645 (Miss. 1996).

Trial judge did not abuse his discretion by permitting the introduction into evidence at a murder trial of a tape recording, along with a transcript of same, of an out-of-court statement made by the defendant with reference to the shooting, where, prior to the jury's hearing the tape, the court offered a cautionary instruction advising the jurors that the tape was primary evidence of what was or was not recorded and that the transcript was being furnished for their convenience in following the tape. *Dye v. State*, 498 So. 2d 343 (Miss. 1986).

Testimony as to the clothes defendant was wearing on a certain date was admissible in murder trial, not as proof of a crime distinct from the one was charged, but to identify defendant. *Graves v. State*, 492 So. 2d 562 (Miss. 1986).

Trial judge's finding that capital murder defendant's confession was voluntary was neither manifestly wrong nor against the overwhelming weight of the evidence where, at the hearing outside the presence of the jury, the defendant stated that he had signed confession to help his brother

and father, who were implicated in the crime, and testified as to threats made by police officer, but the threats were denied by the officer alleged to have made them. *Cabello v. State*, 490 So. 2d 852 (Miss. 1986).

A portion of defendant's statement confessing to the burglary of victim's trailer on the day previous to the murder was competent evidence since it was part of the circumstantial web implicating defendant. *Trunell v. State*, 487 So. 2d 820 (Miss. 1986).

In capital murder prosecution of black defendant based on murder of white highway patrolman, court may deny defense permission to cross-examine state witness as to fact that patrolman had previously killed black man where defense makes no attempt to demonstrate relevancy of such killing, either before or during trial. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Prior inconsistent statements of defense witness are inadmissible in capital murder prosecution where witness freely admits inconsistencies and asserts falsity of statements; error in admitting statements is compounded when district attorney argues them as substantive evidence of guilt during closing arguments. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

In a prosecution against accused for the death of his brother through gunshot wounds, where a doctor had told deceased about 40 minutes before he died that he was critically ill, his chances were narrowing, he felt deceased's family should be notified, and then asked the deceased who had shot him, whereupon deceased replied that it was the accused, but that the shooting was accidental, the statement of the deceased was admissible as a dying declaration. *Powell v. State*, 238 Miss. 283, 118 So. 2d 304 (1960).

In a prosecution of a husband for the killing of his wife, evidence that during an incident in a cafe some 30 or 40 minutes prior to the homicide, the accused had exhibited a knife similar in appearance to that found near the body of the deceased was competent as bearing upon the ques-

tion as to who had the knife at the time of the fatal difficulty. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595 (1958).

Statement of defendant that he hoped S would kill L held admissible as lending color to, and explaining, defendant's acts shortly thereafter borrowing gun and delivering it to S. *Fleming v. State*, 142 Miss. 872, 108 So. 143 (1926).

Evidence of the intoxication of the accused shortly before the killing is admissible. *Huddleston v. State*, 134 Miss. 382, 98 So. 839 (1924).

Evidence that several hours after killing, deceased's rifle was on safety, was admissible where no change in body shown. *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916).

Evidence that deceased was trying to procure pistol with which to shoot accused is improperly excluded. *Lucas v. State*, 109 Miss. 82, 67 So. 851 (1915).

38. —Res gestae; continuing acts.

Evidence as to whether defendant pulled wallet from victim's pocket was admissible in murder trial because it was so closely related to the killing as to form a single transaction or closely related series of transactions. *Robinson v. State*, 497 So. 2d 440 (Miss. 1986).

Telephone conversation between murder victim and third party in which victim identifies killer and in which third party hears voice in background does not constitute direct evidence, for purposes of determining whether murder prosecution is based solely on circumstantial evidence, where third party is unable to identify voice in background; however, testimony of third party as to content of conversation is admissible under *res gestae* exception. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

Where all of the matters complained of were admitted as part of the *res gestae* and the facts surrounding the homicide could not have been properly related without bringing the matters out, it was not error to admit evidence showing that the bullet that killed deceased also struck and injured the one-year-old baby deceased was holding at the time she was shot, that the defendant was engaged in selling liquor, or that he had been apparently living in adultery with the deceased. *Turner*

v. State, 244 Miss. 206, 141 So. 2d 249 (1962).

Evidence was held admissible in prosecution for murder committed for purpose of robbery, that within 5 minutes after the killing, the defendants, who were interrupted by a passing truck, returned to the scene and robbed the body, since the killing and robbery were continuing acts, and the robbery was supporting proof of the previously formed intention to rob by use of prepared weapons. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

39. —Admissions; confessions.

State presented ample evidence that the statement made by defendant at booking, and before he was read his *Miranda* rights, was voluntary and was not in response to express questioning or its functional equivalent. Defendant was simply present in the booking room when two officers were having a discussion about paperwork in order to book him, and defendant voluntarily responded to a question that was posed to one officer by the other officer, of how many charges of homicide were being filed against defendant; defendant independently volunteered the information that he had only shot one person, without compulsion or coercion. *Hammons v. State*, 918 So. 2d 62 (Miss. 2005).

In a capital murder case, defendant claimed that defendant's statements should have been excluded because defendant was denied the right to an initial appearance within 48 hours of arrest; however, the record showed defendant was given *Miranda* warnings, signed two waiver forms, and freely, voluntarily and intelligently gave the statements. The State's failure to provide an initial appearance within the time allowed was not, of itself, a reason to suppress defendant's confession. *Stewart v. State*, 881 So. 2d 919 (Miss. Ct. App. 2004).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed as caselaw mandated; thus, the trial judge did not find defendant's claim that defendant's claim credible that defendant was forced to give a statement that defendant committed murder of the child while in the commission of felonious abuse and/or

battery of the child because the officers beat defendant. *Seeling v. State*, 844 So. 2d 439 (Miss. 2003).

Finding that murder was committed during course of robbery, meeting statutory definition of capital murder, was supported by defendant's own statements to police and to newsmen and by fact that he took victims' purses, jewelry, and car. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

State has burden of proving all facts prerequisite to admissibility of defendant's confession beyond a reasonable doubt. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

A murder defendant's confession was not the product of an illegal arrest, since conflicting statements regarding the events surrounding the killing related by the defendant to law enforcement officers provided probable cause for his arrest; moreover, the defendant's confession was not the product of the arrest, since he gave his confession only after incriminating physical evidence was found by the officers, and the discovery of the physical evidence was the result of separate questioning of another witness and was therefore unconnected with the arrest. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

The delay from the time of a defendant's arrest until he was taken before a judicial officer did not violate Rule 1.04, Miss.Unif.Crim.R.Cir.Ct.Prac. and the 4th Amendment to the United States Constitution where his initial hearing was held within 48 hours of the time he was taken into custody for questioning, and there was no indication that the officers were purposely holding him in custody to gather sufficient evidence to justify his arrest; thus, his confession was not a product of any delay in taking him before a magistrate and was therefore admissible. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A defendant's confession was freely and voluntarily given, and was therefore admissible into evidence in his murder trial,

where law enforcement officers testified that he was given all the Miranda warnings prior to giving his confession and that he did not ask for an attorney at any time, he was familiar with his constitutional rights as evidenced by his refusal to sign a waiver form and the fact that he had previously been convicted of a felony, and his videotaped confession did not suggest any coercion. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A murder defendant's initial refusal to sign a waiver of rights form did not constitute a demand for an attorney where he was not questioned again until more than 32 hours had lapsed when he was presented with incriminating physical evidence connecting him to the crime, and he was again advised of his rights before further questioning; thus, admission of his confession into evidence did not violate his constitutional right against compulsory self-incrimination or right to an attorney. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

In order to establish the admissibility of a murder defendant's confession, the State was not required to offer as witnesses law enforcement officers who allegedly yelled at the defendant and were abusive when he was initially questioned, since the alleged statements made by the officers had no bearing on the defendant's confession which was made 2 days later after he was given the Miranda warnings. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

Incriminating statements made by a murder defendant were properly admitted into evidence where the defendant was not under arrest at the time of the questioning, the law enforcement officers were merely seeking information about a missing person, the defendant voluntarily went with the officers to the sheriff's office, he was free to leave, and he was taken home by an officer when the questioning was over. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

The trial court in a capital murder prosecution erred in refusing to suppress the defendant's confession as involuntary where a former teacher and retired minister was called in by the sheriff to meet privately with the defendant, the minister

communicated to the defendant, at the sheriff's direction, the notion that there might be a chance for mercy if he volunteered to cooperate, the minister and the defendant discussed the death penalty and the religious ramifications of the defendant's action, a sheriff's deputy told the defendant that he thought it would look better if the defendant confessed, and an investigator who conducted the interrogation with the sheriff admitted that the defendant may have been given the impression by the investigator and the sheriff that cooperation could be of some benefit. *Abram v. State*, 606 So. 2d 1015 (Miss. 1992).

A trial court erred in admitting accomplices' statements into evidence in a murder prosecution under Rule 106, Miss.R.Ev., which contemplates the introduction of a writing by a party and contemporaneous introduction of other parts of the statement to prevent the misleading of the jury, where the defense counsel was merely cross-examining the police officer who investigated the accomplices and he in no way introduced parts of these statements into evidence. Additionally, there were serious confrontation problems since the jury was unable to observe the demeanor of the accomplices when they made the unsworn statements and the statements were taken under the coercive atmosphere of police interrogation. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

Court did not err in admitting into evidence statement made by defendant, after getting in patrol car, telling officers where gun was and that he "didn't mean to do it, that it was only an accident," where officers gave defendant Miranda warnings prior to statement. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

Statement of defendant that "I shot her" was admissible into evidence, falling within exclusion to Miranda which recognizes that where interrogation is part of "general on-the-scene investigation" Miranda warnings are not prerequisite to admissibility of statements. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

Admission of photograph of victim's body in evidence at murder less-than-capital trial was not error since, even though the homicide was not denied, or contradicted, the photograph had probative value in corroborating testimony of police officer as to the position and condition of the body. *Hunter v. State*, 489 So. 2d 1086 (Miss. 1986).

Notwithstanding defendant's claim that his request to consult an attorney had been refused, there was no error in admitting his written statement into evidence where the defendant, as well as 2 police officers attending the interrogation when the statement was given, testified that it was freely and voluntarily given, and the officers testified that there was strict adherence to the Miranda warnings. *Trunell v. State*, 487 So. 2d 820 (Miss. 1986).

Fact that prosecuting attorney has threatened alleged accomplice of capital murder defendant with additional 65 years incarceration and possibility of death sentence if accomplice refuses to testify for state and instead testifies for defendant is admissible on issue of credibility of accomplice's testimony against defendant. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

In a prosecution for capital murder based on a charge of committing murder while engaged in armed robbery, the trial court properly admitted into evidence the defendant's alleged confession, even though the corpus delicti of robbery had not been proven, where the corpus delicti of murder had been sufficiently proven, and therefore the robbery could then be proved entirely from the confession to make out a case of capital murder. *Gentry v. State*, 416 So. 2d 650 (Miss. 1982).

Where accused, after having been arrested but before being formally charged with murder, voluntarily testified before a coroner's jury that he had accidentally killed his wife while shooting in self-defense at his father-in-law, and none of this testimony was admitted in the trial on the merits, accused's constitutional privilege not to incriminate himself was not violated. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

The court did not err in admitting in evidence defendant's confession, which

was fully corroborated by the state's evidence and was consistent with the physical facts and circumstances, where it appeared that the confession was made to two members of the highway patrol on the day of defendant's arrest, and upon a preliminary inquiry into the admissibility of the confession, there was testimony by the highway patrolmen that the defendant was advised of his rights, and that the confession was not induced by fear, threat, or promise of reward; neither was the confession inadmissible for the reason that the defendant was unlawfully detained. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957).

The trial court did not err in admitting accused's confession in a trial of a homicide prosecution where it appeared that the confession was voluntarily given without threats, promises or hope of reward, and the statement, which was written by the sheriff exactly in accordance with what the accused told him, was read to the accused before it was signed "his mark X" by a colored cook in the jail. *McCarty v. State*, 230 Miss. 330, 92 So. 2d 853 (1957).

Since the state proved the corpus delicti, the accused's confessions and admissions were properly admitted in evidence. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956).

Before admission in evidence of alleged confession of one on trial on charge of murder, court must decide on preliminary investigation whether there was a confession, and if so, whether it was free and voluntary. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751 (1948).

If an alleged confessor, who is on trial for murder, did not sufficiently understand language of confession, or if person to whom confession was allegedly made did not accurately and certainly understand what confessor said, there was no lawful confession, and court should hear evidence of defendant and his witnesses on this issue on preliminary hearing. *Morroco v. State*, 204 Miss. 498, 37 So. 2d 751 (1948).

40. —Motive; propensity for violence.

Evidence regarding victim's involvement as state's field secretary of national civil rights organization, his efforts to integrate schools, and his quest for equal

rights for African American citizens was admissible in murder prosecution to show motive consistent with state's theory that murder was racially motivated. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

In a murder prosecution involving a victim who died of smoke inhalation after receiving a blow to the head, the admission of facts concerning the murder of another victim who died from shotgun wounds did not violate the defendant's rights under the Eighth Amendment to the federal constitution or the due process clauses of the Mississippi Constitution and the federal constitution, where the revelation that a second person was missing was necessary in putting together the pieces of the case, evidence that the investigating officers discovered 2 bodies in the trunk of the victim's car was unavoidable, and the testimony of the other victim's mother was necessary in that she was the only witness who could testify to seeing the defendant near the victim's house, she was able to discuss what the victim was doing on the day he was killed, and she was able to give some important time frames. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

Trial court was not in error in allowing state to introduce evidence of murder male companion of defendant's ex-wife in trial for murder of ex-wife, under exception for admission of other crimes, motive, intent, preparation, and plan; evidence of second crime, when so closely related to the one being tried as to form one event, is admissible when necessary to give plausibility to testimony presented to jury. *Shaw v. State*, 513 So. 2d 916 (Miss. 1987).

Circuit Court did not err in refusing testimony that victim had reputation for violence and for carrying weapon where all testimony heard prior to pro-offer of such testimony indicated that defendant was aggressor, and under Mississippi law at time of trial, character or reputation of deceased was not admissible in murder case unless there was doubt as to who was aggressor. *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987), cert. denied, 484 U.S. 1016, 108 S. Ct. 723, 98 L. Ed. 2d 672 (1988).

Trial court erred in ruling that reputation testimony must originate in the com-

munity where victim resided, and in excluding testimony of witness as to victim's reputation, in the trucking industry, for violence, but the error was harmless in view of abundance of evidence as to victim's violent nature already admitted. *Mullins v. State*, 493 So. 2d 971 (Miss. 1986).

Evidence that murder defendant may have been high on marijuana is admissible as tending to show that defendant was engaged in act eminently dangerous and evincing depraved heart; evidence of use of marijuana at time prior to date on which murder occurred is admissible if defendant has raised defense of insanity. *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

In capital murder case arising from killing of deputy sheriff while deputy was attempting to serve arrest warrant based on simple assault charge filed by defendant's spouse, testimony of spouse and of judge who issued warrant is admissible to shed light on motive for commission of crime and further to tell jury full story giving rise to deputy's death. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

Evidence of marital discord occurring only days before wife is shot by husband is admissible in murder prosecution of husband as tending to prove motive, malice, premeditation and criminal intent. *Fuller v. State*, 468 So. 2d 68 (Miss. 1985).

Evidence that defendant on trial for murder of wife had, 10 months prior to death of wife, unsuccessfully solicited someone to kill her, is not too remote to be admissible. *Hammond v. State*, 465 So. 2d 1031 (Miss. 1985).

Evidence of killings committed in Georgia is inadmissible in guilt phase of capital murder prosecution for killing committed in Mississippi even though defendant was fleeing Georgia authorities and used gun and handcuffs taken from Georgia victim in Mississippi killing. *West v. State*, 463 So. 2d 1048 (Miss. 1985).

In prosecution for murder, evidence of other crimes is incompetent except to show identity, guilty knowledge, intent or motive, or where offense charged is so interwoven with other offenses that they cannot be separated. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

Evidence of events forming continuous and inseparable sequence culminating in murder is competent in murder prosecution to reveal motive and establish malice or deliberation in the homicide. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

Error, in murder trial, to admit evidence of various specific acts of violence committed by deceased at many different times and places as well as his general reputation for violence. *McCoy v. State*, 91 Miss. 257, 44 So. 814 (1907).

41. —Photographs, other prejudicial evidence.

Trial court did not err in allowing the admission of crime scene photographs to show the condition of the victim's body where the victim had been dead for approximately two months before her body was discovered and the condition of the body was relevant to determining the date of death. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Admission of photographs of victim's body in its casket taken at his funeral, introduced during testimony of victim's widow, was not unduly prejudicial to defendant in murder prosecution; widow's testimony, used in conjunction with photographs, established circumstances of killing and corpus delicti. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Admissibility of photographs rests within sound discretion of trial court which will be upheld unless there has been abuse of discretion. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

In determining admissibility of photographs, court must keep in mind rule governing exclusion of relevant evidence and must consider whether proof is absolute or in doubt as to identity of guilty party and whether photographs are necessary evidence or simply ploy on part of prosecutor to arouse passion and prejudice of the jury; same standard is applicable in determining admissibility of photographs are applicable to videotapes. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Videotape of crime scene was not cumulative so as to be inadmissible where the only visual evidence submitted prior to the videotape was photograph of victim's face for the purpose of identification and where identity of victim's murderer was still in question prior to the admission of the videotape. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Videotape which depicted position of victim's body at the crime scene corroborated aspects of defendant's confession and aided prosecution in identifying him as the guilty party and was necessary to help jury to visualize bloody crime scene when hearing testimony regarding the injuries which the victim received, how and where she received them, and the force necessary to inflict her injuries. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Autopsy photographs may be admitted during sentencing phase of capital murder prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Medical examiner could testify as to condition of capital murder victim's body at time of autopsy and on cause of death, over complaint that prejudicial effect of testimony outweighed its probative value; evidence was admissible to establish death of human being, and criminal agency causing death, and trial court had sustained defendant's objection to repetitive nature of testimony. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

A videotape of the exhumation of the victim's body from the site where the defendant had buried it should not have been admitted into evidence in a murder prosecution against the defendant, where the videotape did not reveal more than that which was revealed through photo-

graphic evidence. However, admission of the videotape did not warrant reversal in view of the overwhelming evidence presented against the defendant. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

Even if photographs of a murder victim were cumulative or repetitive, the admission of the photographs into evidence was harmless where the photographs were not particularly gory and did not have a highly inflammatory effect on the jury. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In a slaying in which the only eyewitness is the defendant, and it is argued that the slaying was something other than murder, the relevancy of photographs showing the scene and victim is increased. Photographs from different angles in such a case are for the jury to evaluate. However, there can be a limit both in the number of photographs and the manner in which they are displayed to the jury. The discretion afforded circuit judges is by no means unlimited, and they are strongly urged to curtail excess. *Griffin v. State*, 557 So. 2d 542 (Miss. 1990).

In a murder prosecution, extremely gruesome photographs of the victim's nude and partially decomposed body were improperly admitted into evidence since the probative value of the photographs was outweighed by their tendency to inflame and prejudice the jury; the State could have shown the angle and entry of the bullet wound without a full-color, close-up view of the decomposed maggot-infested skull. When presented with such photographs, the trial judge should carefully consider all the facts and circumstances surrounding the admission of this particular type of evidence. More specifically, the trial court must consider: (1) whether the proof is absolute or in doubt as to identity of the guilty party, as well as, (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury. *McNeal v. State*, 551 So. 2d 151 (Miss. 1989), appeal after new trial, 617 So. 2d 999 (Miss. 1993).

In determining the admissibility of photographs, the discretion of the trial judge runs toward almost unlimited admissibil-

ity regardless of the gruesomeness, repetitiveness, and the extenuation of probative value; no meaningful limits exist in the balancing of the probative/prejudicial effect of photographs. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Error, if any, in admitting evidence alleged to be hearsay, that defendant had gun was harmless, where evidence was otherwise clear that defendant did have gun. *Alford v. State*, 508 So. 2d 1039 (Miss. 1987).

Admission into evidence at a capital murder trial of portions of defendant's testimony at his father's earlier trial was reversible error, where the prior testimony, which could not be characterized as admissions, was offered as part of the state's case-in-chief, and not in an attempt to impeach defendant or to rebut his testimony at his trial. *Stringer v. State*, 491 So. 2d 837 (Miss. 1986).

Testimony from prosecution investigator concerning record of collect telephone call from murder victim to third party is inadmissible where state makes no effort to introduce telephone records and offers no explanation for absence of records; where admission of testimony has strong potential for prejudice in that it allows official endorsement of third party's already damaging testimony regarding telephone calls, admission of testimony is harmful error requiring reversal. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

While wholesale introduction of gruesome photographs in capital murder prosecution is not endorsed, trial court may admit 5 photographs where each portrays some evidence not shown by others. *Cabello v. State*, 471 So. 2d 332 (Miss. 1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (1986).

The admission into evidence of photographs of a slain victim was a matter resting within the sound discretion of the circuit judge, and where, in a prosecution under section 97-3-19(2)(e) for capital murder while in the commission of the crime of rape, the photographs had evidentiary value in proving the brutality of the slaying, they were proper evidence.

Ruffin v. State, 447 So. 2d 113 (Miss. 1984).

Prejudicial error was not committed in allowing a constable to testify that one accused of murder had lost the murder weapon while fleeing from the scene and that the accused, when not found in his father's home, was called by the latter from nearby bushes. *Vassar v. State*, 200 Miss. 412, 27 So. 2d 541 (1946).

42. — Photographs as admissible.

Pre-death photograph was shown to the victim's stepfather and the district attorney asked the stepfather whether the photograph fairly depicted the victim (who had been burned beyond recognition). The photograph served the legitimate, evidentiary purpose of identifying the victim and was properly admitted. *Davis v. State*, 904 So. 2d 1212 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

In defendant's criminal prosecution for murdering his wife's ex-boyfriend, the trial court did not err in admitting photographs of the victim and crime scene. The photographs were probative and relevant, because they revealed the position and location of the victim's body. *Roland v. State*, 882 So. 2d 262 (Miss. Ct. App. 2004).

Trial judge did not abuse his discretion in admitting color photographs of murder victim during capital prosecution; photographs served to clarify and supplement testimony and to describe cause of victim's death. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Although photographs of crime scene were essentially the same evidence as videotape of the crime scene which had been admitted earlier, they were properly admitted because they were clearer than the video, and were used by physician in proving cause of death, and aided jury in determining heinous, atrocious, and cruel nature of the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Color photographs of murder victim's body, taken from close range, that showed position of body in car, were admissible. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S.

Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Probative value of 6 color 4"x6" autopsy photographs depicting fatal stab wounds to children, admitted during sentencing phase of capital murder prosecution to demonstrate location and extent of wounds as well as pain and suffering of victims, outweighed any prejudicial effect; photographs were taken after bodies had been cleaned up but before autopsies were performed. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court did not abuse its discretion, in capital murder case, by admitting into evidence photograph of deceased; photograph had been shown to various witnesses, in order to verify identity of victim, prior to point at which defendant stipulated as to identity. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court had discretion to admit into evidence, in capital murder case, photograph showing defendant with 2 companions in his house, with one photograph depicting him bare chested, generally unkempt, holding beer can and sticking his tongue out; photograph corroborated testimony of one companion that defendant had been with her after he had allegedly committed crime and he was acting as if nothing had happened. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court could admit photographs showing capital murder victim after corpse had been burned by perpetrator, even though pictures were acknowledged to be "gruesome"; pictures could assist jury to infer that defendant decided to burn body to destroy fingerprint, pubic hair and clothing fiber identification evidence, cover his tracks and avoid apprehension. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not abuse its discretion in capital murder case in allowing into

evidence photographs depicting victim's gunshot wounds; photographs served to clarify and supplement coroner's testimony and described cause of victim's death. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial court did not err in admitting gruesome photographs into evidence in a murder prosecution where they identified the victims, showed the effect resulting from the gunshot wounds inflicted by the defendant, and corroborated medical testimony. *Westbrook v. State*, 658 So. 2d 847 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the trial judge did not err in admitting photographs of the victim into evidence where he made a thorough examination of the photographs in chambers prior to admitting them into evidence, and a pathologist testified that they were probative and relevant on the issue of whether the murder was especially heinous and cruel. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

Color photographs of a murder victim taken during a postmortem examination were properly admitted into evidence in the murder trial where the photographs depicted the location of the shotgun pellet wounds which caused the victim's death, and a forensic pathologist used the photographs to explain the location, trajectory, and angulation of multiple entrance and exit wounds. *Hart v. State*, 637 So. 2d 1329 (Miss. 1994).

In a murder prosecution, the admission of an autopsy photograph showing a close-up of the victim's neck cut open by the pathologist was not error since the photograph provided graphic evidence that the victim's trachea was lined with soot and therefore substantiated the State's theory that the defendant had knocked the victim unconscious and then poured gasoline over his body and ignited it, resulting in the victim's death due to smoke inhalation. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

In a prosecution for a single murder, it was not error for the trial court to allow

the admission of photographs showing the bodies of 2 victims in the trunk of a car where they were found, one of which graphically showed the intestines of the second victim exposed and hanging from his body, in spite of the defendant's argument that the photographs of the second victim were extraordinarily gruesome and were not necessary to establish the defendant's role in the murder of the first victim, where the photographs supplemented the investigating officers' testimonies concerning what they found in the trunk of the car, and the investigators could not have taken a picture of the first victim's body without also having the second victim in the photograph, unless they tampered with the evidence. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

A trial judge did not abuse his discretion in admitting photographs of a murder victim's body into evidence where the body was fully clothed, there was no large amount of blood, the body was not decomposed, and the photographs were used by a forensic pathologist to point out wounds and the effects of those wounds. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Color photographs of the victim's body were admissible in a murder prosecution where the defendant claimed to have observed the victim's body only briefly after entering the victim's darkened living room behind a police officer, since the photographs were relevant to the issue of the defendant's detailed knowledge of the condition of the body. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

In a murder prosecution, a photograph of the victim's body which showed the extent of a wound to the head and showed brain tissue, blood and other unspecified fragments on the floor and the wall, was admissible where testimony indicated that the defendant was the only person at the crime scene wielding a shotgun and the photograph accurately reflected "the force and violence" a shotgun would cause as opposed to a pistol or handgun, and the photograph corroborated the expert testimony of the doctor who testified that the photograph showed very clearly that

brain and other tissue was splattered on the lower part of the door and the floor instead of on the ceiling or the upper portion of the wall, which corroborated earlier testimony to the effect that the victim was kneeling or crawling when she was shot. *Stringer v. State*, 548 So. 2d 125 (Miss. 1989).

In a murder prosecution in which the victim showed signs consistent with someone who had been choked or strangled, photographs of the victim's face and neck lying on an autopsy table, though grisly, were probative of the condition of the body, both as to the cause of death and to rebut the defendant's claim that he shot the victim in self-defense, and were therefore admissible. *Stokes v. State*, 548 So. 2d 118 (Miss. 1989), cert. denied, 493 U.S. 1029, 110 S. Ct. 742, 107 L. Ed. 2d 759 (1990), dismissal of habeas corpus aff'd, 123 F.3d 858 (5th Cir. 1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

Autopsy pictures of a homicide victim clearly indicating the number and placement of stab wounds were admissible as evidence of the defendant's state of mind and to show the placement of the wounds. *Marks v. State*, 532 So. 2d 976 (Miss. 1988).

Photographs of a homicide victim as she was found at the scene of the crime were admissible since the jury was entitled to see the manner in which the deceased met her death, particularly since the defendant testified to having no memory of the immediate circumstances surrounding the killing. *Marks v. State*, 532 So. 2d 976 (Miss. 1988).

In a trial for capital murder of a 6-month-old child, photographs of the victim taken when she was in the hospital prior to her death were admissible in evidence where they accurately depicted bruises on her neck and chest and a cut on her inner lip, and consequently were of probative value, particularly in light of the defendant's assertion that the child simply went limp while he held her and that no blood was present before the child was taken to the hospital. *Monk v. State*, 532 So. 2d 592 (Miss. 1988).

Photographs of the body of a gunshot victim showing bruises on the body, the

wound caused by the bullet, and the general condition of the body and marks on it, were admissible in a murder prosecution where they contradicted the defendant's testimony that the decedent had committed suicide. *Jackson v. State*, 527 So. 2d 654 (Miss. 1988).

In a murder prosecution, photographs of the decedent's body were admissible where they showed the extent of the decedent's wounds and lacerations and were, therefore, essential to the main issue in the case, namely, whether the decedent died from blood loss or alcohol consumption. *Knip v. State*, 525 So. 2d 385 (Miss. 1988).

Trial court did not abuse its discretion in admitting into evidence photographs depicting bullet holes at and around crime scene. *Alford v. State*, 508 So. 2d 1039 (Miss. 1987).

Trial court did not abuse its discretion in allowing into evidence photographs depicting location of deceased's wounds, since it was evidence relevant to show that deceased was not facing direction from which shots were fired, thereby negating defense that deceased was aggressor from whom defendant had right to defend himself. *Alford v. State*, 508 So. 2d 1039 (Miss. 1987).

At a murder less-than-capital trial, where defendant's experts had already testified that defendant was competent to stand trial, testimony by state's expert as to his and associate's finding on the issue was not inadmissible hearsay. *Hunter v. State*, 489 So. 2d 1086 (Miss. 1986).

Photograph of scene of killing taken shortly after killing occurred, which is fair and accurate depiction of scene other than use of flash to light scene and presence of investigating officer, is admissible so long as presence of officer and additional light is carefully explained to jury each time photograph is used. *Holmes v. State*, 483 So. 2d 684 (Miss. 1986).

Gruesome photograph of murder victim is admissible where it is probative of severity of victim's wounds and is clearer than photograph which has previously been introduced without objection. *Swanier v. State*, 473 So. 2d 180 (Miss. 1985).

Color photographs of deceased and scene of crime are admissible into evi-

dence at homicide trial, at which defendant is ultimately convicted of manslaughter, where photographs depict location of wound and tend to negate defendant's assertion that deceased had reached under shirt as if going for gun prior to shooting and where pictures of interior of bar in which shooting occurred tend to negate defendant's statement that he placed decedent in chair after shooting. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

In prosecution for murder, photographs of deceased showing exact location, range and extent of wounds causing death of victim are relevant and competent as evidence, although photographs produce sympathetic emotions in jurors to prejudice of defendant. *Seals v. State*, 208 Miss. 236, 44 So. 2d 61 (1950).

43. —Expert testimony; scientific techniques.

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. *Ross v. State*, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Pathologist's testimony was admissible to prove cause of victim's death, even though pathologist could not with certainty pinpoint cause of death of decomposed body, and even though pathologist had prepared 2 arguably inconsistent reports; pathologist's opinion tended to make cause of death more probable than it would have been without his testimony, and pathologist was subject to rigorous cross-examination. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

A trial court in a murder prosecution properly refused to permit a psychiatrist's opinion testimony that the defendant was telling the truth when he was interviewed while under the influence of hypnosis,

since this field is not recognized as a reliable science and the physician's opinion would have been "improper bolstering" of testimony. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

A trial court in a murder prosecution properly refused to permit a psychiatrist's opinion testimony that the defendant was telling the truth when he was interviewed while under the influence of sodium amytal, since this field is not recognized as a reliable science and the physician's opinion would have been "improper bolstering" of testimony. *Thibodeaux v. State*, 652 So. 2d 153 (Miss. 1995).

The trial judge in a capital murder prosecution did not err in refusing to admit the results of polygraph tests, since the results of polygraph tests have not reached that stage in scientific reliability justifying their competency as substantive evidence. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A trial court in a murder prosecution did not err in excluding a psychologist's expert opinion testimony that the defendant suffered from "post-traumatic stress" syndrome and therefore had "reasonable grounds" to believe that the victim was going to kill him, which would have supported the defendant's claim of self-defense, since the question of whether a defendant has "reasonable grounds" to fear imminent death or serious bodily injury is governed by a "reasonable person" standard, and is a matter to be decided by the fact-finder alone. *Hart v. State*, 637 So. 2d 1329 (Miss. 1994).

The trial court in a murder prosecution properly allowed the admission of DNA "matching" evidence where the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests. *Polk v. State*, 612 So. 2d 381 (Miss. 1992).

A trial court in a murder prosecution did not abuse its discretion in admitting into evidence a plaster cast and photographs of footprints found near the victim's body, even though a forensic toxicologist with the Mississippi Crime Lab testified that the sample was insufficient to connect the defendant's shoes to the cast, where there was no dispute that the footprints were actually found at the

scene of the crime. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

At the joint trial of 2 defendants charged with conspiracy to commit murder, admission, in prosecution's case-in-chief, of co-conspirators' post-arrest statements, wherein each co-defendant pointed a finger at the other, was reversible error, where these statements fell outside the co-conspirator's exemption from the hearsay rule, did not interlock in substantial particulars, and were not attended by other indicia of reliability sufficient to satisfy the conspirators' rights under the confrontation of witnesses clauses of federal and state constitutions. *Mitchell v. State*, 495 So. 2d 5 (Miss. 1986).

Medical testimony of prior injuries to child tending to establish previous abuse by parent is admissible in murder prosecution of parent where sufficient predicate is laid of evidence showing parent to be in exclusive control of child prior to time that injuries occurred and of expert medical testimony contradicting parent's version of accidental causes of death. *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Defendant in murder prosecution is not entitled to admission of testimony of psychiatrist as to defendant's grief following death of victim, especially where testimony of psychiatrist would be cumulative. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

The trial court in a murder prosecution did not err in excluding testimony of psychologists as to defendant's state of mind at the time of the killing, where, as long as the complete defense of insanity was not at issue, expert psychiatric testimony was not available to either party to attempt to reduce the charge of murder under this section to one of manslaughter under § 97-3-35. *Taylor v. State*, 452 So. 2d 441 (Miss. 1984), but see *May v. State*, 524 So. 2d 957 (Miss. 1988).

44. Circumstantial evidence.

Defendant mainly took issue with the forensic pathologist's testimony, and claimed that a reasonable hypothesis of defendant's innocence was the possibility that the victim (defendant's wife) had shot herself. However, all of the expert's testi-

mony was based upon a reasonable medical certainty that the victim could not have fired the shot that killed the victim, and the expert's testimony was based upon physical facts: the location of the entrance wound, the resting place of the bullet, and the distance from the head to where the gun was fired; moreover, the victim had defensive wounds and the State met its burden of proof through strong circumstantial evidence. *Ross v. State*, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Where defendant was charged with murder in the shooting death of his wife, after forensic experts determined that she was killed by two gunshots instead of one, and because there was only one entrance wound and evidence of two bullet trajectories, suicide was excluded because the victim would not have had sufficient motor skills to fire a second shot, a jury could conclude that defendant's defense of suicide did not constitute a reasonable hypothesis of innocence, and the circumstantial evidence used to convict defendant was sufficient to establish guilt beyond a reasonable doubt. *Jones v. State*, 857 So. 2d 740 (Miss. 2003).

Crediting all the evidence and all reasonable inferences most favorable to the State, a jury could reasonably exclude the hypothesis that the victim committed suicide; the circumstantial evidence used to convict defendant of murder was sufficient to establish guilt beyond a reasonable doubt. *Cox v. State*, 849 So. 2d 1257 (Miss. 2003).

Evidence that a defendant who was charged with the murder of a woman whose badly decomposed body was found in Mississippi in an area where defendant had relatives, that the defendant had left New Mexico with the victim to visit the father of the victim's infant child in Texas shortly before the probable time of the victim's death, that defendant was seen with the victim's child in Memphis shortly after the date of the victim's death and heard telling people that the child's mother was either on tour as an entertainer or was in jail, that defendant was in possession of a gun and ammunition similar to those used to kill the victim, that

defendant used a false name when contacted by police in Florida, as well as other circumstantial and scientific evidence linking the defendant to the crime, was sufficient to support the defendant's conviction of the crime of murder. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Because case was largely circumstantial, jury was required to believe defendant guilty beyond all reasonable doubt and to exclusion of every reasonable hypothesis other than that of guilt. Evidence showed that defendant, convicted of murder, had started walking home with victim, was gone some 30 to 40 minutes, returned alone, told individuals upon return that "somebody done got" victim, was wet to waist and trembling or shivering; defendant and others found victim's body in ditch filled approximately waist deep with water, and "beggar's lice" were found on clothes of victim and defendant. *Stokes v. State*, 518 So. 2d 1224 (Miss. 1988).

When its case is based entirely upon circumstantial evidence, state is required to prove defendants guilty not only beyond reasonable doubt, but also to exclusion of every reasonable hypothesis consistent with innocence; circumstantial evidence need not exclude every possible doubt, but only every other reasonable hypothesis of guilt, and mere fanciful, farfetched, or unreasonable hypothesis of innocence is not sufficient to require acquittal. *Montgomery v. State*, 515 So. 2d 845 (Miss. 1987).

Circumstantial evidence was sufficient to sustain conviction for murder where: (1) motive existed; (2) serial number of rifle was listed in ledger found in defendant's room; (3) defendant's diary contained schedule of victim's morning procedure and whereabouts; (4) bullets extracted from victim's body plus those found in defendant's drawer, door facing, and those remaining in clip were of same type, accounting for all 15 bullets missing from box of ammunition found nearby; (5) defendant was in area of murder on morning of murder; (6) defendant admitted smoking brand of cigarettes found in victim's office commode; and, (7) defendant's fingerprints were on door facing of back door. *Montgomery v. State*, 515 So. 2d 845 (Miss. 1987).

Knife was admissible in evidence, notwithstanding defendant's objection based on fact that one witness did not remember the knife as having a leather handle, where other witnesses testified that the knife in question was found at the stabbing scene, established the chain of custody thereof, and described the weapon. *Graves v. State*, 492 So. 2d 562 (Miss. 1986).

On a coram nobis proceeding, defendant, under death sentence, was not entitled to a new trial, where, even though state's 2 identification witnesses had committed perjury at his trial, the circumstantial evidence that defendant murdered victim was so overwhelming that there was not a reasonable probability that a different result would be reached even without the perjured testimony. *Smith v. State*, 492 So. 2d 260 (Miss. 1986).

Although proof in a circumstantial evidence murder case was weak, evidence was sufficient to go to jury on issue of defendant's guilt. *Trunell v. State*, 487 So. 2d 820 (Miss. 1986).

Telephone conversation between murder victim and third party in which victim identifies killer and in which third party hears voice in background does not constitute direct evidence, for purposes of determining whether murder prosecution is based solely on circumstantial evidence, where third party is unable to identify voice in background; however, testimony of third party as to content of conversation is admissible under *res gestae* exception. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

Evidence that murder victim died in interval between victim's departure from bar with defendant and defendant's return to bar in upset and disheveled condition is insufficient to exclude reasonable hypothesis asserted by defendant that, outside bar, victim and defendant parted ways, that victim met death at hands of third party, and that defendant's condition upon return to bar was due to unrelated incident. *Hester v. State*, 463 So. 2d 1087 (Miss. 1985).

Where the most that could be said for the evidence of the state in a murder prosecution was that the knife of the de-

fendant with blood and hair upon it was found in his automobile approximately $\frac{1}{2}$ to $\frac{3}{4}$ of a mile from the body of the victim, and there was no evidence of motive, no evidence that the defendant and the deceased had ever been together or evidence that they were acquainted, and moreover, at the time of his arrest, the defendant did not appear to be emotionally upset, and no blood or bloodstains were found upon his person or clothing or even in his car, a weak case based totally upon circumstantial evidence was presented and justice required another jury to pass upon the guilt or innocence of the defendant. *Shore v. State*, 287 So. 2d 766 (Miss. 1974).

The proof must show beyond a reasonable doubt that the person killed is the person charged in the indictment to have been killed, though circumstantial evidence may be sufficient. *Dooley v. State*, 238 Miss. 16, 116 So. 2d 820, 86 A.L.R.2d 718 (1960).

While state's evidence to establish identity of the accused as the perpetrator of the crime must be such as to leave no reasonable doubt as to his identity, it is not essential that this proof be made by testimony of witnesses, since circumstantial evidence may be sufficient, and, where there is both direct and circumstantial evidence, a mere conflict in testimony of the witnesses does not necessarily mean that the testimony is insufficient to sustain a conviction. *Freeman v. State*, 228 Miss. 687, 89 So. 2d 716 (1956).

Where conviction depends upon circumstantial evidence, legal test of its sufficiency for that end is its power to satisfy understanding and conscience of jury and it is sufficient if circumstances produce moral certainty, to exclusion of every reasonable doubt. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

When state relies upon circumstantial evidence to establish any essential element of crime charged, that evidence must rise sufficiently high to exclude every reasonable doubt of guilt and every reasonable hypothesis of innocence. *Barclay v. State*, 43 So. 2d 213 (Miss. 1949).

Where the shooting of a husband and wife in their home followed one immediately after the other, the two shootings

were so integrated as to make it impractical to segregate the evidence concerning each. *Walker v. State*, 201 Miss. 780, 30 So. 2d 239 (1947).

45. Prior difficulty.

In a murder prosecution, evidence that the defendant had previously run a car that he was driving into a car that his girlfriend was driving was improperly admitted. *Edlin v. State*, 533 So. 2d 403 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851 (1989).

In a murder prosecution against the husband of the victim, a note handwritten by the victim which indicated that she intended to file for divorce on grounds of mental cruelty and that the defendant had threatened to kill her was admissible as evidence of prior difficulties between the victim and the defendant. *Jackson v. State*, 527 So. 2d 654 (Miss. 1988).

State's soliciting of testimony of prior difficulties between defendant and his ex-wife was legitimate means of revealing criminal intent where defendant waived his right against self-incrimination and took stand for purpose of showing that his former wife was killed in apparent attempt by him to defend her from unknown attacker; threats apparently took place only about one month prior to murder. *Shaw v. State*, 513 So. 2d 916 (Miss. 1987).

A defendant has the constitutional right to make an opening statement pro se without being put under oath and subject to cross examination, and action of trial court preventing him from doing so is reversible error. *Trunell v. State*, 487 So. 2d 820 (Miss. 1986).

Evidence of prior difficulties occurring close to the date of the commission of the crime between the defendant and her deceased husband was admissible to show motive and intent. *Pendergraft v. State*, 213 So. 2d 560 (Miss. 1968), appeal dismissed, 394 U.S. 715, 89 S. Ct. 1453, 22 L. Ed. 2d 671 (1969); reh'g denied, 395 U.S. 941, 89 S. Ct. 1993, 23 L. Ed. 2d 459 (1969).

Evidence of a previous difficulty is admissible. *Hardy v. State*, 143 Miss. 352, 108 So. 727 (1926).

In murder prosecution admission of details of previous altercation, held prejudi-

cial error. *Hardy v. State*, 143 Miss. 352, 108 So. 727 (1926).

Evidence of previous difficulty, held harmless error where not prejudicial to defendant. *Lewis v. State*, 132 Miss. 200, 96 So. 169 (1923), error overruled, 137 Miss. 70, 96 So. 737 (1923).

Details of previous disconnected difficulty between parties, inadmissible in trial of subsequent offense. *Rich v. State*, 124 Miss. 272, 86 So. 770 (1921).

Language used by third person in prior difficulty with deceased held improperly admitted. *Marley v. State*, 109 Miss. 717, 69 So. 210 (1915).

Where defendant was aggressor, evidence that deceased was aggressor in former difficulty was properly excluded. *Huggins v. State*, 103 Miss. 227, 60 So. 209 (1913).

In homicide, details of previous difficulty on same day of killing between defendant's brother and deceased are inadmissible. *McCoy v. State*, 91 Miss. 257, 44 So. 814 (1907).

In homicide prosecution it is competent to prove what was said and done in difficulty just prior to killing, where whole constitutes one continuous difficulty. In such case, it is error to exclude details of prior difficulty. *Brown v. State*, 87 Miss. 800, 40 So. 1009 (1906).

Exclusion of defendant's testimony as to whereabouts at time of woman about whom and at whose house difficulty occurred just prior to killing, was error. *Brown v. State*, 87 Miss. 800, 40 So. 1009 (1906).

46. Threats.

In a capital murder prosecution arising from a prison inmate's stabbing of a correction officer, the trial court did not err in excluding evidence of threats against the defendant made by organized gangs in the prison. *Russell v. State*, 607 So. 2d 1107 (Miss. 1992).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at

the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835 (Miss. 1991).

In a murder prosecution, testimony concerning prior murder threats made by the defendant against the victim were admissible where the threats were made from 10 months prior to the murder until less than one week before the victim's death. *May v. State*, 524 So. 2d 957 (Miss. 1988).

Since the determination of whether a threat is too remote to be admissible is addressed to the sound discretion of the trial judge, the trial judge presiding at a murder trial did not commit reversible error in permitting prosecution witness to testify, over defense objection, in rebuttal, that she had seen defendant threaten deceased with a gun on 3 different occasions, one of which allegedly occurred a year before, and the other 2 some 6 months prior to, the murder. *Higgins v. State*, 502 So. 2d 332 (Miss. 1987).

In a prosecution of a husband for the killing of his wife, evidence of the exchange of remarks between the accused and the deceased, and the accused's threat to kill the deceased, which had occurred only 30 or 40 minutes prior to the homicide, was competent as tending to show the state of the mind of the accused and deceased, and as bearing upon the question of who was the aggressor. *Murphy v. State*, 232 Miss. 424, 99 So. 2d 595 (1958).

Admission in evidence of statement of defendant in homicide prosecution made by him three or four hours before the homicide that he was going to kill somebody was proper as tending to show that the killing was with malice aforethought. *Jones v. State*, 192 So. 342 (Miss. 1939).

Previous difficulty and threats made at time are admissible. *Hardy v. State*, 143 Miss. 352, 108 So. 727 (1926).

Evidence that shortly before killing accused stated he intended to kill unnamed man is admissible. *Huddleston v. State*, 134 Miss. 382, 98 So. 839 (1924).

Exclusion of threats by decedent held reversible error. *Burks v. State*, 101 Miss. 87, 57 So. 367 (1912).

Threat of defendant to do violence to deceased for having instigated, as he claimed, a quarrel which resulted in death

of friend of defendant, is admissible, but details of quarrel are not. *Clemens v. State*, 92 Miss. 244, 45 So. 834 (1908).

47. Self-defense.

Evidence that a defendant was "retarded and slow," suffered from epilepsy, and took the drug Dilantin was not admissible in a murder prosecution where the only possible defense to the slaying was that the defendant shot the victim in necessary defense of himself or his brother, and the defendant's own intelligence had no bearing on whether he reasonably had ground to fear for his own or his brother's life or safety. *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990).

Defendant presented evidence sufficient to warrant granting of self-defense instruction where he testified he was in fear for his life because victim was threatening him with wine bottle, at which point defendant drew gun, which misfired once and then delivered fatal bullet. *Turnage v. State*, 518 So. 2d 1217 (Miss. 1988).

In a murder trial, where defendant asserted self-defense against a homosexual attack, while credible evidence that victim was a homosexual would have been admissible, the exclusion of evidence that victim was frequently seen at a public highway rest stop was within trial court's discretion. *Harveston v. State*, 493 So. 2d 365 (Miss. 1986).

Where defendant or defendant's witnesses are the only eyewitnesses to a homicide, their version of what happened, if reasonable, must be accepted as true, unless substantially contradicted in material particular by credible evidence, physical facts or facts of common knowledge; but where there are circumstances shown in the evidence which materially contradict the defendant's version of self-defense, the jury is not required to accept his version, but may, in determining guilt or innocence, consider his version of self-defense along with the conflicting evidence and any unfavorable inferences therefrom. *Harveston v. State*, 493 So. 2d 365 (Miss. 1986).

There is no basis upon which to give self-defense instruction when evidence, considered most favorably to capital murder defendant, initial aggressor and ultimate victim of defendant fled after firing

shot at defendant, defendant then became aggressor seeking victim out, emptying one gun on victim, striking victim at least 3 times, then obtaining more powerful rifle and firing 3 additional shots, with intent to kill victim. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

Where the defendant admitted threatening the victim two weeks before a homicide, the defendant left a cafe immediately following the victim, no weapon of any description was found on the body of the victim, and, after the shooting, defendant went home and went to bed telling no one of the altercation, the defendant, who claimed the shooting was in self-defense, was not entitled to a directed verdict on the basis of a rule requiring the court and the jury to accept self-defense testimony where there is no evidence to the contrary. *Gordon v. State*, 258 So. 2d 752 (Miss. 1972).

The Weathersby Rule makes it mandatory for the court and the jury to accept the testimony of the defendant and his witnesses who testify that the defendant acted in self-defense, where there is no testimony contradicting their version of the homicide, and where there are no physical facts or evidentiary circumstances on which a contrary finding could be reasonably predicted. *Gordon v. State*, 258 So. 2d 752 (Miss. 1972).

A new trial was required where, in a murder prosecution, the verdict of the jury convicting the accused of manslaughter was predicated on statements of the deceased, admitted as dying declarations, to the effect that the deceased was shot in the back, which statements were contradicted by the undisputed facts, and the testimony of the accused and the only other eye-witness showed that the accused had shot in self-defense, and it further appeared that at the time of the trial, sentiment in the community was hostile to the accused. *Cannon v. State*, 244 Miss. 199, 141 So. 2d 251 (1962).

Evidence that, at the time the accused shot and killed the deceased, the deceased was pursuing the accused with pistol in hand and threatening to kill him, failed to sustain a manslaughter conviction. *Pickens v. State*, 229 Miss. 409, 90 So. 2d 852 (1956).

The jury had the right in a murder prosecution to reject defendant's testimony that he killed deceased in self-defense, where the proof of the state and the evidence of the only witness for the defendant, except that given by himself, showed that the killing was deliberate murder. *Flowers v. State*, 29 So. 2d 653 (Miss. 1947).

Under claim of self-defense, it was prejudicial error to admit evidence that a man wearing clothes similar to defendant's was seen watching place where decedent worked the night before killing. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Where self-defense claimed, and defendant testified he did not know deceased's position when he shot last three time because of smoke, instruction to find accused guilty if he fired after deceased turned his back and accused was in no danger at his hands, is prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Refusal to give instruction that jury might consider previous threat by decedent to kill accused next time they met was prejudicial error. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

Defendant pleading self-defense has right to show deceased was under influence of cocaine. *Moseley v. State*, 89 Miss. 802, 41 So. 384 (1906).

Where evidence conflicting as to who was aggressor, statement of prosecuting witness immediately after assault that he was sorry he did not kill defendant and that he went to place of conflict for that purpose, is admissible. *Shields v. State*, 87 Miss. 429, 39 So. 1010 (1906).

Where self-defense interposed in homicide it is incompetent for state to show deceased was unarmed. *Moore v. State*, 86 Miss. 160, 38 So. 504 (1905).

Where plea of self-defense interposed in homicide, it was error to refuse to allow defendant to show that his shirt was cut in front during difficulty with deceased. *Street v. Smith*, 85 Miss. 359, 37 So. 837 (1905).

48. Insanity.

Whether a murder defendant was M'Naghten insane at the time of the shooting was purely a legal question which the trial judge properly prohibited

the defendant's psychiatric expert from answering. *Roundtree v. State*, 568 So. 2d 1173 (Miss. 1990).

Guilty verdict in murder less-than-capital trial was not against the weight of the evidence which presented a sharp and contradictory conflict on the issue of M'Naghten insanity. *Hunter v. State*, 489 So. 2d 1086 (Miss. 1986).

Although defendant was diagnosed as a paranoid schizophrenic, jury's finding that he was sane at the time of the murder was supported by the evidence, where the state's expert witnesses were of the opinion that he knew the difference between right and wrong at the time of the offense, and those opinions were corroborated by lay witnesses. *Gill v. State*, 488 So. 2d 801 (Miss. 1986).

Jury's finding a capital murder defendant not M'Naghten insane was supported by evidence that at the time of committing act he knew its quality and nature, and also knew that what he was doing was considered wrong by society and was wrong according to law. *Laney v. State*, 486 So. 2d 1242 (Miss. 1986).

Late testimony inferentially suggesting at time in question that defendant pleading insanity as defense to murder prosecution was sufficiently in possession of faculties to know difference between right and wrong and to be able to appreciate nature and quality of action is sufficient to support conviction even though there can be little doubt that defendant is decidedly psychotic. *Gerlach v. State*, 466 So. 2d 75 (Miss. 1985).

When defense in murder prosecution is insanity, general or partial, door is thrown wide open for admission of evidence, and every act of defendant's life is relevant to issue and admissible in evidence. *Hinton v. State*, 209 Miss. 608, 45 So. 2d 805 (1950), suggestion of error overruled, 209 Miss. 608, 46 So. 2d 445 (1950), cert. denied, 340 U.S. 802, 71 S. Ct. 68, 95 L. Ed. 590 (1950), reh'g denied, 340 U.S. 894, 71 S. Ct. 205, 95 L. Ed. 648 (1950).

Letter by superintendent of Mississippi State Hospital to sheriff stating that defendant had been diagnosed "as without psychosis, not insane," was incompetent in murder prosecution wherein defendant invoked defense that he was not mentally

capable of committing the crime, since letter was purely ex parte statement of fact not under oath. *Horton v. State*, 196 Miss. 506, 18 So. 2d 155 (1944).

Exclusion of evidence relating to the issue of insanity from the consideration of the jury upon motion of the state on the ground that it failed to meet the legal requirement of showing that the defendant could not distinguish between right and wrong at the time of the killing was error. *Waycaster v. State*, 185 Miss. 25, 187 So. 205 (1939).

Under defense of insanity evidence not showing insanity held properly excluded. *Garner v. State*, 112 Miss. 317, 73 So. 50 (1916).

49. Sufficiency of evidence; generally.

Defendant's convictions for murder and aggravated assault were proper where the evidence was sufficient to support the convictions because the State not only produced a complaining victim, but also an eyewitness to the crime. Additionally, the living victim testified that defendant shot him in the neck after defendant shot and killed the other victim. *McGee v. State*, 929 So. 2d 353 (Miss. Ct. App. 2006).

Defendant's conviction for murder was proper pursuant to Miss. Code Ann. § 97-3-19(1)(a) where defendant's bloody fingerprints were found in the automobile in which the victim was killed and his DNA was found under the victim's fingernails. *Wright v. State*, 915 So. 2d 527 (Miss. Ct. App. 2005).

After the victim's partially burned and decomposing body was found in a dump, defendant admitted that he shot a man in the head and burned him. A reasonable inference could be made that defendant shot the victim; the State met its burden to prove the elements of simple murder. *Anderson v. State*, 914 So. 2d 1239 (Miss. Ct. App. 2005).

Defendant's murder conviction was proper where defendant testified that he had dinner with the victim, his wife, shortly before she was killed, and his inconsistent testimony regarding when he left the house could have supported the jury's conclusion that he was present at the time she was shot. Shortly after the murder, defendant tested positive for gunshot residue on the back of his right hand

and the palm and back of his left hand. *Dendy v. State*, — So. 2d —, 2005 Miss. App. LEXIS 855 (Miss. Ct. App. Nov. 15, 2005).

Evidence was sufficient to support defendant's conviction for the deliberate designed murder of his girlfriend pursuant to Miss. Code Ann. § 97-3-19 where the evidence showed that defendant clocked out of work at 10:34 p.m.; that he lived only 5 — 10 minutes from work; that he called police at 11:29 p.m.; and that he was covered with blood when police arrived and found his girlfriend's body. Also the blood stains on defendant's tee shirt were consistent with the blood transfer pattern on the scarf his girlfriend was wearing when her body was discovered. *Jones v. State*, 918 So. 2d 1220 (Miss. 2005).

While there was conflicting testimony on whether defendant or a second man fired the gun at the victim (who had taken defendant's cocaine without paying for it), that was of no effect since there was more than enough undisputed evidence defendant had aided and abetted in the commission of the murder, making him as guilty as the principal. Witnesses for the state and defense testified that defendant drove the car used in the murder and was therefore present during the commission of the crime, and even if he was not the one who pulled the trigger, he deliberately chased the victim in the car and parked it close enough for the other man to fire the pistol at the victim and end his life; thus, the evidence sufficed for defendant's conviction, and his motion for new trial was properly denied. *Dilworth v. State*, 909 So. 2d 731 (Miss. 2005).

In defendant's murder trial, the evidence showed that the victim, who had struck defendant two days earlier in a bar fight, was struck by gunshots in a manner that indicated he was facing away from the person who shot him and was possibly running or bent over while working on his car when struck by four gunshots. It was reasonable for the jury to make the determination that defendant was seeking revenge, the evidence indicated defendant instructed his companion to stop upon observing the victim, and the jury could have reasonably concluded that defendant

did not fear for his safety as he initially approached the victim; thus, the jury's verdict was not against the overwhelming weight of the evidence and defendant's motion for a new trial was properly denied. *Knox v. State*, 912 So. 2d 1004 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Defense did not dispute that defendant fired the fatal shot that killed his former girlfriend, the only dispute was whether her accidentally killed her when defending himself from her male friend or whether he killed her with deliberate design. An eyewitness testified that she saw defendant shoot the victim in the back, approach her as she lay on the ground, and shoot her in the head, and several witnesses that had been in her apartment testified that her male friend was in the apartment when they heard shots fired; thus, the evidence was sufficient to support defendant's conviction for murder and his motion for new trial was properly denied. *Raiford v. State*, 907 So. 2d 998 (Miss. Ct. App. 2005).

In defendant's trial for the deliberate design murder of defendant's girlfriend, a physician who performed the autopsy rebutted defendant's contention of suicide, the victim was right-handed, and the wound was to the left side of the victim's head, two witnesses testified that defendant's pants pocket showed the outline of a handgun, and defendant's suspicious behavior in removing a shell casing and leaving the scene upon the appearance of law enforcement created an inference of defendant's guilt. Thus, the evidence was sufficient to sustain defendant's conviction and the trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Coleman v. State*, 876 So. 2d 1065 (Miss. Ct. App. 2004).

Defendant claimed that there was insufficient evidence that defendant participated in the robbery of the victim because defendant's co-indictee (who pled to manslaughter) actually took the wallet. However, the jury heard testimony that defendant stated to the co-indictee that, "I got him good, the blade went all the way through," and that defendant then searched through the victim's wallet which was later found in the possession of

both men. Thus, a reasonable juror would have found defendant guilty and substantial evidence supported defendant's conviction. *Stewart v. State*, 881 So. 2d 919 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder as the evidence showed the victim died of blunt force trauma and was sexually assaulted and defendant was the only adult in the home with the child when she died. *Gilmore v. State*, 872 So. 2d 744 (Miss. Ct. App. 2004).

Where three eyewitnesses testified that the victim pulled defendant off the other man's back during a bar fight, and defendant then shot the victim in the head when the victim turned to help the other man, and defendant's self-defense argument had virtually no basis, defendant's murder conviction was proper where the jury was properly instructed on both murder and manslaughter, and chose to credit the witnesses testimony and discredit defendant's testimony; further, counsel properly followed the procedure outlined in *Turner v. State* for cases of frivolous appeals. *Smith v. State*, 868 So. 2d 1048 (Miss. Ct. App. 2004).

Defendant's stepson, who was sitting in the back seat of the car when the victim was shot, testified that he saw his stepfather walk out of the house, pull out a gun and shoot the victim, and that he did not see defendant slip and fall before he shot the victim. Defendant's stepson and defendant's own son both testified that after the shooting, defendant walked to the front of the car and took a few drags on the cigarette he was smoking, and the pathologist who performed the autopsy testified that the gun left an imprint below the victim's ear and that the gun left soot on the victim's skin, indicating close, hard contact between the gun and the victim's skin; thus, the evidence was sufficient to support defendant's murder conviction and defendant's motion for a new trial was properly denied. *Smith v. State*, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Defendant maintained that the State failed to offer any credible evidence that he committed the murder of his wife with deliberate design or malice aforethought.

However, defendant's sister's fiancé testified that the next day, defendant told him that he had "killed his wife," and that he had done it at the old house, and defendant's sister also testified that defendant admitted having killed his wife; thus, there was no abuse of the trial court's discretion in denying defendant's motion for a new trial based on an alleged faulty jury instruction, or a juror's alleged failure to have disclosed her status as a past crime victim during voir dire. *Gibson v. State*, 895 So. 2d 185 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's conviction for murdering his wife where he admitted the fatal shot and there was testimony that the victim was in a posture to defend herself from injury when the shot was fired and that the shot was fired at least 18 inches from her, refuting defendant's argument that the shooting was accidental. *Doss v. State*, 866 So. 2d 1105 (Miss. Ct. App. 2003).

Defendant's conviction for murdering her estranged husband was not against the overwhelming weight of the evidence: she attempted to cover up the murder by giving the police false information and lying about the victim's whereabouts; she attempted to impede the police investigation by seeking a temporary injunction against the police department; she never reported her husband missing or inquired about the investigation; she testified she had once moved out of the marital home to avoid killing the victim in anger; and it was for the jury to determine whether to believe defendant's testimony or that of her accomplice. *Kingston v. State*, 846 So. 2d 1023 (Miss. 2003).

Where defendant, a security guard, shot a man inside a car, who had allegedly waived a gun at defendant, and defendant argued the evidence only supported a charge of culpable negligence manslaughter, in each of the cases cited by defendant, the killing had been unintentional, but in defendant's case, there was no evidence in the record to suggest that defendant did not intend to shoot, and substantial evidence supported defendant's conviction for depraved heart murder. *Steele v. State*, 852 So. 2d 78 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

Defendant's murder conviction was proper: he did not articulate an arguable basis to conclude that the trial court acted arbitrarily in denying his 11th-hour motion when he had done nothing to pursue retained counsel in time leading up to trial; further, the evidence was sufficient because the court did not find the evidence that defendant acted in self-defense so compelling as to lead to the conclusion that a fair-minded juror was obligated to accept it as true. *Nelson v. State*, 850 So. 2d 201 (Miss. Ct. App. 2003).

Defendant's murder conviction was proper where defendant's argument that a reasonable jury could only have found that he acted in self-defense was without merit because the evidence was uncontradicted that the victim was in fact unarmed, and no one other than defendant saw the victim reach for a weapon before defendant shot him. *Ables v. State*, 850 So. 2d 172 (Miss. Ct. App. 2003).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Evidence was sufficient to convict a defendant of murder where his accomplice admitted in his statement for his plea agreement that defendant shot at the murder victim, and a witness testified about the accomplice's statement that implicated defendant in the murder. *Wells v. State*, 849 So. 2d 1231 (Miss. 2003).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital murder. *Shelton v. State*, 853 So. 2d 1171 (Miss. 2003).

Defendant's murder conviction was proper and the evidence sufficient where an inappropriate comment before the jury as to a prior criminal charge was sufficiently cured by the trial court's action in

sustaining the objection and in requesting the jury to disregard the remark; moreover, the prejudicial effect of that comment was not of such nature as to have irreparably affected defendant's fundamental right to a fair trial. *Lee v. State*, 837 So. 2d 781 (Miss. Ct. App. 2003).

Where defendant first killed a man and immediately thereafter sexually assaulted and killed a woman, he was properly convicted of the felony murder of the man with sexual assault as the predicate felony, as there had been no break in the chain of events. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Defendant was properly convicted of the felony murder of a man and a woman, as the evidence was sufficient to prove the man was murdered while in commission of a sexual battery on the woman; defendant's intent to sexually batter the female victim could be inferred from his actions, as he had to first incapacitate the man in order to get to the woman. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Evidence was sufficient to sustain defendant's murder conviction where the defendant fired a 9mm gun, the victim was shot by a 9mm gun, witnesses testified that defendant fired several volleys, and no evidence showed that anyone other than defendant shot a gun. *Montana v. State*, — So. 2d —, 2002 Miss. LEXIS 172 (Miss. May 9, 2002).

Evidence was sufficient where the physical evidence clearly suggested defendant's guilt, as it provided a possible link between a cord found in the victim's clothing and the cord in defendant's pants; and it was not error for the State to fail to present DNA evidence because the exculpatory nature of the evidence was not readily apparent. *Randle v. State*, 827 So. 2d 705 (Miss. 2002).

Evidence was sufficient to establish that the defendant attempted to commit the underlying felony of armed robbery and, therefore, to support a conviction for felony murder where (1) the defendant confessed that a coperpetrator stated that he intended to rob a store, and the defendant accepted a gun from the coperpetrator, masked his face, and walked into the store wielding the gun, and (2) the plan was abandoned when a

store employee recognized the defendant, and the defendant and his coperpetrators then shot both store employees, killing one of them. *Spann v. State*, 771 So. 2d 883 (Miss. 2000).

Evidence was sufficient to support a conviction for murder where the evidence showed that the victim was shot and killed by a .38 caliber pistol at a time when only the defendant had the opportunity to kill her. *Carter v. State*, 722 So. 2d 1258 (Miss. 1998).

Evidence was sufficient to support defendant's murder conviction for the shooting death of former paramour; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, and shots hit former paramour at close range and killed her. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

Valid conviction for capital murder, arising out of rape or kidnapping, must be supported by evidence legally sufficient to support conviction of both murder and underlying felony, had either been charged alone. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

When its case is based entirely upon circumstantial evidence, state is required to prove defendants guilty not only beyond reasonable doubt, but also to exclusion of every reasonable hypothesis consistent with innocence; circumstantial evidence need not exclude every possible doubt, but only every other reasonable hypothesis of guilt, and mere fanciful, farfetched, or unreasonable hypothesis of innocence is not sufficient to require acquittal. *Montgomery v. State*, 515 So. 2d 845 (Miss. 1987).

State's case passed muster under general review of sufficiency of evidence where a number of witnesses to shooting contradicted defendant's testimony. *Alford v. State*, 508 So. 2d 1039 (Miss. 1987).

Where respondent was charged with capital murder for participating in assault

during course of which respondent's companion killed victim, and was sentenced to death under capital murder statute, but death sentence was vacated under intervening U.S. Supreme Court decision holding that Eighth Amendment forbids imposition of death penalty on one who aids and abets felony in the course of which murder is committed but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force be employed, cert on federal habeas corpus review should require state's judicial system to examine entire course of proceedings to determine whether at some point requisite factual finding has been made to support death penalty, which under proper circumstances does not offend Eighth amendment. *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), on remand, 784 F.2d 187 (5th Cir. 1986), overruled on other grounds, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 429 (1987).

Circumstantial evidence strongly suggesting that murder victim was in truck with defendant on night victim was murdered, coupled with evidence that defendant had never known victim before and fact that she was found strangled to death several days later, and evidence showing that victim had sexual intercourse with male on night in question is sufficient to establish to exclusion of every reasonable hypothesis consistent with innocence of defendant that victim was raped, that person who committed rape was defendant, that defendant acted with felonious intent, and that rape occurred in substantial temporal and factual relation to victim's murder at hands of defendant. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

When indictment charges defendant with capital murder in course of rape and robbery and trial judge's instructions, as requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Circumstantial evidence that defendant took several pieces of jewelry, personal

property having some value, although modest, from murder victim combined with circumstantial evidence that defendant was person who committed killing, is sufficient to prove that taking of jewelry was by violence to victim or by putting victim in fear of immediate personal injury and is legally adequate to establish that defendant committed felony of robbery underlying capital murder conviction. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Evidence that skeletal remains were found at place and under circumstances that were unusual, consistent with confession or admission of accused, is sufficient to prove corpus delicti. *Miskelley v. State*, 480 So. 2d 1104 (Miss. 1985).

Evidence identifying defendant as being present on occasion of homicide in convenience store and that defendant was behind counter waiting on customers, that defendant had large amount of cash on him and that over \$300 was taken from store is sufficient to present to jury question of whether robbery and capital murder were committed and whether defendant was person who committed crime. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

State's evidence showing that accused was not in imminent danger of losing his life or suffering great bodily harm at hands of the victim at the time he fired the fatal shot, in view of the distance which separated the two men at that time and the fact that the victim was unarmed and not advancing toward the accused, was sufficient to sustain conviction. *Pickert v. State*, 234 Miss. 513, 106 So. 2d 681 (1958).

The death penalty was not justified where in a general melee in a colored restaurant precipitated by the armed intrusion of the proprietor after the accused had taken a pistol away from his brother to prevent harm, the proprietor was shot by the accused while he was on his knees and the proprietor was trying to use his own gun. *Magee v. State*, 200 Miss. 861, 27 So. 2d 767 (1946), suggestion of error sustained, 200 Miss. 861, 28 So. 2d 854 (1947).

Where deceased was shot at night through a window and there were no eye-

witnesses to the killing, circumstantial evidence as to the identity of defendant as the guilty person would not sustain conviction. *Moore v. State*, 188 Miss. 546, 195 So. 695 (1940).

Proof of motive not absolutely necessary to sustain conviction of murder. *Motley v. Smith*, 172 Miss. 148, 159 So. 553 (1935).

State must make out its case to moral certainty; accused need only raise reasonable doubt of guilt to entitle him to acquittal. *Cumberland v. State*, 110 Miss. 521, 70 So. 695 (1916).

50. —Conviction sustained—murder.

Trial court properly denied defendant's motion for a judgment notwithstanding the verdict because there was sufficient evidence for a reasonable jury to find that he committed murder; the prosecution produced an eyewitness to the murder, in addition to another witness who heard defendant state that he was going to kill the victim for stealing his truck battery. *Herron v. State*, — So. 2d —, 2006 Miss. App. LEXIS 242 (Miss. Ct. App. Apr. 4, 2006).

Defendant's murder conviction was appropriate where the State presented an eyewitness to the murder, along with two witnesses whose testimony revealed the consistency of the child witness's account. Additionally, there was arguably incriminating testimony of defendant's cell mate. *Osborne v. State*, — So. 2d —, 2006 Miss. App. LEXIS 134 (Miss. Ct. App. Feb. 21, 2006).

Defendant's conviction for murder of his mother was affirmed as defendant rested without putting on a defense, the manner of death (homicide) was not contested by any evidence in the record, and the broom was consistent with the type of instrument that was used to inflict the injuries to the mother's bruised and battered body. *Ware v. State*, 914 So. 2d 751 (Miss. Ct. App. 2005).

Appellate court affirmed defendant's conviction for capital murder as defendant entered the victim's home, knocked the victim unconscious, and then set the house on fire. *McIntosh v. State*, 917 So. 2d 78 (Miss. 2005).

Where defendant repeatedly hit the victim with a barstool and her blows were so forceful that they caused the barstool to

break, the evidence was sufficient to sustain her murder conviction under Miss. Code Ann. § 97-3-19. There was no evidence that defendant was acting in self-defense. *Shields v. State*, 920 So. 2d 1033 (Miss. Ct. App. 2005).

State proved the elements of murder because (1) defendant stated that she saw no one else at the apartment when the victim was shot three times; (2) she stated that she was in the apartment when the victim was shot and fell; (3) she did not try to get help for the victim, and it was not until defendant's mother arrived that the mother called the police; (4) defendant had a scratch on her face; and (5) a gunshot residue test kit showed that defendant tested positive for gunshot residue on her right and left palms. *Reynolds v. State*, 913 So. 2d 290 (Miss. 2005).

Evidence was sufficient to convict defendant of murder because there was an abundance of credible, corroborated, eyewitness testimony in support of the verdict, including (1) the DNA evidence on defendant's clothing; (2) the testimony of a witness that defendant confessed to killing the victim; and (3) the testimony of a second witness placing defendant at the motel in the time period that the victim was killed. *Young v. State*, 891 So. 2d 813 (Miss. 2005).

Evidence proved beyond a reasonable doubt that defendant murdered the victim because (1) the victim had various bruises upon her body when she was admitted to the hospital; (2) the victim's blood and urine alcohol content were zero when she was admitted to the hospital; (3) defendant had two prior convictions for domestic abuse upon the victim; (4) the doctor performing the autopsy determined the cause of the victim's death to be blunt force trauma to the abdomen, leading to necrosis of the bowel; and (5) defendant's evidence contradicting the State's version of events that the victim was murdered and did not die from alcohol or acetaminophen toxicity was not so strong that reasonable and fair-minded jurors could only have found defendant not guilty; thus, the trial court did not err in denying defendant's motion for a directed verdict, or his motion for a judgment notwithstanding a verdict or a new trial. *Moses v. State*, 893 So. 2d 258 (Miss. Ct. App. 2004).

Where defendant brutally beat, stabbed and choked his wife to death in the presence of her friend and her seven-month-old baby, the evidence was sufficient to support his conviction for murder. Defendant was properly sentenced to life imprisonment. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

In a murder case, in view of evidence that (1) defendant and his girlfriend were seen together about 1 § hours before her body was found in defendant's truck; (2) the truck was found minutes after defendant reported it stolen by his girlfriend; (3) a bullet in the victim's head came from a .38 caliber gun, and such a gun was recovered from defendant's home; and (4) there were similarities between the bullet recovered from the victim's body and bullets fired from the recovered gun, the trial court properly denied defendant's motion for judgment notwithstanding the verdict or for a new trial. *Rinehart v. State*, 883 So. 2d 573 (Miss. 2004).

Following evidence was sufficient to convict defendant of capital murder: (1) an eyewitness's testimony that he was with defendant when defendant murdered a woman, that defendant threatened him with death if he told anyone, and that defendant used the same type of weapon that the State's expert testified had been used to kill the victim; (2) testimony of another witness that defendant had bragged about killing a woman; and (3) testimony of a third witness that pinpointed two males at the scene when the victim was killed, corroborating the eyewitness's story. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Sufficient evidence existed to convict defendant of capital murder as defendant confessed to the murder after twice waiving his Miranda rights, defendant was seen leaving the murder scene, and the victim's blood was on defendant's clothing. Further, defendant's confession that he attacked the victim when she would not lend him money was sufficient to support a finding of armed robbery under Miss. Code Ann. § 97-3-79. *Carr v. State*, 880 So. 2d 1079 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of murder of the two victims;

the victims lived with defendant, defendant's friend testified that she saw one of the victims in her bed over a period of a couple of days before the fire and the victim never moved, and defendant prevented a home nurse from checking the other victim by lying to her and telling her the victim had been taken to the hospital. *McGruder v. State*, 886 So. 2d 27 (Miss. Ct. App. 2004).

There was substantial evidence in the record to support defendant's conviction for murder (1) there was DNA evidence on defendant's clothing; (2) a witness testified that defendant confessed to killing the victim; and (3) another witness, the hotel manager, placed defendant at the hotel in the time period that the victim was killed. Because there was substantial evidence to support defendant's conviction, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Young v. State*, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004).

Court affirmed defendant's murder conviction, rejecting defendant's contention that he could have been guilty of manslaughter only on the theory that he had used excessive force to repel an unwanted trespasser. Defendant's wife had voluntarily admitted the victim into defendant's home as a guest, and the victim's efforts to calm defendant did not place him in the class of an unauthorized trespasser despite defendant's repeated demands that he leave the property. *Lester v. State*, 862 So. 2d 582 (Miss. Ct. App. 2004).

Defendant's murder conviction under Miss. Code Ann. § 97-3-19 was supported by sufficient evidence and was not against the weight of the evidence; the State presented testimony by witnesses that indicated defendant's killing of the victim, defendant's ex-boyfriend, was intentional, as defendant told one witness that she intended to kill the victim, and another witness testified that the victim had taken no threatening action against the victim prior to the shooting. *Reed v. State*, 863 So. 2d 981 (Miss. Ct. App. 2003).

Evidence presented at trial was sufficient to permit the verdict of murder found by the jury where the facts indicated that when the victim and defendant

began to argue, defendant retrieved a gun, which discharged and struck the victim in the head, fatally wounding her; defendant stopped the vehicle and shoved the victim out of the car onto the road where she was struck by another vehicle. *Fairley v. State*, 871 So. 2d 1282 (Miss. 2003).

Defendant's conviction for murder, Miss. Code Ann. § 97-3-19, was affirmed; based on testimony by three witnesses who identified defendant as the shooter, the verdict was not against the weight of the evidence, and was not so unconscionable as to require a new trial. *Bownes v. State*, 861 So. 2d 1061 (Miss. Ct. App. 2003).

Where the facts showed that defendant shot an unarmed friend in the back, defendant stated an intention to kill the victim, and defendant kicked the victim's body after the shooting, there was sufficient evidence to sustain a murder conviction, rather than a conviction for heat of passion manslaughter. *Schuck v. State*, 865 So. 2d 1111 (Miss. 2003).

Evidence showing that defendant was beaten by her husband, that defendant told her husband that he was "fixing to die," that defendant went inside the trailer where she lived with her husband and armed herself with a shotgun, which she fired once as a "warning" to her husband and fired again 45 minutes later fatally wounding him, was sufficient to support a jury's finding that defendant had murdered her husband. *Moore v. State*, 859 So. 2d 379 (Miss. 2003).

Evidence that defendant stabbed two companions was sufficient to support his conviction for double murder. *Stack v. State*, 860 So. 2d 687 (Miss. 2003).

Evidence was sufficient to convict a defendant of murder where his accomplice admitted in his statement for his plea agreement that defendant shot at the murder victim, and a witness testified about the accomplice's statement that implicated defendant in the murder. *Wells v. State*, 849 So. 2d 1231 (Miss. 2003).

Defendant's conviction for murdering her estranged husband was not against the overwhelming weight of the evidence: she attempted to cover up the murder by giving the police false information and lying about the victim's whereabouts; she

attempted to impede the police investigation by seeking a temporary injunction against the police department; she never reported her husband missing or inquired about the investigation; she testified she had once moved out of the marital home to avoid killing the victim in anger; and it was for the jury to determine whether to believe defendant's testimony or that of her accomplice. *Kingston v. State*, 846 So. 2d 1923 (Miss. 2003).

Testimony that defendant threatened the victim, shot him with a sawed-off shotgun while the victim sat in his car, and that the victim's wounds were consistent with defendant standing over him and firing his weapon, was sufficient to convict defendant of murder; defendant's testimony that the gun accidentally went off as he jumped out of the way of the car merely created an issue of fact for the jury. *Shipp v. State*, 847 So. 2d 806 (Miss. 2003).

Defendant's motions for a directed verdict and for a new trial were properly denied and the evidence was sufficient to support defendant's conviction for murder where defendant admitted killing the victim, and his accomplice's testimony evidenced the conspirators' premeditated design. *Roy v. State*, 878 So. 2d 84 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital murder. *Shelton v. State*, 853 So. 2d 1171 (Miss. 2003).

Trial judge properly refused to direct a verdict in defendant's favor where the evidence offered by the State was such

that fair-minded jurors could find defendant guilty as charged; eyewitnesses testified that they had seen the defendant kill the victim and shoot into the air and gun residue tests indicated that defendant had been in the environment of a discharged weapon. *Maxwell v. State*, 856 So. 2d 513 (Miss. Ct. App. 2003), cert. denied, 892 So. 2d 824 (Miss. 2005).

Where defendant first killed a man and immediately thereafter sexually assaulted and killed a woman, he was properly convicted of the felony murder of the man with sexual assault as the predicate felony, as there had been no break in the chain of events. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Defendant was properly convicted of the felony murder of a man and a woman, as the evidence was sufficient to prove the man was murdered while in commission of a sexual battery on the woman; defendant's intent to sexually batter the female victim could be inferred from his actions, as he had to first incapacitate the man in order to get to the woman. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Sufficient evidence supported the jury's verdict where, although conflicting evidence was presented as to defendant's mental status at the time of the offense, it was in the jury's discretion to accept or reject any expert testimony, and its finding would not be reversed as it was supported by substantial evidence. *Knight v. State*, 854 So. 2d 17 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003).

Evidence that a defendant who was charged with the murder of a woman whose badly decomposed body was found in Mississippi in an area where defendant had relatives, that the defendant had left New Mexico with the victim to visit the father of the victim's infant child in Texas shortly before the probable time of the victim's death, that defendant was seen with the victim's child in Memphis shortly after the date of the victim's death and heard telling people that the child's mother was either on tour as an entertainer or was in jail, that defendant was in possession of a gun and ammunition similar to those used to kill the victim, that defendant used a false name when contacted by police in Florida, as well as other

circumstantial and scientific evidence linking the defendant to the crime, was sufficient to support the defendant's conviction of the crime of murder. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Evidence that the defendant gave a gun to another man who had said he wanted to shoot the victim, told the man the victim was outside, was in the alley with the man who shot the victim when the victim was shot, and was seen running from the alley with the other man after the shooting while they both carried guns, and asked the other man "Did you get him?" was sufficient to support a conviction for murder. *Brown v. State*, 796 So. 2d 223 (Miss. 2001).

Evidence was sufficient to support a conviction for murder since there was ample evidence of the defendant's deliberate design to kill the victim where the defendant stated that he was going to "burn [the victim's] ass," he then left for his house to retrieve a gun, ran his car off the road in the process, got a ride from someone else for the remainder of the trip to his house, retrieved a gun, walked for at least ten minutes through the woods to return to the scene, stood outside the window, shouted, "MF, I'm fixing to kill you," and then shot and killed the victim. *Jackson v. State*, 784 So. 2d 180 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987 (2002).

Evidence was sufficient to support convictions for murder, notwithstanding the defendant's assertion that he and the codefendant did not act with deliberate design but only intended to beat the victims severely, as the defendant and codefendant committed a dangerous act, i.e., the severe beating of two human beings, which showed disregard for the lives of those two people and resulted in their deaths. *Reed v. State*, 799 So. 2d 92 (Miss. Ct. App. 2001).

Evidence was sufficient to show deliberate design murder where (1) conversations between the defendant and a coconspirator showed a plan to commit murder, (2) the defendant sought out the victim, and (3) the defendant shot the victim through a screen door. *Ellis v. State*, 778 So. 2d 114 (Miss. 2000).

Evidence was sufficient to support a conviction for murder, notwithstanding

the contention that the shooting was accidental and in self-defense, where (1) the defendant did not testify and there was no direct evidence to support the theory that the defendant subjectively believed or apprehended the necessity, if any, of the use of deadly force to defend against the alleged aggression of the victim, (2) the defendant left the home of the victim in order to obtain a pistol and returned to this site with the intention of shooting the victim, (3) witnesses at the scene of the incident testified that the defendant returned with his weapon in order to confront the victim and force him to repay 20 dollars and apologize, and (4) the defendant remained in the front seat of a truck with the pistol in his lap, and when the victim approached the truck, the defendant stepped from the truck and shot the victim in the chest. *Walters v. State*, 772 So. 2d 1072 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for murder where the defendant pressed a gun to the victim's head, pulled the trigger, and killed her, notwithstanding that he had removed the clip from the gun and believed it to be unloaded, although one round remained in the chamber, since his conduct was eminently dangerous and evinced a depraved heart demonstrating complete disregard for the victim's life. *Dowda v. State*, 776 So. 2d 714 (Miss. Ct. App. 2000).

Evidence was sufficient to sustain a conviction for deliberate design murder, notwithstanding the defendant's contention that his gun discharged accidentally, where, according to three witnesses, (1) the defendant approached the victim's car and berated him for ignoring a request to move his car, (2) the defendant then deliberately returned to the automobile he had been riding in, retrieved a gun from the back seat, and went back to the victim's vehicle where he placed the gun to the victim's head, and (3) the defendant then took a step back and fired a shot into the door of the victim's car and then took a second step back, deliberately aimed the gun at the victim, and fired the shot that mortally wounded him. *Carr v. State*, *Carr v. State* (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for murder. *Brooks v. State*, 763 So. 2d 859 (Miss. 2000).

Evidence was sufficient to support a conviction for murder and to disprove self-defense where (1) expert evidence showed that the defendant shot the victim was she was lying on the ground, (2) the defendant stated that he choked the victim until she fell on the floor, and that she got up and pleaded with him not to kill her, (3) a bruise found on the victim's left hand was consistent with defensive posturing, (4) the defendant was substantially larger than the victim, and (5) the victim sustained several blunt force traumas. *Boyd v. State*, 754 So. 2d 586 (Miss. Ct. App. 2000).

The evidence was legally sufficient and supported the guilty verdict of the jury where witnesses testified that the victim did not have a weapon, that they saw defendant remove a gun from his car and fire one shot in the direction of the victim, and the police officer who pulled defendant over found the murder weapon on the floorboard of defendant's vehicle. *Jackson v. State*, 755 So. 2d 45 (Miss. Ct. App. 1999).

The stabbing of an unarmed seventy-nine year old woman, 47 times, by a twenty-two year old defendant is evidence sufficient to support the jury's finding of malice and the verdict of murder. *Robinson v. State*, 749 So. 2d 1054 (Miss. 1999).

Evidence was sufficient to sustain a conviction for deliberate design murder where the defendant never denied shooting at the victim, but claimed it was in self-defense, because the victim fired first, but where witnesses testified that the victim was just talking to the defendant when the defendant pulled a gun and shot at the victim's feet four or five times, that the victim did not push the defendant or pull a gun, and that the defendant chased the victim and shot at him an additional seven or eight times, and the victim was shot a total of six times with two wounds in his back and one wound in the back of his leg. *Riddley v. State*, — So. 2d —, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), *aff'd*, 777 So. 2d 31 (Miss. 2000).

Evidence was sufficient to show that the defendant killed his estranged wife with deliberate design and, therefore, was sufficient to support his conviction for murder; it was not necessary for the state to

prove that the defendant went to the scene of the crime with the purposeful design to stab his wife to death and it was sufficient that, at some point, he formed an intention to violently attack his estranged wife with a steak knife and to repeatedly stab her with the knife until he had inflicted one or more mortal wounds to her body. *Coffield v. State*, 749 So. 2d 215 (Miss. Ct. App. 1999).

Evidence was sufficient to show deliberate design and to support a conviction for murder, notwithstanding the defendant's assertion that the victim shot at him first and that he shot the victim in self-defense, where (1) a witness testified that she saw the victim talking to the defendant when the defendant pulled a gun and shot at the victim's feet four or five times, and that she never saw the victim push the defendant or pull a gun on him, and that the defendant chased the victim and shot at him an additional seven or eight times, (2) another witness that he never saw the victim with a gun nor did he see a gun in his immediate vicinity, and (3) the victim was shot a total of six times with two wounds in his back and one wound in the back of his leg. *Riddley v. State*, — So. 2d —, 1999 Miss. App. LEXIS 237 (Miss. Ct. App. Apr. 20, 1999).

Defendant's confession, coupled with witness' verification of defendant's story, was sufficient to support convictions of murder and armed robbery when coupled with other trial testimony, even though witness had made deal with state for lesser sentence if he testified against defendant; jury was made aware of deal. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

Defendant's conviction of murdering her husband was supported by evidence that defendant was the only other person home when shots were fired, that defendant proclaimed that victim committed suicide by shooting himself twice, that victim was shot a third time in a manner that indicated that shot was not self-inflicted, that two of victim's wounds could not both have been self-inflicted, that defendant later asked an individual living in home where shooting occurred to retrieve a gun from attic, and that bullets found in victim's body bore same characteristics as those

produced by gun retrieved from attic. *Rhodes v. State*, 676 So. 2d 275 (Miss. 1996).

A murder defendant's actions met the requirements for aiding and abetting, and therefore her conviction for murder would be affirmed, where she was present when her boyfriend shot the victim, she arranged for the victim to be at the location of the killing, she testified that she suspected trouble when she saw her boyfriend arrive with a gun, she admitted that she did nothing while her boyfriend stood talking with the victim for approximately 30 minutes, and there was testimony that she knew of the plan to kill the victim. *Swinford v. State*, 653 So. 2d 912 (Miss. 1995).

The evidence was sufficient to support a conviction of murder, even though the defendant testified in his own behalf and claimed that he shot the victim in self-defense, where the defendant armed himself with a loaded shotgun after threatening to do something to the victim before the victim did something to him, he drove to the victim's house and made his presence known by honking his automobile horn, and he thereafter shot the victim from a distance of 30 to 40 feet when the victim's hands were at his side. *Hart v. State*, 637 So. 2d 1329 (Miss. 1994).

The evidence was sufficient to support a murder conviction where witnesses saw the defendant near the crime scene during the time period that the murder was estimated to have occurred, the defendant was seen trying to sell a gun similar to the gun owned by the victim on the evening after the murder occurred, the defendant was seen purchasing oranges before the murder occurred and the victim was found with an orange in her mouth, human blood was found on the defendant's knife which was hidden by the defendant at his girlfriend's house, a witness testified to an admission of the killing made by the defendant on the evening after the murder occurred, inmates who were with the defendant in jail testified as to another admission of the murder made by the defendant while in jail, and witnesses testified as to the defendant's detailed knowledge of the victim's injuries and the crime scene. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

Circumstantial evidence was sufficient to sustain conviction for murder where: (1) motive existed; (2) serial number of rifle was listed in ledger found in defendant's room; (3) defendant's diary contained schedule of victim's morning procedure and whereabouts; (4) bullets extracted from victim's body plus those found in defendant's drawer, door facing, and those remaining in clip were of same type, accounting for all 15 bullets missing from box of ammunition found nearby; (5) defendant was in area of murder on morning of murder; (6) defendant admitted smoking brand of cigarettes found in victim's office commode; and, (7) defendant's fingerprints were on door facing of back door. *Montgomery v. State*, 515 So. 2d 845 (Miss. 1987).

State's proof was sufficient to establish beyond reasonable doubt that defendant acted in manner imminently dangerous to others and evincing depraved heart where evidence showed that defendant had hit victim several times with large stick, and victim subsequently died as result of blows inflicted about his head. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

Defendant's conviction for murder was sustained by state's evidence showing that the deceased was shot with the defendant's gun, the defendant moved the body and the gun from the original site, the defendant got rid of the bullets from the gun, the deceased had several bruises and abrasions about the head, face and hand which were inflicted near the time of death and were unaccounted for, and defendant had threatened the deceased some months prior to the shooting. *Higgins v. State*, 502 So. 2d 332 (Miss. 1987).

Evidence that at approximately 3:00 in afternoon, parent entered apartment carrying child, who was then alive, that parent had been drinking, that no one else entered apartment but 3 other young children, that at approximately midnight, officers were summoned to apartment where they found child's body on bed, badly bruised and cut, that cause of death was extensive blows to head, and that medical experts' testimony discounted parent's testimony that cause of death was accidental fall is sufficient to support murder conviction of parent. *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Testimony by witnesses for state and physical evidence contradicting murder defendant's version of shooting as being accidental is sufficient to support murder conviction. *Fuller v. State*, 468 So. 2d 68 (Miss. 1985).

Evidence was sufficient to support defendant's conviction of murder, in violation of subsection (2)(e) of this section, notwithstanding minor inconsistencies in defendant's two confessions, and notwithstanding contradictory testimony by defendant's two accomplices who pleaded guilty to murder, where the confessions were consistent in most respects, where law enforcement officers testified that defendant knew the location of his rape-murder victim and directed them to it, where he explained to them how he had gained entry to the house, where contradictions in the accomplices' testimony was explainable by their desire to blame each other for the crime, where the jury had sufficient evidence from the two of them to believe that all three defendants had been in the victim's home, that the victim had been raped and then murdered, and that all three of them had in some manner participated, and where there was ample evidence, aside from the accomplice testimony, to sustain defendant's conviction. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

The proof was sufficient to support a conviction of murder under this section where the adult defendant killed a four year old child by kicking her in the stomach and striking a blow to her head. *Neighbors v. State*, 361 So. 2d 345 (Miss. 1978).

The evidence, although largely circumstantial, against the defendant who was identified by witnesses as the driver of the automobile in which the female victim had been driven off after being offered a babysitting job, which automobile was registered in the name of the defendant's wife according to the tag number which the victim's mother had written down, and who could not name a single person he saw or talked to in the hours subsequent to the disappearance of the victim, was sufficient to sustain his conviction of murder. *Taylor v. State*, 254 So. 2d 728 (Miss. 1971).

Conviction of murder was sustained by evidence that defendant, angry over an altercation with respect to money and using a deadly weapon, purposely and designedly, shot the victim in the back when she was running away from him and having no weapon of any kind on her person, notwithstanding defendant alleged that victim had called him a son-of-a-bitch. *McLaurin v. State*, 205 Miss. 554, 37 So. 2d 8 (1948), cert. denied and appeal dismissed, 336 U.S. 933, 69 S. Ct. 750, 93 L. Ed. 1093 (1949), motion granted, 207 Miss. 14, 41 So. 2d 41 (1949).

Evidence that defendant, after leaving deceased's house, returned and, upon requesting deceased to bring him a splinter and match to hunt for his pocketbook, shot deceased with a shotgun as he came out of the door, sufficiently established malice so as to authorize conviction of murder. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454 (1944).

Evidence was sufficient for jury in murder prosecution although the testimony showed that the night was dark and rainy so as to affect the ability of the witnesses to see the event testified to and their testimony was in conflict with natural laws. *Williams v. State*, 188 Miss. 398, 195 So. 334 (1940).

Evidence of a dispute between defendant and deceased, that defendant invited deceased outside, at the same time opening a knife and placing it in his pocket, that shortly thereafter the deceased approached defendant, having no weapon in his hands, and placed one hand on defendant's shoulder, and that defendant thereupon stabbed him, causing his death, justified a conviction of murder against plea of self-defense. *Hudson v. State*, 185 Miss. 677, 188 So. 561 (1939).

51. — —Capital murder.

Evidence was sufficient to sustain the underlying felony of robbery in a capital murder case, and thus the capital murder conviction, where officers discovered defendant in possession of the victim's truck and a sword taken from the victim's trailer, and in addition to his possession of the property, there was testimony that defendant admitted that the truck was stolen. *Spicer v. State*, 921 So. 2d 292 (Miss. 2006).

Defendant attempted to assert that the jury did not have sufficient evidence to convict him of murder with the underlying offense of robbery; this argument hung on the fact that the robbery occurred right after the murder. The time between the murder and the robbery, however, formed a continuous chain of events; therefore, there was compliance with the statute's intent, and the evidence was sufficient to support the convictions. *Shaw v. State*, 915 So. 2d 442 (Miss. 2005).

There was ample evidence to support the jury's verdict convicting defendant of capital murder because (1) an accomplice testified that he and defendant attempted to rob the victims and thus proved the underlying felony of robbery, *Miss. Code Ann. § 97-3-79*; (2) three detectives testified that defendant confessed to shooting the deceased victim; and (3) defendant's letters to the accomplice apparently expressed defendant's concern in the accomplice's testimony against him. Thus, the trial court did not err in denying defendant's motion to dismiss and for a judgment of acquittal. *Moore v. State*, 914 So. 2d 185 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

In a capital murder case, a conviction was based on substantial evidence where the evidence showed that defendant participated in a robbery where three victims were killed by beating; the intent to kill was not required to support the conviction where the jury found that the homicides were committed during a robbery. *Le v. State*, 913 So. 2d 913 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 622, 163 L. Ed. 2d 508 (2005).

In a capital murder case, the evidence was sufficient to convict defendant of the underlying felony of robbery because jury could have found that (1) the inmate killed the victim in the garage; (2) took her house and car keys from her; (3) dragged her body and placed it in the trunk of the car; and (4) took the keys intending to take her car, and that he either failed to do so or intended to return at a later time. *Knox v. State*, 901 So. 2d 1257 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 797, 163 L. Ed. 2d 630 (2005).

Evidence was sufficient to convict defendant of capital murder under *Miss. Code*

Ann. § 97-3-19 where it was shown that he had felonious intent to commit robbery under *Miss. Code Ann. § 97-3-79* in that he admitted that his plan was to kill the victim and take the victim's car to Chicago to get away, and he packed his belongings and left them outside the victim's house for easy access. *Walker v. State*, 913 So. 2d 198 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 743, 163 L. Ed. 2d 581 (2005).

There was sufficient evidence to convict defendant of capital murder under *Miss. Code Ann. § 97-3-19* with armed robbery as the underlying felony under *Miss. Code Ann. § 97-3-79* in that he confessed to and described the murder and the accounts matched the cashier's and other witnesses'. *Bush v. State*, 895 So. 2d 836 (Miss. 2005).

Capital murder is the killing of a human being without the authority of law by any means or when done with or without any design to effect death, by any person engaged in the commission of the crime of robbery; the jury could have easily inferred that defendant knew about the money on the victim's person, shot him in the back of the head, and proceeded to take the money from the victim's pocket; the court will reverse only when reasonable and fair-minded jurors could find the accused not guilty. *Miller v. State*, 885 So. 2d 97 (Miss. Ct. App. 2004).

Evidence included the testimony of the witnesses who saw defendant and co-defendant together throughout the evening, the blood evidence, the items found at co-defendant's home, and defendant's confession; thus, reasonable, fair-minded jurors could find beyond a reasonable doubt that defendant was guilty of robbery and capital murder. Therefore, the trial court did not err in denying defendant's motion for a directed verdict. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

Sufficient evidence supported the capital murder conviction of an aider and abettor who provided a gun that was used in a murder; defendant admitted that he thought his accomplice was planning to steal the victim's car, and the jury specifically found that defendant had intended to kill the victim. *Lynch v. State*, 877 So.

2d 1254 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1299, 161 L. Ed. 2d 122 (2005).

Evidence was sufficient to convict defendant of capital murder where the jury heard defendant's version of events and decided instead that the State's account of the victim's death was correct; the verdict of guilty was upheld as it was not the result of prejudice, bias or fraud, and was not against the weight of the evidence. *Palmer v. State*, 878 So. 2d 1009 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Capital murder conviction and death sentence were affirmed because there was sufficient evidence to support the underlying charge of attempted rape, the State's evidence concerning the underlying charge was not based upon circumstantial evidence, and defendant's claims that he received ineffective assistance of counsel at his trial were without merit. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

Evidence was sufficient to support defendant's conviction for capital murder where defendant was identified as the shooter by an independent witness and by a codefendant, testimony revealed that defendant had pulled away from the car, raised his hands in the air, jumped back, and fired the gun, and a codefendant stated that when defendant returned to the car, defendant said that the victim sprayed him in the face with mace so he shot him. *Howell v. State*, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

Evidence that defendant was one of five men who robbed a store owner and that defendant shot and killed the store owner during the robbery was sufficient to support defendant's conviction of and life sentence for capital murder. *Ellis v. State*, 856 So. 2d 561 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Evidence was sufficient to uphold defendant's capital murder conviction, even in the absence of fingerprint and DNA evidence, because defendant's dentition matched the bite marks found on the victim's body, he lived two blocks away

from the victim, his former girlfriend testified that he liked to bite her on the breast and neck during intercourse, he smelled of burnt wood or clothes the morning after the murder, and he confessed to a detective that he had a temper and that is why the incident occurred. *Howard v. State*, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

Where two witnesses testified they saw defendant leave their slain mother's store carrying a money bag and their mother's purse, other witnesses placed defendant near the crime scene, and he admitted to a cellmate that he hit a woman with pipe wrench and took her purse and money bag, the evidence was legally sufficient to support defendant's conviction for capital murder. *Shelton v. State*, 853 So. 2d 1171 (Miss. 2003).

Where the defendant did not attempt to rebut any of the state's evidence, the court was required to take the evidence presented by the state as true and to affirm the trial court's denial of his motion for a directed verdict as well as his motion for *jnov*. *Morris v. State*, 777 So. 2d 16 (Miss. 2000).

Evidence was sufficient to support a conviction for capital murder where the state presented testimony about the events surrounding the robbery of two businesses and the defendant's presence and participation in the robbery, established that the defendant owned the gun used as the murder weapon, and also established that the victim died from a gunshot wound inflicted during the robbery. *Ellis v. State*, — So. 2d —, 2000 Miss. App. LEXIS 385 (Miss. Ct. App. Aug. 15, 2000).

Circumstantial evidence was sufficient to support the defendant's conviction for capital murder while in the commission of felonious child abuse, notwithstanding the defendant's offer of a hypothesis consistent with his innocence. *James v. State*, — So. 2d —, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000).

Evidence supported a conviction for capital murder with the underlying felony being sexual battery where photographs and testimony established that the victim was under the age of 14, medical testi-

mony established sexual penetration, and eyewitness testimony and bite marks on the victim identified the defendant as the perpetrator. *Brooks v. State*, 748 So. 2d 736 (Miss. 1999).

The evidence was sufficient to establish that the murder victim was a deputy sheriff and was sufficient to sustain a conviction for capital murder, notwithstanding that the state did not produce a written appointment and oath of the victim that specifically addressed the office of deputy sheriff where (1) the sheriff testified that the victim was a deputy, and was in charge of the jail, pursuant to his control, consent, and approval, (2) numerous witnesses testified that, when he was killed, the victim was wearing a deputy sheriff's uniform and a badge with an inscription of his name, and (3) the victim had, under the administration of a previous sheriff, signed an oath of office. *Stevenson v. State*, 733 So. 2d 177 (Miss. 1998).

Substantial circumstantial evidence existed for the jury to find that the prosecution met its burden of proof regarding the kidnapping and murder of the victim; therefore, evidence was sufficient to support the defendant's conviction for capital murder. *Underwood v. State*, 708 So. 2d 18 (Miss. 1998).

Evidence supported jury's verdict of guilt for capital murder committed while engaged in child abuse, despite defendant's claim that child had fallen from bed; State presented no fewer than five medical witnesses who testified that child could not have been injured the way defendant claimed she was, and defendant had sole custody of child on day injuries were inflicted. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Finding that murder was committed during course of robbery, meeting statutory definition of capital murder, was supported by defendant's own statements to police and to newsman and by fact that he took victims' purses, jewelry, and car. *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g

denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Conviction of capital murder was supported by evidence that defendant planned to "get" his wife by harming one of her children, that defendant lacked alibi during time of victim's disappearance, that defendant gave conflicting accounts of scratches on his face and body, that defendant attempted to get 2 different women to say that they had scratched him, and that defendant told a friend that he had killed victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Finding that defendant was under life sentence when murder was committed, which allowed conviction for capital murder, was supported by certified copy of order of prior conviction and life sentence, and by testimony of Department of Corrections supervisor of probation and parole services that defendant was on parole from life sentence when murder was committed. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For defendant to be convicted of capital murder, state was not required to prove that defendant's prior conviction resulting in life sentence was valid; state was only required to prove that defendant was "under sentence of life imprisonment." *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Evidence that money and money orders were taken from victim's presence before victim was fatally shot and that money orders were found in defendant's possession when he was arrested was sufficient to support conviction of capital murder during commission of robbery, despite inconsistencies in testimony of defendant's accomplice. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Evidence supported felony-murder conviction of defendant, even though he claimed he formed intent to commit sexual battery upon victim only after she was already dead, and that his act of inserting a stick into her vagina after he had apparently drowned her could not serve as a felony-murder predicate; there was testimony from accomplice that defendant had attempted to have vaginal intercourse with victim, and had succeeded in having anal intercourse, before he drowned her and that after defendant had inserted the stick he told accomplice that he "had always wanted to do that." *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Testimony from accomplices provided sufficient evidence to sustain defendant's murder conviction; contradictions in accomplice testimony were minor and did not concern defendant's role in the crime. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Psychological examinations that allegedly showed that it was improbable that defendant was mastermind of robbery and murder were not relevant in determining whether evidence was sufficient for conviction, where examinations were not introduced as evidence at trial or were not offered until sentencing phase, at which one examination was admitted for identification purposes only. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

The evidence was sufficient to support a conviction for capital murder where the defendant was seen on the night the victim was killed in the same area where she had been seen, the defendant was in the vicinity of the crime scene the following morning, the defendant was a "non-secreter" and forensic evidence showed that semen found in the victim's vagina was from a non-secreter, and the DNA banding pattern from the defendant's blood matched one of the patterns found

in the victim's vaginal swab. *Parker v. State*, 606 So. 2d 1132 (Miss. 1992).

In a capital murder prosecution, there was sufficient evidence to support the jury's verdict that the murder occurred during the course of an armed robbery, in spite of the defendant's argument that the alleged robbery was completed long before the victim was killed 60 miles away in another county, where the jury was instructed that it was necessary for them to find that the defendant had the intent to rob when the killing was done, the evidence offered at trial put the defendant in the same neighborhood as the victim on the date in question, there was evidence of violence in the victim's home, within a few hours the defendant was seen approximately 60 miles away in possession and control of the victim's car, and the victim's personal effects were found in the general vicinity of the car. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

Valid subsection (2)(e) of this section capital murder conviction must be supported by evidence legally sufficient to support conviction of both murder and underlying felony had either been charged alone. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Testimony of accomplice, which is corroborated by bloodstain and fiber tests and which is directly disputed only by another accomplice whose testimony is not convincing, is sufficient to support conviction for capital murder. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Defendant's conviction for murder while engaged in robbery in violation of subsection (2)(e) of this section was adequately supported by the evidence, where a forensic pathologist testified that the cause of the victim's death was cardiac arrest resulting from stress compatible with blows to his head, where two eye witnesses saw defendant and the victim struggling in a restroom, and it appeared that the defendant had partially pulled the victim's billfold out of his back pocket, where forensic investigation revealed that the blood on the floor of the restroom was the victim's

type but not the defendant's, and that blood on the defendant's face and hand was also of the victim's type, and where arresting officers found the victim's billfold in the defendant's possession 15 minutes after the victim's death. *Jackson v. State*, 441 So. 2d 1382 (Miss. 1983).

Testimony that a certain carburetor was found in defendant's apartment, that defendant rented the truck which was used in the robbery and returned it the next day, and that the body found in the woods was that of the robbery victim constituted sufficient evidence to sustain defendant's conviction of capital murder; and in violation of subsection (2)(c) of this section imposition of the death sentence was not disproportionate, wanton, or freakish when compared to cases involving similar crimes, nor was the sentence imposed under the influence of passion, prejudice, or any other arbitrary factors, where defendant had been engaged in robbing the victim, committed the murder for pecuniary gain, had previously been convicted of a felony involving the use or threat of violence, and committed the murder in an especially heinous, atrocious, and cruel manner. *Hill v. State*, 432 So. 2d 427 (Miss. 1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983), habeas corpus granted, 667 F. Supp. 314 (N.D. Miss. 1987), aff'd in part, rev'd in part, 887 F.2d 513 (5th Cir. 1989), opinion supplemented on denial of reh'g, 891 F.2d 89 (5th Cir. 1989), vacated, 498 U.S. 801, 111 S. Ct. 28, 112 L. Ed. 2d 6 (1990), on remand, 920 F.2d 249 (5th Cir. 1990), post-conviction relief granted, 659 So. 2d 547 (Miss. 1995), reh'g denied, (Miss. 1995).

In a prosecution for murdering a constable while such constable was attempting to serve an arrest warrant, defendant's conviction of murder was adequately supported by testimony including that of the defendant's son who stated that his father stated he shot the constable and intended to do so. *Polk v. State*, 417 So. 2d 930 (Miss. 1982).

In a capital murder prosecution, the jury properly found beyond a reasonable doubt that the alleged killing occurred while defendant was engaged in committing the crime of robbery where the jury

was fully instructed that it was necessary for them to find that defendant had the intent to rob when the murder was committed and where, based on the defendant's actions as well as the surrounding circumstances, the evidence was sufficient to show such intent. *Voyles v. State*, 362 So. 2d 1236 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2184, 60 L. Ed. 2d 1059 (1979).

52. —Conviction not sustained.

Conviction for depraved heart murder was not sustained by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the 2 started joking around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying; defendant's conduct of falling to ground and crying following shooting could be considered as consistent with accident, and there was no testimony indicating that gun was defendant's, that he knew it was loaded, or that he pulled the trigger. *Hankins v. City of Grenada*, 669 So. 2d 85 (Miss. 1996).

The evidence was insufficient to support a defendant's conviction for murder for failure to properly feed and care for her daughter, who suffered from birth defects and required constant care, where the record was replete with hospital visits, doctors' office visits, "and a spasmodic, yet continuous, effort by the defendant to find help for the child and to deal with her numerous health problems"; the defendant should not have been held to a standard of care that she could not give and which was not available to her even through charitable or government agencies. *Clayton v. State*, 652 So. 2d 720 (Miss. 1995).

Circumstantial evidence conviction will not be disturbed unless it is opposed by decided preponderance of evidence. *Stokes v. State*, 518 So. 2d 1224 (Miss. 1988).

In case in which testimony is so contradictory that it is virtually impossible to reconstruct what actually happened and there are number of unresolved issues, proof is not sufficient to sustain conviction

for murder but is sufficient to sustain conviction for lesser included offense of manslaughter. *Clemons v. State*, 473 So. 2d 943 (Miss. 1985).

Evidence that deceased and accused killed in heat of passion or self-defense is insufficient to sustain murder conviction. *Pigott v. State*, 107 Miss. 552, 65 So. 583 (1914).

Conviction of murder not supported by evidence where deceased began shooting at defendant before defendant showed any intent to kill or do him bodily harm. *Jones v. State*, 60 So. 735 (Miss. 1913).

Where evidence raises only issue of self-defense or manslaughter murder conviction will be reversed. *Jones v. State*, 98 Miss. 899, 54 So. 724 (1911).

"Maliciously" not same as "malice aforethought," and conviction of murder where jury find that defendant wilfully and maliciously killed deceased with deadly weapon, is error. *Brett v. State*, 94 Miss. 669, 47 So. 781 (1908).

III. INSTRUCTIONS.

53. In general.

Jury was properly instructed that it could consider as an aggravating factor the fact that defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person, even though defendant's previous conviction was for manslaughter, which was not a capital offense. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

In a capital murder case, an instruction to the jurors that they should consider and weigh any aggravating and mitigating circumstances but which cautioned them not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feelings correctly stated the law, as it did not tell the jurors to completely disregard sympathy. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

As defendant, on trial for capital murder, could be sentenced only to death or life imprisonment without the eligibility of parole, by instructing the jury that these were its only sentencing options, the

trial judge properly gave the jury all the instructions that were needed. *Brown v. State*, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Trial court did not err in denying defendant's requested alibi instruction where the evidence showed that defendant was not present in the location where the crime was committed on dates before and after the date on which the victim was killed but did not raise an issue as to whether defendant was present in the area on the date of the offense. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

In a prosecution in which the defendant was charged with depraved heart murder, it was not error to instruct the jury with regard to both depraved heart murder and deliberate design murder. *Sanders v. State*, 781 So. 2d 114 (Miss. 2001).

Trial court did not improperly speculate on parole in capital murder case by telling venire about possibility of parole should defendant be sentenced to life in prison; trial court emphasized that court and jury had no control over parole, when further pressured by venire regarding parole eligibility, court gave truthful response, and at close of presentation of evidence, court properly instructed jury regarding options of life and death. *Wiley v. State*, 691 So. 2d 959 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 886, 118 S. Ct. 219, 139 L. Ed. 2d 153 (1997).

Defendant is not per se entitled to manslaughter instruction in murder case. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

That murder was committed (1) while engaged in crime of robbery and (2) for pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at state, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggravators. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Defendant on trial for murder less than capital was not entitled to requested reasonable doubt instruction where the jury

had been properly and adequately instructed on reasonable doubt, and the requested instruction was argumentative and abstract. *Hunter v. State*, 489 So. 2d 1086 (Miss. 1986).

Instruction that where defendant is only eyewitness to homicide, defendant's version of homicide, if reasonable, must be accepted as true need not be given where defendant's version of homicide is contradicted by state witness who received telephone call from victim immediately prior to homicide and where court has great difficulty reconciling physical evidence with defendant's account. *Flanagin v. State*, 473 So. 2d 482 (Miss. 1985).

Instruction tailored specifically to facts of murder case is proper. *Fairley v. State*, 467 So. 2d 894 (Miss. 1985), cert. denied, 474 U.S. 855, 106 S. Ct. 160, 88 L. Ed. 2d 133 (1985).

Instruction which impermissibly directs jury to find defendant guilty of murder if homicide victim was willfully and deliberately killed by defendant without authority of law is not cured by giving of instruction properly setting forth distinction between murder and manslaughter. *Smith v. State*, 463 So. 2d 1028 (Miss. 1984), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

In a capital murder prosecution, even if one jury instruction was confusing, the underlying felony was adequately explained in another instruction, which tracked the language of subsection (2)(e) of this section; accordingly, the jury was fully and fairly instructed as to the applicable law. *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), reh'g denied, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985), post-conviction relief denied, 478 So. 2d 1043 (Miss. 1985), cert. denied, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986), denial of post-conviction relief aff'd, 655 So. 2d 1 (Miss. 1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 818, 133 L. Ed. 2d 762 (1996), grant of habeas corpus rev'd, 135 F.3d 311 (5th Cir. 1998).

In a prosecution for murder while engaged in armed robbery, an instruction was not defective for failing to mention armed robbery, where the indictment

stated armed robbery, the evidence was as to armed robbery, the state secured instructions on armed robbery, as did the defendant, and when all of the instructions were read and considered as a whole, the jury had adequate instruction on the issues. *Alexander v. State*, 250 So. 2d 629 (Miss. 1971).

Where an indictment charged that the defendant did wilfully, unlawfully, feloniously, and of his malice aforethought, kill and murder the deceased, the indictment was sufficient to charge murder in the proper terms, and the state was entitled to instructions setting forth both the theory of a premeditated killing and the theory of a homicide resulting from the commission of a crime of violence. *Wilson v. J. Ed Turner, Inc.*, 221 So. 2d 368 (Miss. 1969).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

Instruction in murder prosecution is not erroneous as assuming defendant killed victim as it does not assume as fact that defendant inflicted fatal blow when it provides "if the defendant was inflicting blows," the qualifying word "if" eliminating any possibility of there being unwarranted assumption by jury. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Only approved instructions should be requested. *Mott v. State*, 123 Miss. 729, 86 So. 514 (1920).

53.5. Variance between pleadings and instructions.

Defendant waived any objection to a variance of one day between the date of offense set out in the indictment and the date of offense set out in the jury instructions by not objecting to the instructions as given at trial. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

There was no fatal variance between the pleadings and the instructions where the indictment charged that the defendant murdered the victim with malice aforethought, but the jury was instructed to convict the defendant if he killed the defendant while engaged in a robbery, since notwithstanding the “malice aforethought” language, the indictment served notice on the defendant that he was charged with murder while engaged in the commission of an armed robbery. *Bell v. State*, 725 So. 2d 836 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805 (1999).

54. Terms and definitions.

Every murder committed with deliberate design was by definition done in the commission of an act imminently dangerous to others, evincing a depraved heart; thus, the two versions of murder in Miss. Code Ann. § 97-3-19(1)(b) (depraved heart) and (1)(a) (deliberate design) have been coalesced by the case law. Therefore, the trial court did not err when it allowed a “depraved heart murder” clause to be added to the deliberate design jury instruction. *Young v. State*, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004).

Instruction defining offense of murder, which contained surplus language that killing must not have been in necessary self-defense, was not prejudicial to defendant in murder prosecution; such surplus language served only to raise state’s burden of proof. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

Trial court’s refusal to give defendant’s proposed instruction setting out elements of murder offense and instructing jury that prosecution was required to prove each and every one of those elements beyond a reasonable doubt did not constitute reversible error in murder prosecution, where charges given, taken together, fully and fairly instructed jury on elements of murder, presumption of innocence, and reasonable doubt requirement. *De La Beckwith v. State*, 707 So. 2d 547 (Miss. 1997), cert. denied, 525 U.S. 880, 119 S. Ct. 187, 142 L. Ed. 2d 153 (1998).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh’g denied, 691 So. 2d 1026 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh’g denied, 691 So. 2d 1026 (Miss. 1996).

“Depraved heart” instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; the two subsections of murder statute had “coalesced.” *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

Denial of instruction defining deliberate design was not reversible error, where elements of murder were sufficiently addressed by other instructions. *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

In a prosecution for capital murder while engaged in the crime of kidnapping, an instruction as to the underlying felony of kidnapping was proper even though it did not include “asportation” as an element of the crime. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder, “culpable negligence” should be defined as “negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life.” *Clayton v. State*, 652 So. 2d 720 (Miss. 1995).

A trial court’s instruction to the jury that the defendant should be found guilty of capital murder if the jury found that he killed the victim while committing the

crimes of kidnapping “or” robbery did not require reversal of the defendant’s conviction, in spite of the defendant’s contention that the instruction permitted the jury to return a less-than-unanimous verdict because some jurors could have found him guilty of kidnapping but not robbery while other jurors could have found him guilty of robbery but not kidnapping, where the jury’s sentencing verdict clearly indicated a finding that the defendant was engaged in both kidnapping and robbery when he murdered the victim, and all 3 crimes of which the defendant was accused occurred as part of a single transaction and were essentially inseparable. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh’g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In a capital murder prosecution arising from the defendant’s alleged killing of the victim while engaged in the commission of a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as “felonious intent,” where the language “without authority of the law” was used in the instruction defining capital murder, so that robbery was defined correctly tracking the language of the statute when the 2 instructions were read together. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

It is permissible to use words “deliberate design” in place of “malice aforethought” in capital murder instruction. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

A definition of murder in the exact language of the statute [Code 1942, § 2215] is not error on the ground that it states an abstract legal definition. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

An instruction setting forth the allowable verdicts upon conviction of murder and their respective implications, which was prefaced with a proviso that conviction be “as charged in the indictment,” did

not preclude conviction for manslaughter. *Dobbs v. State*, 200 Miss. 595, 27 So. 2d 551 (1946), overruled on other grounds, *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

Instructions granted in favor of the state given in the exact language of Code 1942, § 2215, subsections a and b, defining the crime of murder, with the additional words “and the court further instructs the jury that if you believe beyond a reasonable doubt that the defendant, at the time and place testified about, so killed the deceased, he would be guilty of murder, and the jury should so find,” were not objectionable. *White v. State*, 190 Miss. 672, 1 So. 2d 500 (1941).

Instruction that unlawful killing of human being, with malice aforethought and deliberate design to kill him, or in commission of act eminently dangerous to others and evincing depraved heart, regardless of human life, though without such design, is murder, held not erroneous in trial for murder under indictment in language of statute. *Talbert v. State*, 172 Miss. 243, 159 So. 549 (1935).

Instruction defining “murder” in exact language of statute held proper, notwithstanding it did not contain words “with malice aforethought.” *Brown v. State*, 173 Miss. 542, 158 So. 339 (1935), error overruled, 173 Miss. 542, 161 So. 465 (1935), rev’d on other grounds, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936), conformed to, 167 So. 82 (Miss. 1936).

In prosecution for shooting another with intent to murder him, court properly included in instruction definition of murder. *Martin v. State*, 163 Miss. 454, 142 So. 15 (1932).

An instruction purporting to define murder under this section which excludes the statutory words “without authority of law” is erroneous. *Ivy v. State*, 84 Miss. 264, 36 So. 265 (1904); *Rutherford v. State*, 100 Miss. 832, 57 So. 224 (1912).

III. INSTRUCTIONS.

54.5. Terms and definitions.

54.6 — — Depraved heart murder.

In a criminal prosecution for murder, the State was permitted to instruct the jury that it could convict defendant if his

actions showed a depraved heart. The State produced evidence showing depraved heart murder by establishing that defendant was engaged in a fight with an unarmed man before he fired several shots in a hotel room with several people present; defendant was properly convicted as charged. *Lett v. State*, 902 So. 2d 630 (Miss. Ct. App. 2005).

55. Failure to give manslaughter instruction—where accused fails to request.

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Trial court's failure to give instruction on manslaughter was not error where defendant had submitted instruction on manslaughter, which undoubtedly would have been granted by lower court, but then withdrew instruction, obviously exercising trial strategy and gambling upon clear verdict of not guilty. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

Capital murder defendant who fails to request manslaughter instruction, on theory that giving of such instruction would encourage jury to find defendant guilty on compromised charge, may not thereafter obtain reversal of conviction on basis of trial judge's failure to give instruction, which judge would have done had defendant so requested. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

Accused in murder prosecution who has requested and been granted instruction limiting jury to verdict of guilty of murder or acquittal cannot complain of instruction given at request of state because it limited jury to murder or acquittal. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

56. —Where evidence supports manslaughter.

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an

instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Trial court's failure to give any manslaughter instructions in prosecution for capital murder during course of felonious child abuse was reversible error; jury was given no choice other than convicting defendant's of capital murder or acquitting him and, at the time, statutes were indistinguishable. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

State Supreme Court's Butler decision, under which defendant was entitled to manslaughter instructions in prosecution for capital murder during course of felonious child abuse, applied retroactively, even though it had been reversed on appeal on other grounds; rule was not specifically designated as "purely prospective" in nature, and failure to give manslaughter instruction was overwhelmingly prejudicial where jury ultimately found that defendant had caused child's death, but not that he either attempted to kill child or intended death. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

An instruction limiting the verdict to murder was erroneous where the evidence could have warranted a jury verdict of manslaughter. *McMullen v. State*, 291 So. 2d 537 (Miss. 1974).

Error to refuse submission of manslaughter in murder trial where elements present in testimony. *Lee v. State*, 130 Miss. 852, 94 So. 889 (1923).

57. —Where evidence does not support manslaughter.

Where the evidence showed that defendant murdered another passenger in the car by shooting him in the head and

burning his body, there was no evidence that he acted in the heat of passion. Defendant was convicted of simple murder; he was not entitled to a jury instructions regarding the lesser-included offense of manslaughter. *Anderson v. State*, 914 So. 2d 1239 (Miss. Ct. App. 2005).

In a case where defendant was convicted of murdering his wife and her son, the trial court did not err in refusing defendant's proffered manslaughter instructions because defendant put on no evidence of accident, misfortune, or heat of passion, and there was no evidence that would entitle defendant to have the jury instructed on the lesser included offense of manslaughter. *Wortham v. State*, 883 So. 2d 599 (Miss. Ct. App. 2004).

Because defendant was found guilty of robbery, and the death resulted in the commission of the robbery, defendant was guilty of capital murder regardless of whether a lesser-included offense instruction was given. Thus, the trial court did not err in refusing the jury instruction of the lesser-included offense of manslaughter. *Jacobs v. State*, 870 So. 2d 1202 (Miss. 2004).

Both the depraved heart murder and culpable negligence manslaughter instructions were given, and the question essentially before the jury was how reckless was defendant? The jury resolved that question by convicting of depraved heart murder. *Steele v. State*, 852 So. 2d 78 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

The defendant was not entitled to an instruction on manslaughter since his heat of passion argument was purely speculation and was totally void of any evidentiary support, notwithstanding the defendant's claim that his unusual conduct on the day of the victim's death coupled with the testimony and photographs of the victim's living room supported his assertion

that he acted in the heat of passion. *Agnew v. State*, 783 So. 2d 699 (Miss. 2001).

In a prosecution for depraved heart murder, it was not error to refuse to instruct the jury with regard to culpable negligence manslaughter since there was absolutely no evidence of a negligent act on the part of the defendant where all the testimony was that he intentionally hit the victim in the head with a hammer. *Sanders v. State*, 781 So. 2d 114 (Miss. 2001).

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter instruction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Failure to give circumstantial evidence instruction with regard to capital murder charge was not error, where circumstantial evidence instruction was given in connection with felonious child abuse charge arising from same conduct. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence that he did not intend to kill the victim or that the murder was committed in the heat of passion and evidence was presented as to brutal and intentional nature of the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Planning to conduct robbery of home at time when defendant believed residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction on lesser included offense on homicide for killing without malice in heat of passion. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction

where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles away where he raped her, cut her throat, and then shot her. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. *Graham v. State*, 582 So. 2d 1014 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

A defendant who was indicted for murder under subsection (2)(e) of this section was not entitled to a manslaughter instruction under § 97-3-27, where the victim was beaten to death and the injuries were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A murder defendant was not entitled to a manslaughter instruction where the record contained no evidence from which the jury could determine that the killing resulted from heat of passion and was not the result of malice. *Wilson v. State*, 574 So. 2d 1324 (Miss. 1990).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990).

Capital murder defendant is not entitled to instruction on lesser included offense of manslaughter where, considering evidence in light most favorable to defendant, defendant armed himself and two other persons, abducted two persons at knife point, led murder victim into woods at knife point, beat victim to ground breathless, supplied knife to accomplice and left accomplice to complete crime. *Gray v. State*, 472 So. 2d 409 (Miss. 1985), rev'd on other grounds, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987), and see *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Conventional instruction as to verdicts and punishments upon conviction of murder, which does not contain instruction on manslaughter, is not improper on ground that it limits jury to murder on acquittal, when there is no evidence suggesting manslaughter. *May v. State*, 205 Miss. 295, 38 So. 2d 726 (1949).

Granting a manslaughter charge to the state on an indictment for murder, sustained by the state's proof, and where the evidence discloses no elements of manslaughter, is not prejudicial error even though the defendant denies that he did the killing. *Lowry v. State*, 202 Miss. 411, 32 So. 2d 197 (1947).

Failure of trial court to inform jury, which found defendant guilty of murder, that it might convict him of manslaughter, is not error where the proof failed to show any element of manslaughter. *Dillon v. State*, 196 Miss. 625, 18 So. 2d 454 (1944).

It is proper to refuse an instruction in a murder case informing the jury that they may find the accused guilty of manslaughter if, under the evidence, the jury could not rightfully so find. *Leavell v. State*, 129 Miss. 579, 92 So. 630 (1922).

58. —Where underlying offense is robbery.

Defendant charged with capital murder was not entitled to lesser included offense instruction of murder where evidence, which included defendant's confession and empty purse found at scene, supported theory that robbery had occurred. *Davis v. State*, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Defendant was not entitled to instruction on manslaughter as lesser included offense of capital murder where killing took place during robbery at which defendant was not present. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial court did not err in refusing to grant a lesser included offense instruction for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it dis-

charged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in this section which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although § 97-3-27 authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. *Griffin v. State*, 557 So. 2d 542 (Miss. 1990).

Capital murder defendant was not entitled to manslaughter instruction, where neither his confession nor his testimony at trial supported a finding that the victim's death was the result of defendant's intent to commit larceny instead of robbery. *Cabello v. State*, 490 So. 2d 852 (Miss. 1986).

Trial court may refuse defendant's request that manslaughter instruction be given in homicide prosecution in which state's evidence shows robbery and repeated stab wounds to victim and defendant denies having anything to do with stabbing of victim. *Swanier v. State*, 473 So. 2d 180 (Miss. 1985).

In a capital murder prosecution, the trial court properly refused to give a lesser included offense instruction, since under subsection (2)(e) of this section any murder committed during the course of a robbery is capital murder, and since, inasmuch as it was proved that defendant committed a robbery, any murder committed had to be capital. *Jones v. Thigpen*, 555 F. Supp. 870 (S.D. Miss. 1983), rev'd on other grounds, 741 F.2d 805 (5th Cir. 1984), reh'g denied, 747 F.2d 1465 (5th Cir. 1984).

59. Manslaughter instruction given where evidence sufficient for murder.

In a criminal prosecution for murder where defendant fatally shot the victim during a fight, the State was entitled to a jury instruction on the lesser included offense of manslaughter. However, defendant was not entitled to a jury instruction on reasonable doubt, because the State had fully informed the jury to find defendant guilty only if the State established

guilt beyond a reasonable doubt. *Lett v. State*, 902 So. 2d 630 (Miss. Ct. App. 2005).

Where the record contains evidence legally sufficient to support a finding of guilty of murder, had the jury so found, the defendant will not be heard to complain that a manslaughter instruction was given. *Fowler v. State*, 566 So. 2d 1194 (Miss. 1990).

It was not error for trial court to give jury manslaughter instruction where facts of case presented issue to jury on murder, despite defendant not asking for instruction and objecting to such instruction. *Crawford v. State*, 515 So. 2d 936 (Miss. 1987).

The fact that a defendant has been indicted for capital murder does not preclude the trial court's giving instructions on lesser-included offenses of murder and manslaughter where, under the evidence, a reasonable jury could find the defendant not guilty of capital murder but guilty of one of the lesser-included offenses. *Harveston v. State*, 493 So. 2d 365 (Miss. 1986).

Where the evidence is sufficient to convict for murder, the accused cannot complain of the granting of a manslaughter instruction when he has been convicted of manslaughter. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273 (1956).

In a prosecution for murder it was not reversible error for the court to instruct the jury that they could find the defendant guilty of manslaughter. *Mazie v. State*, 54 So. 2d 734 (Miss. 1951).

Granting a manslaughter charge to the state on an indictment for murder, sustained by the state's proof, and where the evidence discloses no elements of manslaughter, is not prejudicial error even though the defendant denies that he did the killing. *Lowry v. State*, 202 Miss. 411, 32 So. 2d 197 (1947).

Where defendant is convicted of manslaughter on a charge of murder, he cannot complain of the giving of a murder instruction, as he was not prejudiced thereby. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417 (1947).

60. Failure to limit conviction to manslaughter.

Defendant was not entitled to a manslaughter instruction when his victim was

killed in the course of a burglary, because burglary was excepted from the provisions of Miss. Code Ann. § 97-3-27 by Miss. Code Ann. § 97-3-19(2)(e). *Coleman v. State*, 804 So. 2d 1032 (Miss. 2002).

In a prosecution for murder the court did not err in failing to instruct the jury to restrict its verdict and find the defendant "guilty of manslaughter or not guilty," where the evidence was for the jury to resolve the issue of whether the defendant was guilty of murder, manslaughter, or no crime. *Polk v. State*, 417 So. 2d 930 (Miss. 1982).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he re-entered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Where the evidence would support a conviction of manslaughter but did not support a conviction of murder, the court erred in not granting the defendant's request for an instruction limiting his conviction to manslaughter. *Taylor v. State*, 188 Miss. 166, 194 So. 589 (1940).

61. Accessories, accomplices.

An instruction in a murder prosecution, in which the defendant was tried as an accessory before the fact, stating that "even if the defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case" was erroneous. To be convicted as an accessory, the defendant must possess the mens rea for the commission of the crime, and the precise state of mind of the defendant has great significance in determining the degree of his or her guilt; an accomplice may be convicted of accomplice liability only for those crimes as to which he or she personally has the requisite mental state. The cumulative effect of the instruc-

tion was that the defendant was guilty of murder regardless of his mental state; the instruction affirmatively negated the mens rea requirement and should not have been given. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

Capital murder defendant is not entitled to have jury separately instructed and separately to consider whether or not defendant is guilty of being accessory after fact. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), reh'g denied, 476 U.S. 1189, 106 S. Ct. 2930, 91 L. Ed. 2d 557 (1986).

Although the court's instruction on the matter of accessory before the fact in a prosecution under subsection (2)(e) of this section for murder while in the commission of the crime of rape was in the abstract, such instruction was not unconstitutionally vague where an instruction on accessory before the fact in some form was proper in the instant case, where the instruction, when read with all the instructions, could not have misled the jury. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

Death sentence imposed upon codefendant for violation of state capital murder statute is infirm under Eighth Amendment where instructions could have caused reasonable juror to conclude that codefendant's intent to commit murder could be imputed to defendant. *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984), reh'g denied, 732 F.2d 494 (5th Cir. 1984), cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984).

Where accused was prosecuted under an indictment charging him, jointly with two others, with murder, an instruction that if the jury believed from all the evidence beyond a reasonable doubt that one of the others murdered the deceased, and accused, without being forced or coerced, transported the others in his automobile to where they obtained rifles knowing full well that the others intended to murder deceased, and aided, assisted and encouraged them therein, the accused was guilty as charged, was not erroneous. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

Where the accused was prosecuted under an indictment charging him, jointly

with two others, with murder, accused's tendered instruction that since he was charged by the indictment with the killing of the deceased with malice aforethought with a certain gun, and unless the state had proved the charge beyond all reasonable doubt, the jury should find the defendant not guilty, was properly refused, since it was not supported by the evidence and was contrary to the provisions of Code 1942, § 1995. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

In murder prosecution instruction for state that if jury believe from evidence beyond reasonable doubt that defendant did wilfully, unlawfully, feloniously and of his malice aforethought shoot deceased with pistol at time deceased received wounds that caused his death, jury should find defendant guilty even though jury believed that another person was at same time shooting at deceased and jury do not know which person fired shot or shots that actually killed deceased is not objectionable as assuming a conspiracy when evidence shows that defendant was a principal since he was present, aiding and abetting others and evidence is adequate to show defendant guilty individually. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949); *Porter v. State*, 39 So. 2d 307 (Miss. 1949).

62. Cautionary instructions.

Manslaughter instruction which tracks 3 different manslaughter statutes, then states that prosecution must prove them all, need not be given, as requested by defendant in homicide case; nor need cautionary instruction regarding eyewitness identification testimony be given. *Holmes v. State*, 483 So. 2d 684 (Miss. 1986).

Where the trial court, in a prosecution under subsection (2)(e) of this section for murder while in the commission of the crime of rape, instructed the jury that the testimony of two individuals who had implicated the defendant was to be considered with great care and caution, an instruction requested by the defendant asserting that it was the defendant's theory of the case that those two individuals had committed the capital murder and had given statements implicating the defendant for the purpose of inducing the prosecutors to allow them to enter guilty

pleas to lesser included offenses was cumulative and improper, and the refusal of such instruction was not error. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

In a murder prosecution wherein it appeared that at the time of trial sentiment in the community was hostile to the accused, it was reversible error for the trial judge to refuse to instruct on behalf of the accused that dying declarations are a species of hearsay evidence and are not entitled to the same credit and force as if the deceased was alive and testifying in the presence of the jury, under oath, and subject to cross-examination, and that the jury alone were the judges of the weight and force of such dying declarations. *Cannon v. State*, 244 Miss. 199, 141 So. 2d 251 (1962).

63. Peremptory instructions.

Jury instruction on offense of murder was not peremptory, as it allowed jury to consider homicide less than murder; instruction allowed jury to decide whether shooting was in self-defense. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

If defendant and his witnesses are the only eyewitnesses to homicide and if their version of what happened is both reasonable and consistent with innocence, and if there is no contradiction of that version in physical fact, facts of common knowledge or other credible evidence, then no reasonable juror could find defendant guilty beyond reasonable doubt and, under such circumstances, peremptory instructions must be granted. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Instruction given by court, after jury states that it is hung at vote of 10 votes in favor of murder verdict and 2 in favor of manslaughter verdict which in effect peremptorily directs jury to return manslaughter conviction without regard to personal convictions of jurors is impermissibly coercive where instruction is given after jury has deliberated for equivalent of full day without agreeing and verdict convicting defendant of manslaughter instead of murder is returned within minutes after instruction is given. *Isom v. State*, 481 So. 2d 820 (Miss. 1985).

The trial court did not commit reversible error in refusing to grant a peremptory instruction to find the defendant not

guilty of murder where he was not convicted of murder, but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. *Kinthead v. State*, 190 So. 2d 838 (Miss. 1966).

64. Defendant's theory of defense.

Questioning defense witness during cross-examination about defendant's ability to understand exactly what he was doing on day of murder was relevant, where defendant sought through testimony of witness, who was defendant's teacher, to impress on jury that he had learning disabilities and was consequently weak-minded. *McGowan v. State*, 706 So. 2d 231 (Miss. 1997).

Accused has right to have his defenses presented to the jury in jury instruction, but defense must be supported by evidence, however meager it may be. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

In absence of any other instruction that presented defendant's theory of defense to jury, trial court improperly failed to place defendant's proffered instruction, on self-defense by use of deadly weapon against larger, unarmed person, in proper form, in light of evidence which supported claim of justification. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

In homicide cases, trial court should instruct jury about defendant's theories of defense, justification, or excuse that are supported by evidence, no matter how meager or unlikely, and trial court's failure to do so is error requiring reversal of judgment of conviction. *Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

A capital murder defendant was entitled to a "2 theory" instruction where the case was based entirely on circumstantial evidence and there were several facts or circumstances which were susceptible of 2 interpretations, one favorable to the defendant and the other one unfavorable, and therefore the trial court's failure to give the requested 2 theory instructions warranted reversal of the defendant's conviction. *Parker v. State*, 606 So. 2d 1132 (Miss. 1992).

The failure of a trial court in a capital murder prosecution to grant the defen-

dant an instruction embodying his theory of defense constituted reversible error where the defendant's testimony established an evidentiary predicate for the defenses contained in his requested instructions, and the proffered instructions were the only ones presenting his theories of defense; if the requested instructions were in improper form, it was the duty of the trial court to see that they were placed in proper form for jury submission. *Hester v. State*, 602 So. 2d 869 (Miss. 1992).

Where the trial court, in a prosecution under subsection (2)(e) of this section for murder while in the commission of the crime of rape, instructed the jury that the testimony of two individuals who had implicated the defendant was to be considered with great care and caution, an instruction requested by the defendant asserting that it was the defendant's theory of the case that those two individuals had committed the capital murder and had given statements implicating the defendant for the purpose of inducing the prosecutors to allow them to enter guilty pleas to lesser included offenses was cumulative and improper, and the refusal of such instruction was not error. *Ruffin v. State*, 447 So. 2d 113 (Miss. 1984).

An instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in presenting defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681 (1956).

65. Flight as evidence of guilt.

Jury instruction on flight was warranted in capital murder prosecution by evidence that defendant had left his workplace for another state after assuring authorities that he would be there to talk with them, that defendant had purchased handgun and checked into motel under assumed name and that defendant had remained fugitive for several days until arrested by police; instruction that flight may be considered as circumstance of

guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

Giving of flight instruction was reversible error; defendant was arguing self-defense, and jury heard testimony on defendant's flight, which both defendant and codefendant explained as effort to avoid retribution from homicide victim's friends. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained and somehow probative of guilt or guilty knowledge. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

There is two-pronged test for deciding whether flight instruction is appropriate: only unexplained flight merits flight instruction, and flight instructions are to be given only in cases where that circumstance has considerable probative value. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Evidence that defendant and his friends fled scene in victim's taxicab after shooting victim, stole school bus and drove to Chicago, and there attempted to abduct woman and steal her van, was sufficient to warrant flight instruction in capital murder case, despite evidence that defendant had planned to move to Chicago before shooting victim. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Instruction that flight may be considered as circumstance of guilt or guilty knowledge is not appropriate in capital murder prosecution of prison escapee where giving of instruction would require escapee to explain flight and fact that he is prison escapee or not explaining flight and subjecting himself to instruction. *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985).

Flight is ordinarily relevant as evidence of guilt and a jury in a murder prosecution should not be instructed that it is not evidence of guilt. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

66. Malice or deliberate design.

Because every murder committed with deliberate design was by definition done in the commission of an act imminently dangerous to others, evincing a depraved heart, and because the two versions of murder in Miss. Code Ann. § 97-3-19 (depraved heart and deliberate design) had for all practical purposes coalesced, the trial court did not err when it allowed a depraved heart murder clause to be added to the deliberate design jury instruction. *Young v. State*, 891 So. 2d 813 (Miss. 2005).

In a case where defendant was convicted of murdering his wife and her son, the jury was properly instructed as to the element of deliberate design because the language complained of had previously been found to be proper; defendant did not put on any credible evidence of a defense so the trial court was not required to instruct the jury on all other circumstances where they could have found the homicides to have been justifiable, excusable, or manslaughter; and the given instruction specifically stated that deliberate design could not be formed at the very moment of the fatal act. *Wortham v. State*, 883 So. 2d 599 (Miss. Ct. App. 2004).

In a murder prosecution, where a manslaughter instruction was neither requested nor given, the State maintained defendant's deliberate design to kill existed well before the shooting, and on the defense theory, it never existed at all because the shooting was accidental, the trial court's granting of a deliberate design instruction was proper. *Shipp v. State*, 847 So. 2d 806 (Miss. 2003).

An instruction on "deliberate design" was not required where there was no central issue defining the time during which deliberation must have occurred, and there was substantial evidence that defendant had formed the intent well before the killing. *Brown v. State*, 768 So. 2d 312 (Miss. Ct. App. 1999).

"Depraved heart" instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; the two subsections of murder statute had "coalesced." *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

Act which poses risk to only one individual and which results in that individual's

death may be deemed depraved heart murder. *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

Jury instruction that “deliberate design” meant “to kill, without authority of law and not being legally justifiable, legally excusable or under circumstances that would reduce the act to a lesser crime” did not improperly state that deliberate design could be formed at very moment of fatal act or improperly cut off defendant’s contention that shooting was in self-defense. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Jury instruction in homicide prosecution, that “deliberate design may be presumed from the unlawful and deliberate use of a deadly weapon” was reversible error; facts of shooting were set forth in trial, and while testimony was conflicting, question of malice should have been left for consideration of jury. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

In a capital murder prosecution, an instruction on “malice aforethought” was improper where it stated that if the defendant “at the very moment of the fatal shot did so with the deliberate design to take the life of the deceased ... then it was malice aforethought as if deliberate design had existed in the mind of the defendant for minutes, hours, days or weeks or even years”; however, the instruction was irrelevant and harmless, since there was abundant evidence of premeditation and no evidence that the slaying was a sudden idea of the defendant’s. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

In a prosecution for murder, the trial court committed reversible error by giving an instruction stating that “deliberate design” could be formed “at the very moment of the act of violence.” *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

A jury instruction stating that malice aforethought and a premeditated design to kill must exist in the mind of the defendant but for an instant before the fatal act did not constitute reversible error; the defendant would not have been harmed or prejudiced even if the instruction had stated that malice need only exist at the very moment of the fatal act, where the State’s theory of the case was that the defendant lured the victim to his home

with the deliberate design to murder him, and the defense theory was that the defendant’s shooting of the victim was justifiable homicide in response to his finding that the victim had broken into his home and was standing in his hallway holding a hammer, since under the State’s theory the malice would have existed long before the fatal shooting and under the defense theory it never existed. *Thornhill v. State*, 561 So. 2d 1025 (Miss. 1989), reh’g denied, 563 So. 2d 609 (Miss. 1990).

An erroneous instruction stating that “malice aforethought” or “deliberate design” need exist in the mind of the accused only for an “instant” was harmless where there was no reasonable factual scenario under which the jury could have reasonably concluded that the defendant’s premeditated design to kill, if any, existed in his mind but for an instant before the fatal act, and based on the prosecution’s interpretation of the evidence, the premeditated or deliberate design existed well before the shooting while on the defense theory, it never existed. *Blanks v. State*, 542 So. 2d 222 (Miss. 1989).

In a murder prosecution, a trial court committed reversible error in granting a supplemental instruction after the jury had retired, defining “malice aforethought” from Black’s Law Dictionary, which stated that “malice aforethought exists where the person doing the act which causes the death has an intention to cause death or grievous bodily harm to any person” and additionally defined malice aforethought as existing when the defendant has an intention “to commit any felony whatever, has the knowledge that the act will probably cause the death or grievous bodily harm to some person, although he does not desire it or even wishes that it may not be caused ...” *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

An instruction on malice should be given only where the evidence has failed to establish the circumstances surrounding the use of a deadly weapon, and, where the facts have been set forth, even on conflicting testimony, the question of malice should be left to the jury. *Carter v. State*, 493 So. 2d 327 (Miss. 1986).

Murder instruction which follows “depraved heart” provision of § 97-3-19 need

not use words “feloniously,” “wilfully,” or “malice aforethought.” *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Where the accused admitted shooting his paramour, but contended that the killing was accidental, it was reversible error for the court to instruct that malice aforethought might be presumed from the unlawful and deliberate use of a deadly weapon. *Funches v. State*, 246 Miss. 214, 148 So. 2d 710 (1963).

Defendant is not entitled to an instruction defining malice. *Smith v. State*, 237 Miss. 626, 114 So. 2d 676 (1959).

The trial court did not err in giving state’s instruction that, if the jury believed from all the evidence in the case beyond a reasonable doubt that the defendant had deliberately shot and killed the deceased with a deadly weapon, malice might be inferred. *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236 (1957).

Where all facts and circumstances surrounding homicide are fully disclosed by evidence, it is reversible error for court to instruct that law presumes malice from use of deadly weapon. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Instruction that malice may be implied from nature of weapon and deliberate use of deadly weapon not in necessary self-defense is evidence of malice is proper when defendant has made no explanation of facts surrounding her deliberate use of deadly weapon in inflicting fatal wounds on mother and there is no evidence in case which might change character of killing by showing either justification or excuse. *Dickins v. State*, 208 Miss. 69, 43 So. 2d 366 (1949), error overruled 208 Miss. 69, 43 So. 2d 887.

Instructions for state defining malice aforethought is not erroneous on ground that it omits reference to accidental killing when there is little, if anything, in record from which inference could be drawn by jury that killing was accidental and this was matter of defense fully submitted to jury under instruction obtained by defendant. *Price v. State*, 207 Miss. 111, 41 So. 2d 37 (1949), cert. denied, 338 U.S. 844, 70 S. Ct. 92, 94 L. Ed. 516 (1949), reh’g denied, 338 U.S. 888, 70 S. Ct. 187, 94 L. Ed. 545 (1949).

Instruction for state that malice will be implied from deliberate use of deadly weapon is not proper where all of the facts are in evidence, but court is entitled to consider the law on the question in determining whether or not issue of murder should be submitted to jury at all. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949).

Assignment of error as to instruction of the court to find defendant guilty if jury believed beyond reasonable doubt that defendant feloniously and with deliberate design to effect death of victim at a time when neither defendant, nor his common-law wife, were in danger of great personal injury at the hand or design of victim or that there was no imminent danger of such design being accomplished, was not valid as failing to use the statutory language “without authority of law” in view of the facts that the instruction used the word “feloniously,” defendant defined murder in his instruction and defendant’s defense of self-defense was adequately set forth in defendant’s instructions and rejected by the jury’s verdict. *Davis v. State*, 203 Miss. 574, 35 So. 2d 524 (1948).

An instruction to the effect that malice is implied by law from the nature and character of the weapon used, and the deliberate use of a deadly weapon in a difficulty, not in necessary self-defense, or not in necessary defense, or to save the unlawful taking of life, or great bodily harm to, a fellow human being, is in law evidence of malice, disapproved. *Criss v. State*, 202 Miss. 184, 30 So. 2d 613 (1947).

An instruction that malice aforethought did not have to exist in the mind of the slayer for any given length of time, and if at the moment of the fatal stabbing, the defendant cut with deliberate design to take the life of deceased, and not in necessary self-defense, real or apparent, then it was as truly malice and the act was as truly murder as if the deliberate design had existed in the mind of defendant for minutes, hours, days, etc., did not constitute reversible error as being an erroneous definition of “malice aforethought.” *Hudson v. State*, 185 Miss. 677, 188 So. 561 (1939).

An instruction in a homicide prosecution was not erroneous for failing to include the element of deliberate design,

where the evidence disclosed that at the time of the killing there was not only a conspiracy to rob, but actual participation therein by the accused. *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938).

An instruction charging the jury that if they believed from the evidence that the accused in company with others, having a common design to rob the deceased, was so engaged when one of the accused's associates struck the deceased with a deadly weapon killing him, then the jury should find defendant guilty of murder, was not erroneous for failing to include the element of deliberate design. *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938).

67. Self-defense.

Where the jury was given instructions on the right of an individual to repel trespassers from his home and a standard self-defense instruction, the trial court did not err in refusing defendant's request for an instruction on the law relating to defense of habitation; by the defendant's own testimony, the alleged assault against defendant by the victim had advanced to a stage where the distinction between use of deadly force in defense of habitation and use of deadly force in self-defense was no longer relevant to the jury's understanding of the law. *Lester v. State*, 862 So. 2d 582 (Miss. Ct. App. 2004).

Instructions to the jury, when read as a whole, were sufficient where the court specifically instructed that the killing of the victim was justified if committed by the defendant in the lawful defense of his own person. *Evans v. State*, 797 So. 2d 811 (Miss. 2000).

A trial court in a murder prosecution committed reversible error when it granted the prosecution's instruction informing the jury that before it could accept the theory of self-defense, it was required to find that the danger was so urgent that the defendant had no "reasonable mode of escape"; this instruction was not supported by law because it deprived the defendant of the right to claim self-defense if he could have avoided the threat to his safety by escaping. *Craig v. State*, 660 So. 2d 1298 (Miss. 1995).

A trial court in a murder prosecution committed reversible error when it refused the defendant's requested instruc-

tion that a person "may stand his ground" without waiving the right to self-defense, so long as "he is in a place where he has a right to be, and is himself in no unlawful enterprise, not the provoker or aggressor in the combat." *Craig v. State*, 660 So. 2d 1298 (Miss. 1995).

A trial court in a murder prosecution did not err in giving an instruction precluding the jury from considering a claim of self-defense if the jury found that the defendant armed himself and sought the victim with the intent of invoking a difficulty with the victim, or voluntarily entered into a difficulty with the victim with the intent to cause serious bodily harm, where the defendant armed himself with a shotgun while he was in no physical danger from the victim, he drove to the victim's house and honked his automobile horn, he drove by the house several times waiting for the victim to appear, and he claimed that he shot at the victim's feet but the trajectory of the shotgun pellets was upward. *Hart v. State*, 637 So. 2d 1329 (Miss. 1994).

In a homicide prosecution, the trial court's giving of an "arming" instruction improperly cut off the jury's consideration of self-defense and constituted reversible error where there was testimony to support the defendant's theory of self-defense, and the instruction stated that the defendant could not plead self-defense if he armed himself with a deadly weapon and either confronted the victim with the intention of causing a difficulty with the victim or voluntarily entered into any difficulty with the victim with the intent to cause serious bodily harm; such "arming" instructions place a higher burden on a defendant to assert a claim of self-defense than is required by law, are looked upon with disfavor, and should rarely be used. *Keys v. State*, 635 So. 2d 845 (Miss. 1994).

An instruction estopping one from asserting self-defense is not proper except in the few rare cases where all the elements of estoppel are clearly present; the reason for permitting a self-defense theory to be decided by a jury far outweighs the reasons for estopping one from asserting this most basic right. *Thompson v. State*, 602 So. 2d 1185 (Miss. 1992).

In a prosecution for murder, jury instructions stating that the defendant

could not claim the right of self-defense if he armed himself with a gun in advance and provoked the encounter with the victim were not supported by the evidence where the defendant was the owner and operator of a lounge engaged in the business of selling intoxicating liquor to patrons, the victim had been on the premises most of the day armed with a loaded pistol, the defendant requested the victim to take his pistol and leave, the defendant left to run an errand and when he returned the victim was still in the lounge, intoxicated, and in possession of the pistol, and the ensuing fatal encounter involved disputed facts; moreover, the granting of 2 self-defense instructions did not cure the error since the instructions were conflicting. *Thompson v. State*, 602 So. 2d 1185 (Miss. 1992).

A murder defendant was entitled to an instruction informing the jury that self-defense may be applicable to the defense of another person where the evidence showed that the deceased had threatened the defendant's girlfriend. *Calhoun v. State*, 526 So. 2d 531 (Miss. 1988).

Failure to give self-defense instruction was not error where record reflected that jury was fully and fairly instructed concerning law of self-defense by other instructions. *Turnage v. State*, 518 So. 2d 1217 (Miss. 1988).

Refusal to grant instruction that jury should put themselves in place of defendant and judge his acts by facts and circumstances by which he was surrounded at time of difficulty was not erroneous where theory of self-defense was fully covered in another instruction. *Fairman v. State*, 513 So. 2d 910 (Miss. 1987).

At trial of wife indicted for murder of her husband, testimony of defendant that during the confrontation, preceding the shooting, victim grabbed her by the hair and pulled her to the ground, pulled her by the hair over to a picnic table and, after setting her on the picnic table, drew her head back, raised his fist to her head and said he was going to kill her, supported the giving of manslaughter instructions. *Mullins v. State*, 493 So. 2d 971 (Miss. 1986).

A shotgun with a 30-inch barrel and a shotgun case were irrelevant and inad-

missible in evidence at a capital murder trial, where a "riot" gun had been used in the killing. *Stringer v. State*, 491 So. 2d 837 (Miss. 1986).

Trial court properly refuses self-defense instruction in homicide case in which uncontraverted testimony is that victim was asleep and had been asleep approximately 30 minutes at time victim was shot and killed. *Merrill v. State*, 482 So. 2d 1147 (Miss. 1986).

Self-defense instruction which states that party acting upon mere fear, apprehension or belief, however sincerely entertained acts at own peril in taking life is improper and constitutes reversible prejudicial error where case is close factually and instruction has previously been condemned by Supreme Court of Mississippi number of times. *Flowers v. State*, 473 So. 2d 164 (Miss. 1985).

There is no basis upon which to give self-defense instruction when evidence, considered most favorably to capital murder defendant, initial aggressor and ultimate victim of defendant fled after firing shot at defendant, defendant then became aggressor seeking victim out, emptying one gun on victim, striking victim at least 3 times, then obtaining more powerful rifle and firing 3 additional shots, with intent to kill victim. *Lancaster v. State*, 472 So. 2d 363 (Miss. 1985).

In a prosecution for murder the court properly denied a requested jury instruction on self-defense, where the court had granted instructions which liberally directed the jurors to put themselves in the defendant's place, authorizing the jurors to determine whether the killing was done under circumstances wrongfully provoked, and otherwise instructing the jury on self-defense so that when these instructions were considered together the jurors were adequately instructed on self-defense. *Polk v. State*, 417 So. 2d 930 (Miss. 1982).

In a murder prosecution, an instruction which substantially restricts or cuts off defendant's right to defend upon the ground of self-defense is erroneous and requires the grant of a new trial. *McMullen v. State*, 291 So. 2d 537 (Miss. 1974).

In a prosecution of a husband whose defense was that he had accidentally shot

his wife while shooting at his father-in-law, instructions permitting the jury to find that accused did not kill his father-in-law in necessary self-defense, but had murdered him, constituted reversible error where accused had already been acquitted of the charge of murdering his father-in-law. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

In a prosecution of a husband whose defense was that he had accidentally shot his wife while shooting at his father-in-law, the husband, having already been acquitted of the charge of murdering his father-in-law, was entitled to an instruction that if at the time he shot at his father-in-law while acting in necessary self-defense, his wife, without his knowledge, stepped into the line of fire and was accidentally killed, the husband was not guilty of murder. *Dykes v. State*, 232 Miss. 379, 99 So. 2d 602 (1957).

The trial court did not err in refusing defendant's instruction on the disparity in age, size and strength between the deceased and defendant, which was stated in terms of what the evidence showed rather than what the jury believed from the evidence. *Brister v. State*, 231 Miss. 722, 97 So. 2d 654 (1957), cert. denied, 356 U.S. 961, 78 S. Ct. 1000, 2 L. Ed. 2d 1069 (1958).

Instruction bearing on issue of self-defense held not to exclude doctrine of apparent necessity. *Ashby v. State*, 137 Miss. 133, 102 So. 180 (1924).

Instruction denying the accused provoking difficulty right of self-defense held erroneous, in view of evidence of abandonment of homicidal intent. *Adams v. State*, 136 Miss. 298, 101 So. 437 (1924).

Instruction that to justify shooting on apprehension of threats deceased must have made overt act is proper. *Molpus v. State*, 124 Miss. 584, 87 So. 133 (1921), overruled on other grounds, *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

Person whose life has been threatened cannot kill unless there is demonstration inducing reasonable man to believe that there is danger; instruction that there is right to kill on first appearance of danger properly refused. *Molpus v. State*, 124 Miss. 584, 87 So. 133 (1921), overruled on other grounds, *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

Instruction that a man about to be assaulted with deadly weapon might anticipate adversary's action and kill him, erroneously refused. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

68. Miscellaneous.

Trial court did not err in refusing defendant's proffered circumstantial evidence instructions because there was direct evidence of guilt presented at trial; specifically, defendant admitted to no less than two people that he killed his wife and her child. *Wortham v. State*, 883 So. 2d 599 (Miss. Ct. App. 2004).

In defendant's capital murder conviction where defendant was sentenced to death, because Miss. Code Ann. § 47-7-3(1)(f) denied parole eligibility to any person charged, tried, convicted, and sentenced to life imprisonment under the provisions of Miss. Code Ann. § 99-19-101, the trial court did not err in not instructing the jury on life imprisonment with the possibility of parole. *Branch v. State*, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for failing to make an objection to an instruction that death could be imposed if aggravating and mitigating circumstances were of equal weight because as the direct claim was found to be without merit, there could be no claim that the attorneys were ineffective in failing to object to what was an acceptable instruction. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Trial judge did not erroneously instruct the jury in the inmate's capital murder trial that death could be imposed if aggravating and mitigating circumstances were of equal weight because (1) the issue was addressed on direct appeal and found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) it also failed under case law. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Inmate's attorneys were not ineffective, in connection with the inmate's capital murder trial, for not requesting an amendment to sentencing instructions because (1) the issue was raised on direct

appeal and was found to be without merit, and thus the issue was barred under Miss. Code Ann. § 99-39-21(2), and (2) in any event, there was no showing of deficient performance. *Smith v. State*, 877 So. 2d 369 (Miss. 2004).

Trial court did not err in instructing the jury on both depraved heart murder and premeditated murder because under Miss. Code Ann. § 97-3-19, every murder done with the deliberate design of effecting the death of another human being is by definition done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life. *Schuck v. State*, 865 So. 2d 1111 (Miss. 2003).

Although all of petitioner death row inmate's arguments were procedurally barred either by *res judicata* or for failure to raise the arguments earlier, and no intervening case law exempted petitioner from the procedural bar, the court also reviewed petitioner's arguments on the merits; it reiterated its earlier holdings that there were no constitutional deficiencies in the Mississippi murder and death penalty statutes, including those relating to death resulting from child abuse as capital murder, as explained in the jury instructions, and that none of the alleged deficiencies of defense counsel could have affected petitioner's outcome. *Jackson v. State*, 860 So. 2d 653 (Miss. 2003).

Depraved-heart murder instruction given to the jury was not in error because it failed to include the language "without authority of law" as the instruction properly directed the jury that it was required to find beyond a reasonable doubt that defendants had acted unlawfully; however, the failure of the trial court to instruct the jury to acquit if the jury found that defendants had acted in self-defense, and the failure of the depraved-heart murder instruction to include the words "not in necessary self-defense" constituted reversible error. *Harris v. State*, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003).

Trial court did not err in refusing defendant's request for a mistrial after a prosecution witness made a brief reference to defendant's being in jail during an interview; jury was given a cautionary instruc-

tion and any error was harmless. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Defendant waived his right to claim a violation of his right to speedy trial by requesting a continuance and agreeing that the period of the continuance would not be held against the State. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Loss of evidence did not deprive defendant of due process of law where there was no showing that the loss of a baby bag, some crime scene photographs, the clothing the victim was wearing when her body was discovered, and some other pieces of evidence, was intentional or that the evidence would have been exculpatory. *Smith v. State*, 835 So. 2d 927 (Miss. 2002).

Where only theory of defense in murder prosecution was self-defense and jury was properly instructed thereon, there was no requirement that court instruct as to other possible theories under which jury could have found homicide to have been justifiable, excusable, or manslaughter. *Tran v. State*, 681 So. 2d 514 (Miss. 1996).

Refusal to grant murder defendant's request for jury instruction on accident or misfortune was reversible error; under defendant's version of events, he and victim were struggling over gun when it discharged, and thus, it was not sudden combat situation, nor did shooting happen during commission of unlawful act. *Miller v. State*, 677 So. 2d 726 (Miss. 1996).

Trial court was not required to give circumstantial evidence instruction, where defendant had confessed to friend that he killed victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Separate instruction, that state was required to prove capital murder defendant's guilt of unwitnessed killing to exclusion of every other hypothesis consistent with innocence, was not required on capital murder charge, even though evidence of guilt was circumstantial, given that jury was properly instructed on state's burden as to circumstantial evidence in other instructions. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So.

2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Trial court did not mislead jury, in capital murder case involving underlying felony of sexual battery, by instructing that "the fact that the actual moment of the victim's death may have preceded alleged consummation of the underlying felony of Sexual Battery does not void the charge of Capital Murder," even though defendant claimed that jury was misled on intent necessary for capital murder as instruction could be correct statement of law only if jury also found that defendant had formed intent to commit sexual battery; when taken in conjunction with other instructions, jury was clearly informed that it must find defendant intended to kill victim while engaged in commission of sexual battery. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial court did not deny due process rights of capital murder defendant by giving instruction that jury had first to acquit defendant on greater charge of capital murder before going on to consider whether defendant had committed lesser crime of murder. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Defendant was not entitled to instruction on robbery as lesser included offense of felony murder; because victim died as result of injuries suffered during robbery, if defendant was found guilty of robbery, she was also guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Transitional jury instruction in capital murder prosecution, stating that jury should not consider instruction defining lesser included offense of murder unless it found that defendant was not guilty of capital murder, was proper and appropriate. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

A jury instruction in a capital murder prosecution did not violate the due process

clause of the 14th Amendment by relieving the State of the burden of proving intent to commit the underlying felonies where the instruction stated that the defendant should be found guilty if he willfully performed "any act which is an element of the crimes with which he is charged or immediately connected with them or leading to their commission." *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In a prosecution for murder, the trial court committed reversible error in refusing a requested defense instruction stating that the defendant had a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack, where the prosecuting attorney pointed out in his argument before the jury that the victim was not armed, from which the jury might have inferred that the defendant was in the wrong in being armed. *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

When an instruction is given on the right to carry a concealed weapon, it should be prefaced with the admonition to the jury that it "should not view as evidence against the defendant that he carried a concealed weapon on his person," because under the law he did have a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack. *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

In a prosecution for capital murder, the trial court's failure to instruct the jury on the lesser included offense of simple murder did not constitute reversible error, even though Mississippi law strongly favors the granting of lesser included offense instructions, where the defendant never requested a lesser included offense instruction and failed to object to the court's failure to give one, the record did not support the defendant's assertion that he was entitled to a lesser included offense instruction because the evidence of the three component crimes in the capital murder charge were so intertwined as to be virtually inseparable, and any error was cured by the jury's verdict which by

necessary implication found the defendant guilty of simple murder. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

A trial court did not err in denying a capital murder defendant's proposed circumstantial evidence instruction where there was direct evidence in support of the prosecution's charge, consisting of an eyewitness testimony and another witness' repetition of the defendant's admission. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

A circumstantial evidence instruction was not required in a murder prosecution where witnesses testified as to 2 out-of-court admissions of the murder made by the defendant. While not a "confession," an admission constitutes direct evidence of the crime so that the giving of a circumstantial evidence instruction is not required. *Sudduth v. State*, 562 So. 2d 67 (Miss. 1990).

A defendant who was convicted of aggravated assault and sentenced to 15 years imprisonment was not entitled to a jury instruction on attempted murder which carries a maximum sentence of 10 years imprisonment, even though the evidence would have supported a conviction for either offense, since there was no view of the evidence under which the defendant might have been found guilty of attempted murder and not guilty of aggravated assault. *McGowan v. State*, 541 So. 2d 1027 (Miss. 1989).

Failure to challenge instruction or offer another in its place renders this assignment of error meritless, even in context of capital case. *Lockett v. State*, 517 So. 2d 1317 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988), reh'g denied, 487 U.S. 1250, 109 S. Ct. 13, 101 L. Ed. 2d 963 (1988), denial of post-conviction relief aff'd, 614 So. 2d 888

(Miss. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 681, 126 L. Ed. 2d 649 (1994), reh'g denied, 510 U.S. 1173, 114 S. Ct. 1212, 127 L. Ed. 2d 559 (1994), post-conviction relief denied, 656 So. 2d 68 (Miss. 1995), cert. denied, 515 U.S. 1150, 115 S. Ct. 2595, 132 L. Ed. 2d 842 (1995), reh'g denied, 515 U.S. 1180, 116 S. Ct. 26, 132 L. Ed. 2d 909 (1995), habeas corpus granted in part, 980 F. Supp. 201 (S.D. Miss. 1997).

Circumstantial evidence instructions should have been given in capital murder case where state was without confession and without eyewitnesses to gravamen of offense charged. *Williamson v. State*, 512 So. 2d 868 (Miss. 1987), overruled on other grounds, *Jasso v. State*, 655 So. 2d 30 (Miss. 1995), *Walton v. State*, 678 So. 2d 645 (Miss. 1996).

Capital murder defendant was not entitled to a mistrial because state elicited testimony of his alleged criminal activity in Texas, including an arrest for defrauding an innkeeper, in view of trial judge's instructing jury to disregard such testimony. *Cabello v. State*, 490 So. 2d 852 (Miss. 1986).

When indictment charges defendant with capital murder in course of rape and robbery and trial judge's instructions, as requested by state, tell jury that before it can convict defendant it must find that defendant killed victim while in course of committing rape and robbery, state undertakes burden of showing sufficiency of proof to establish both underlying rape and robbery as well as murder. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Insanity instruction need not be given on basis of lay witness testimony that murder defendant heard voices, laughed uncontrollably, was depressed, had headaches, and otherwise acted weird. *Johnson v. State*, 475 So. 2d 1136 (Miss. 1985).

Jury instruction which contains surplus language serving only to raise state's burden of proof does not prejudice capital murder defendant. *Swanier v. State*, 473 So. 2d 180 (Miss. 1985).

Murder defendant whose claim of accidental death of victim by drowning is contradicted by testimony of medical expert showing death by violent blows to head is not entitled to *Weathersby* instruction. *Hammond v. State*, 465 So. 2d 1031 (Miss. 1985).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary for a term not to exceed 20 years. *Flanagan v. National Fire Ins. Co.*, 277 So. 2d 115 (Miss. 1973).

In a murder prosecution, where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. *Barnett v. State*, 232 Miss. 208, 98 So. 2d 656 (1957).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's instruction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless (overruling in part *Blalack v. State*, 79 M 517, 31 So 105). *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236 (1957).

An instruction charging jury that they were required to presume that defendant was innocent from the very beginning of the trial until the case was closed is not proper. *Wright v. State*, 209 Miss. 795, 48 So. 2d 509 (1950).

In murder prosecution, trial court has no duty to give any instructions not requested. *Smith v. State*, 205 Miss. 283, 38 So. 2d 725 (1949).

An instruction that the jury, if it found the defendant guilty, should find that he used a deadly weapon was cured by an instruction that, if it found the defendant guilty of robbery, it should not find that the robbery was with a deadly weapon unless convinced of that fact beyond a

reasonable doubt. *Augustine v. State*, 201 Miss. 731, 29 So. 2d 454 (1947), error overruled, 201 Miss. 741, 29 So. 2d 921 (1947).

It was error to charge murder, where facts showing killing done in heat of passion. *Staiger v. State*, 110 Miss. 557, 70 So. 690 (1916).

69. Death penalty.

In defendant's capital murder trial, the language on the verdict form stating that "if the jury cannot agree on punishment, the court must sentence the defendant to a term of life imprisonment with the possibility of parole" was improper because it was an incorrect statement of law since a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. However such error was harmless because the jury, knowing that it had the life without parole option, chose to impose the death penalty upon defendant. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

Anytime an individual is charged with murder, he is put on notice that the death penalty may result. *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

70. Aiding And Abetting.

In defendant's murder trial, the instruction simply did not contain the operative language that could have been construed as reading that a defendant found guilty of aiding and abetting with respect to "one element" of the crime was guilty as a principal. Rather, the instruction accurately stated that any person who was present at the commission of the criminal offense and aided, counseled, or encouraged another in the commission of that offense was an "aider and abettor" and was equally guilty with the principal offender. *Dilworth v. State*, 909 So. 2d 731 (Miss. 2005).

RESEARCH REFERENCES

ALR. Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 A.L.R.2d 210.

Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 A.L.R.2d 1186.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Homicide by fright or shock. 47 A.L.R.2d 1072.

Admissibility on behalf of accused in homicide case of evidence that killing was at victim's request. 71 A.L.R.2d 617.

Necessity that trial court charge upon motive in homicide case. 71 A.L.R.2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 86 A.L.R.2d 611.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 A.L.R.2d 656.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Homicide: Failure to provide medical or surgical attention. 100 A.L.R.2d 483.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 22 A.L.R.3d 1228.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 A.L.R.3d 1341.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 A.L.R.3d 397.

What constitutes attempted murder. 54 A.L.R.3d 612.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

What constitutes termination of felony for purpose of felony-murder rule. 58 A.L.R.3d 851.

Homicide as affected by lapse of time between injury and death. 60 A.L.R.3d 1323.

Homicide by withholding food, clothing, or shelter. 61 A.L.R.3d 1207.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 A.L.R.3d 283.

Proof of live birth in prosecution for killing newborn child. 65 A.L.R.3d 413.

What constitutes "imminently dangerous" act within homicide statute. 67 A.L.R.3d 900.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.3d 1132.

What constitutes murder by torture. 83 A.L.R.3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

Judicial abrogation of felony-murder doctrine. 13 A.L.R.4th 1226.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation" as elements of murder in the first degree. 18 A.L.R.4th 961.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference". 25 A.L.R.4th 311.

Homicide by causing victim's brain-dead condition. 42 A.L.R.4th 742.

Corporation's criminal liability for homicide. 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Application of felony-murder doctrine where person killed was co-felon. 89 A.L.R.4th 683.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 37 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 9 (homicide scene).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

40 Am. Jur. Trials 501, Forensic Pathology in Homicide Cases.

3 Am. Jur. Proof of Facts 2d, Homicide Outside of Common Design, §§ 7 et seq. (proof that lethal act of co-felon was out-

side of, or foreign to, common design); Withdrawal by Aggressor Reviving Right of Self-defense, §§ 9 et seq. (proof of withdrawal by aggressor — subsequent homicide committed in self-defense).

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§ 97-3-21. Homicide; penalty for murder or capital murder.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary.

Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f).

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2 (1); 1857, ch. 64, art. 167; 1871, § 2630; 1880, § 2877; 1892, § 1151; Laws, 1906, § 1229; Hemingway's 1917, § 959, 1930, § 987; Laws, 1942, § 2217; Laws, 1974, ch. 576, § 7; Laws, 1977, ch. 458, § 1; Laws, 1994, ch. 566, § 3, eff from and after July 1, 1994.

Editor's Note — Laws, 1994, ch. 566, § 5, provides as follows:

"SECTION 5. The provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994."

Cross References — Construction of the terms "capital case," "capital offense," "capital crime," and "capital murder," see § 1-3-4.

What constitutes the offense of capital murder, see § 97-3-19.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Requirement that an indictment for capital murder state specifically the section of the code defining the offense alleged to have been committed, see § 99-17-20.

Execution in capital cases, see §§ 99-19-51, 99-19-55.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application; generally.
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1. Validity.

Thirteen-year-old defendant's automatic life sentence for murder under Miss. Code Ann. § 97-3-21 was proper because

the sentence was not discretionary and had previously been held constitutional. *Edmonds v. State*, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006).

Defendant was convicted of murder and sentenced to life imprisonment because it was the only possible sentence available for convicted murderers, Miss. Code Ann. § 97-3-21; thus, the trial court did not err in sentencing defendant to life imprisonment. *Jackson v. State*, 924 So. 2d 531 (Miss. Ct. App. 2005).

Defendant's sentence was not excessive and unconstitutional because, since the trial court imposed a sentence within the statutory limitations provided by Miss. Code Ann. § 97-3-21, the sentence was appropriate, and there was no error. *Glass v. State*, 856 So. 2d 762 (Miss. Ct. App. 2003).

The application of the capital sentencing statute, as amended this section, ameliorated the stark options that were presented to pre-amendment juries, and, therefore, the retroactive application of the statute does not give rise to an illegal ex post facto law. *West v. State*, 725 So. 2d 872 (Miss. 1998).

The amendment of this section to include life imprisonment without parole as a possible sentence was ameliorative and not onerous as the amendment did not increase the possible penalty for murder; thus, the application of the amended statute in the prosecution of a defendant for a murder that occurred before the effective date of the amendment did not violate the ex post facto clause of the federal constitution. *Tavares v. State*, 725 So. 2d 803 (Miss. 1998).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under § 97-3-53 and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the § 97-3-53 kidnapping. *Meeks v. State*, 604 So. 2d 748 (Miss. 1992).

The imposition of the death penalty against a mentally retarded defendant with the functional equivalent of a 7-year-old did not violate the cruel and unusual punishment clause of the Eighth Amendment, where the jury was instructed as to the mitigating factors enumerated in § 99-19-101(6)(b), (f) and (g) and these 3 mitigating factors were argued to the jury, so that the jury was provided a vehicle, through appropriate jury instructions and argument, to consider and give effect to the mitigating evidence of the defendant's mental retardation in rendering its sentencing decision. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

The capital murder statute, this section, is not unconstitutional. In *re Hill*, 460 So. 2d 792 (Miss. 1984).

This section and § 99-19-101 are not unconstitutional and violative of the Eighth and Fourteenth Amendments to the United States Constitution on the ground that they do not allow the jury to sentence a defendant to life imprisonment without parole, since the legislature's decision to provide two alternative penalties, with clear guidelines for the application of each, was unquestionably within their proper discretion. *Smith v. State*, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983), habeas corpus denied, 689 F. Supp. 644 (S.D. Miss. 1988), aff'd, 904 F.2d 950 (5th Cir. 1990), reh'g denied, 912 F.2d 1465 (5th Cir. 1990), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 503 U.S. 930, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992), on remand, 970 F.2d 1383 (5th Cir. 1992), post-conviction relief granted, 648 So. 2d 63 (Miss. 1994).

The felony murder statute (§ 97-3-19) is constitutional despite the language permitting the imposition of death upon one who harbors no specific intent to kill. Furthermore, since this section places no statutory limitations on the mitigating factors that may be considered in the capital sentencing process, it suffers no constitutional infirmities. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), cert. denied, 449 U.S. 986, 101 S. Ct. 406, 66 L. Ed. 2d 250 (1980), reh'g denied, 449 U.S. 1103, 101 S. Ct. 903, 66 L. Ed. 2d 831

(1981), post-conviction relief denied, 580 So. 2d 1136 (Miss. 1990), cert. denied, 502 U.S. 943, 112 S. Ct. 383, 116 L. Ed. 2d 334 (1991), denial of post-conviction relief aff'd, 612 So. 2d 342 (Miss. 1992); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

State statute which imposed mandatory death penalty for first-degree murder, which included any willful, deliberate, and premeditated killing, and any murder committed in perpetrating or attempting to perpetrate a felony, constituted a violation of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Imposition of death penalty did not constitute cruel and unusual treatment under statutes which provided (1) if defendant is found guilty of first degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to 8 aggravating and 7 mitigating circumstances specified in said statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its functions to be guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976).

Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) capital homicides are limited to intentional and knowing murders committed in the five specified situations of murder of a peace officer or fireman, murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, murder committed while escaping or attempting to escape from a penal institution, murder committed for remuneration, and murder committed by a prison inmate when the victim is a prison employee; (2) if a defendant is convicted of a capital offense, a separate presentence hearing must be held before the jury, where any relevant evidence may be introduced and arguments may be presented for or against the death sentence; (3) the jury must answer the questions (a) whether or not the defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether or not the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal. *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976), vacated, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976).

The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing as conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statute must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge and jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), stay granted, 429 U.S. 1301, 96 S. Ct. 3235, 50 L. Ed. 2d 30 (1976), vacated, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976), reh'g denied, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976).

In view of the decision of the Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410, declaring the death penalty to be a cruel and unusual punishment in violation of the Eighth

Amendment to the United States Constitution, the death penalty can no longer be imposed under Code 1942, § 2217. *Capler v. State*, 268 So. 2d 338 (Miss. 1972); *Peterson v. State*, 268 So. 2d 335 (Miss. 1972).

Verdict fixing defendant's punishment of life imprisonment, without specifying place, held valid. *Harper v. State*, 98 So. 534 (Miss. 1924).

2. Construction and application; generally.

While it is true that Miss. Code Ann. § 97-3-21 provided three sentencing alternatives; the death penalty, life imprisonment without parole, and life imprisonment with the possibility of parole; a life sentence rendered pursuant to Miss. Code Ann. § 99-19-101 will automatically be a life without parole sentence. This is an inconsistency in the statutes that needs to be addressed by the Legislature. *Hodges v. State*, 912 So. 2d 730 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 739, 163 L. Ed. 2d 579 (2005).

Although defendant, convicted of murder, argued that he was improperly sentenced to life imprisonment without parole as a habitual offender, the appellate court found no evidence that defendant was sentenced as a habitual offender; rather, the appellate court found that Miss. Code Ann. § 97-3-21 (2000) provided for a life sentence following a conviction for murder. *Poindexter v. State*, 856 So. 2d 296 (Miss. 2003).

Reading Miss. Code Ann. §§ 97-3-21, 99-19-101(1), 47-7-3(1)(f), together indicates that a defendant on trial for capital murder may be sentenced only to death or to life imprisonment without the eligibility of parole. *Flowers v. State*, 842 So. 2d 531 (Miss. 2003).

When read in *pari materia*, this section and § 47-7-3 provide juries with the option of sentencing capital defendants to life without parole as long as any proceeding, from pretrial through resentencing, that followed the actual charge occurred after July 1, 1994; simultaneously, the two statutes preclude the parole board from granting parole to any capital defendant who was charged after July 1, 1994. *West v. State*, 725 So. 2d 872 (Miss. 1998).

Sentence of death imposed on defendant who shot store clerk four times during commission of armed robbery was not excessive or disproportionate to other similar cases in which such sentence had been imposed. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

In order to impose death sentence, jury must determine that defendant either actually killed, attempted to kill, and intended that killing take place, or intended that lethal force would be employed. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Upon determining that defendant actually killed or intended that a killing take place, jury must identify and weigh aggravating circumstances against mitigating circumstances which it has identified and, if it is unable to find aggravating circumstance or determines that aggravating circumstance is outweighed by mitigating circumstances, death penalty is statutorily barred. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

It is suggestive to provide signature line only under the verdict for death penalty. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Verdict form which provided for signature only under the death penalty and not under life sentence verdict was harmless where jury was instructed prior to deliberations that death penalty was not the only option. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Sentence of death imposed upon 17-year-old defendant with IQ of 67 who struck victim with baseball bat, inserted it into her anus, and had sex with her after she was dead was not disproportionate. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Although third postconviction relief petition to vacate sentence and resentencing would generally have been successive writ barred and procedurally barred, imposition of sentence of life imprisonment without benefit of parole for murder, imposed

when statute did not permit or provide for said sentence, was unenforceable sentence and plain error, capable of being addressed. *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996).

Trial court was required to conduct habitual offender hearing prior to sentencing of defendant for capital murder, in order to make jury aware that, as a habitual offender, defendant could have been sentenced to life imprisonment without possibility of parole. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court's failure to hold habitual offender hearing for defendant convicted of capital murder, which would have allowed jury to sentence defendant to life imprisonment without possibility of parole, required vacatur of death sentence and remand for new sentencing trial with proper instructions. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Autopsy photographs may be admitted during sentencing phase of capital murder prosecution on issue of whether crime was especially heinous, atrocious or cruel, even if photographs were inadmissible during guilt phase. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to make racial arguments against death penalty, even if racial arguments to jury are appropriate, in absence of racial bias claims, proof of bias, and in absence of any potential bias on basis of race of victims. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Death sentence was not excessive or disproportionate for defendant convicted of fatal stabbing of 4 children and inflicting life-threatening wounds upon an adult

and another child while in search of money kept in residence. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Imposition of death penalty on defendant who killed victim during course of robbery was not disproportionate to penalty imposed in similar cases, although defendant was 17 years old at time of offense, had disadvantaged background and had low IQ. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor in capital murder case did not utilize absence of mercy instruction to improperly argue that jurors could not consider mercy or sympathy in their deliberations; prosecutor was allowed to argue that defendant was not deserving of sympathy and jurors had been informed by court that statements of counsel were not evidence, and that they must follow court's instructions and consider evidence presented. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not impermissibly suggest that it was state Supreme Court, rather than jury, that had responsibility of imposing death sentence, when prosecution commented that death penalty had "been through the courts" and had been "honed and sharpened and brought into keen focus." *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Proportionality requirement was satisfied in capital murder case involving kidnapping of stranger, sexual assault prior to killing, and efforts to hide body and obscure evidence; death penalty had been given, and found to be proportional, in another case involving same elements. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Imposition of death penalty, on defendant convicted for kidnapping, sexually

assaulting and killing victim, was not disproportionate even though accomplice who provided evidence against defendant received sentence of life imprisonment; it was defendant's idea to take victim to deserted location, and defendant had been actual perpetrator of assaults, other than one rape perpetrated by accomplice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Sentence of death, imposed on defendant convicted of killing prison guard, was not excessive or disproportionate to other similar cases in which death sentence had been imposed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Trial court acted within its discretion at death penalty phase of trial in excluding, as irrelevant, psychological report that allegedly showed that it was probable that accomplice, rather than defendant, was mastermind behind robbery and murder of victim, in absence of evidence that accomplice had any kind of dominating influence over defendant. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Death penalty was not disproportionate sentence for felony murder, where defendant instigated and planned robbery of victim, she had several opportunities to back out of robbery, she provided guns to accomplices to use against victim, and she burned victim's house to cover her guilt. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor's comparison of defendant to Charles Manson at death penalty phase was not so improper as to require reversal; prosecutor did not call defendant names, did not vilify her, did not try to enrage jury, and did not go into details of Manson's crimes. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d

1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prosecutor's comment at death penalty phase of trial that defendant had "turn[ed] to a life of crime" was not so improper as to require reversal; evidence in record indicated that defendant was serving sentence for armed robbery, and defendant had just been found guilty of capital murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Exception to general rule that state may not mention possibility of appellate review exists where statement is made in response to statement of defense counsel. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defense counsel's comments that Charles Manson murders were more gruesome than that committed by defendant, yet Manson had not received death penalty, opened door for prosecution to mention appellate review by stating that death penalty had been imposed in Manson case but that death penalty statute had later been held unconstitutional. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A capital murder defendant could not be sentenced to life imprisonment without the possibility of parole pursuant to a plea bargain agreement, since this section does not provide such a penalty; the provision in the plea bargain providing for life without parole was not a permissible option under the statute, and therefore the court had no authority to issue such a sentence, and the plea contract was invalid as against public policy. *Patterson v. State*, 660 So. 2d 966 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the court properly allowed the introduction of a third party's statement that the third party killed the victims, as well as the third party's further statement indicating that the defen-

dant killed the victims; both the inculpatory and exculpatory portions of the statement were relevant to mitigating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to admit expert testimony regarding the defendant's polygraph tests; polygraph tests and their results are inadmissible under Mississippi law. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A prosecutor's biblical references during closing argument at the sentencing phase of a capital murder prosecution did not deprive the defendant of a fair trial, as the comments were within the "broad latitude" afforded counsel in closing argument. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In imposing a sentence of death in a capital murder case, the fact that the jury's specific written findings supporting its verdict were "parroted" from the sentencing forms did not render the verdict ambiguous in violation of the 6th and 14th Amendments to the United States Constitution and Article 3, § 24 of the Mississippi Constitution. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

The Eighth Amendment was not violated by a judge's imposition of the death penalty pursuant to a statute requiring the sentencing judge to consider an advisory jury verdict, where the jury recommended life imprisonment without parole, but the judge concluded that the aggravating circumstance that the murder was committed for pecuniary gain outweighed the mitigating circumstances, since (1) the Eighth Amendment does not require a state to define the weight that a judge must accord an advisory verdict, and (2) the Constitution permits a judge, acting alone, to impose a capital sentence, and thus is not offended when a state further requires a judge to consider a jury's recommendation and trusts the judge to give proper weight to such recommendation.

Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995), reh'g denied, 514 U.S. 1078, 115 S. Ct. 1725, 131 L. Ed. 2d 583 (1995).

In the sentencing phase of a capital murder prosecution, the trial judge abused his discretion in denying the defendant's request for 25 minutes for closing argument and granting him 15 minutes "to the side." A defendant must be allowed, within reason, whatever time he or she believes is necessary to seek a penalty less than death, and the defendant's request for 25 minutes was within reason. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In the sentencing phase of a capital murder prosecution, it was not error for the district attorney to ask the defendant to take the murder weapon, stick it in his pants, then pull it out, aim it and pull the trigger, where the district attorney was having the defendant demonstrate the time it took him to go through those motions in response to the defendant's contention that he shot the victim on a sudden impulse. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

In the sentencing phase of a capital murder prosecution, the district attorney's question during cross-examination of the defendant asking whether the thought of the victim having a Christian burial ever crossed his mind, and the district attorney's reference to a Christian burial during his closing argument did not constitute error. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

A capital murder defendant was not entitled to have a separate jury impaneled to hear the evidence at the penalty phase. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

It was within the judge's discretion to impose a life sentence on a 17-year-old murder defendant despite the discretion afforded by the Youth Court Act. *Reed v. State*, 526 So. 2d 538 (Miss. 1988).

Refusal of the trial judge in a homicide prosecution to grant the simple murder instruction was harmless error since, if defendant had been found guilty of simple murder, instead of capital murder, the sentence would have been the same under this section. *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984).

The Mississippi Supreme Court's interpretation of this section as permissive is, as a matter of law, not reviewable by District Court and raises no federal constitutional question. *Irving v. Hargett*, 518 F. Supp. 1127 (N.D. Miss. 1981).

A conviction in a murder prosecution would be reversed where the trial court permitted the jury to be led to believe that a coconspirator who testified against defendant would be prosecuted, even though the court and the prosecution knew that he had been granted immunity. *King v. State*, 363 So. 2d 269 (Miss. 1978).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

A case where the permissible punishment is death is a capital case, in which the state and the defendant are each entitled to 12 peremptory challenges to prospective jurors, and where the state in a homicide prosecution did not inquire of prospective jurors on voir dire if they had any conscientious scruples against infliction of the death penalty, this did not constitute a waiver of death penalty and thereby limit the state and the defendant to six peremptory challenges each, on the ground that the case was no longer a capital case. *Shorter v. State*, 257 So. 2d 236 (Miss. 1972).

It is not necessary that the same jury that rendered the verdict of guilty against a defendant indicted for murder shall also determine the question of his punishment. *Irving v. State*, 228 So. 2d 266 (Miss. 1969), vacated in part, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972).

The defendant was not entitled to another trial on the issue of his guilt, where he had been lawfully determined to be guilty of murder but it was necessary to relitigate the question of penalty. *Rouse v. State*, 222 So. 2d 145 (Miss. 1969).

Under this section [Code 1942, § 2217], when the jury has returned the death penalty upon a verdict of guilty in a murder case, the trial judge has no alternative except to sentence the prisoner to death. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

Motion for new trial in prosecution for homicide on ground of compromise verdict was held properly denied although verdict certified that jury was unable to agree as to punishment, since the record did not show defendant offered any juror as witness to sustain his motion but simply filed an unsworn motion for new trial averring that no member of the jury voted for death sentence and that there was no disagreement among the jurors as to the punishment, and since members of the jury cannot be offered as witnesses to impeach their own verdict. *Calvin v. State*, 206 Miss. 94, 39 So. 2d 772 (1949).

Argument of the prosecuting attorney, approved by the trial court, in a murder prosecution, that there was no use for the jury to return a manslaughter verdict, or one for a life sentence, because the accused was already serving a life sentence in the state penitentiary and that anything less than the death penalty would not be any punishment, was reversible error. *Hartfield v. State*, 186 Miss. 75, 189 So. 530 (1939), overruled in part by *Lovelace v. State*, 410 So. 2d 876 (Miss. 1982), superseded by statute as state in *Wetz v. State*, 503 So. 2d 803 (Miss. 1987).

3. Sentencing factors.

Had defendant not pled guilty to manslaughter and demanded to go to trial for murder, he still possessed no right for a jury to decide his sentence, as the sentence was mandatory; defendant forfeited no right to have a jury decide his sentence by pleading guilty to the lesser crime of manslaughter. *Smith v. State*, 922 So. 2d 43 (Miss. Ct. App. 2006).

Death sentence for capital murder was affirmed because the statutory aggravating factors of engaging in the commission

of or attempting to commit the crime of rape and committing a heinous, atrocious or cruel crime in the murder of the victim were proven beyond a reasonable doubt. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether capital offense was committed while defendant was engaged in commission of armed robbery, notwithstanding fact that robbery was also element of capital murder for which defendant was being prosecuted. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Sentencing court in bifurcated capital murder prosecution properly allowed jury to consider, as aggravating circumstance, whether defendant shot victim in order to avoid or prevent lawful arrest; record was devoid of any reference showing that defendant was disguised when he entered or left store at which shooting took place, and fellow prison inmate claimed that defendant told him that he shot victim because he believed she was stalling and seemed like she was reaching for something. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

If there is evidence from which it may be reasonably inferred that substantial reason for killing was to conceal identity of killer or killers or to “cover their tracks” so as to avoid apprehension and eventual arrest by authorities, then it is proper for court to allow jury to consider aggravating circumstance of avoiding or preventing lawful arrest. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Evidence pertaining to when defendant in capital murder case would be released on parole if sentenced to life in prison is merely speculative and should not be admitted for consideration at sentencing hearing. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Where defendant was charged with two acts of sexual battery, one of which consti-

tuted the underlying felony to the capital murder and the other of which served as the basis of separate sexual battery conviction, the latter aggravated the crime and narrowed the class of defendants eligible for the death penalty substantially. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Robbery, by definition, is committed for pecuniary gain and thus robbery and pecuniary gain cannot be used as two separate aggravating circumstances in capital murder prosecution. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Individual can have prior conviction involving use of threat or violence and yet not be under sentence of imprisonment, and individual can be under sentence of imprisonment and yet not have prior conviction involving use of threat or violence, so that both aggravating circumstances may be used, even when they are based on the same offense. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment charging defendant with aggravated assault was best evidence to prove that defendant had been convicted of felony involving use of threat or violence, provided that it was properly certified. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which bore signature of county clerk who attested to its origins was properly certified and thus admissible in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Indictment which led to defendant's conviction for aggravated assault was relevant in capital murder prosecution to prove that defendant had prior conviction for felony involving use of threat or violence and to prove that defendant was under sentence of imprisonment at the time of the murder with which he was charged. *Blue v. State*, 674 So. 2d 1184

(Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prosecution had no burden to bear with respect to proof that aggravated assault was a crime of violence and could be considered as an aggravating circumstance as such in capital murder prosecution, as aggravated assault by its very definition signifies violence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Mental retardation is not a bar to execution of one convicted of capital murder, but is only a mitigating circumstance. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Finding of aggravating circumstance in death penalty case that defendant was under sentence of imprisonment at time of murder was supported by evidence provided in guilt phase that defendant was on parole for life sentence. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Finding of aggravating factor in death penalty case that defendant had been previously convicted of felony involving use or threat of violence was supported by evidence that defendant had previously been convicted of murder and aggravated assault, even though aggravated assault conviction had occurred after murder for which defendant was being sentenced to death. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder while engaged in commission of kidnapping or flight after kidnapping; victim's body was found in car with windows open approximately 2 months after her disappearance, which did not provide sufficient evidence beyond a reasonable doubt that defendant had kidnapped victim. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Jury was not entitled to consider aggravating factor in death penalty case that defendant had committed murder for purpose of avoiding or preventing lawful arrest; there was no evidence that desire to avoid apprehension and arrest was a substantial reason for victim's murder. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Instruction in death penalty case which included all mitigating factors contained in statute except "age of the defendant" was proper; "age of the defendant" factor would fall under "catch-all" mitigating circumstance. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Capital murder aggravating circumstance, that defendant knowingly created a "great risk of death to many persons," applied to defendant who stabbed 4 children to death and inflicted life-threatening stab wounds on one adult and another child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder aggravating factor for when defendant knowingly creates great risk of death to many persons applies when there are multiple victims; aggravating factor is not limited to instances when there is a great risk to those other than intended victims. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Considering underlying crime of felonious abuse as aggravating factor during sentencing of capital murder defendant did not fail to narrow class of defendants eligible for death penalty, in violation of Eighth Amendment; fact that aggravating circumstance duplicates element of crime does not make death sentence constitutionally infirm. *Jackson v. State*, 672 So.

2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Certified copy of indictment and judgment and testimony of police officers present at incident justified use of capital murder defendant's prior violent felony as aggravating circumstance, even if gun used during incident was inoperable and separate kidnapping charges were dropped. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Prosecution in capital murder case could establish aggravating factor of avoiding arrest, by introducing testimony and photograph of police crime expert showing that body of victim had been burned in hands and pubic area, in order to preclude identification of victim by fingerprints or of perpetrator through pubic hair combings, even though defendant claimed that burning taking place after murder had been completed did not show that murder was undertaken to cover up earlier crimes including sexual assault; "avoiding arrest" aggravator extended also to avoiding arrest for killing. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Evidence supported avoidance of arrest as aggravating factor in penalty phase of capital murder case; defendant began asking victim if she wanted to live or die from moment that she, defendant and accomplice arrived at lake, he expressly informed accomplice they were going to have to kill victim, after victim was dead defendant doused body with gasoline and burned victim, with special emphasis on hands and pubic area so as to preclude identification through fingerprints, fiber and pubic hair comparisons. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prosecutor did not make improper statement of law, in closing argument of penalty phase in capital murder case, that

matters in mitigation carry less weight than matters of aggravation; remarks were supported by law which holds that aggravating factors must be found beyond reasonable doubt, while mitigating factors may simply be found. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

“Pen packs” detailing defendant’s prior offense were relevant during penalty phase of capital murder trial to prove 2 aggravating circumstances, that defendant was previously convicted of another capital offense or felony involving use or threat of force and that defendant committed capital offense while under sentence of imprisonment, where such evidence was not offered to impeach defendant or any of his witnesses. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Indictment contained in defendant’s “pen pack” was relevant and admissible during penalty phase of capital murder case to show that defendant’s previous escape was crime of violence for purposes of statutory aggravating factor. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

State has right and requirement, in death penalty resentencing cases, to put on evidence impacting Enmund factors, relating to circumstances surrounding victim’s death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

State, in its case in chief during penalty phase of capital murder case, is permitted to introduce evidence relevant to one or more of 8 statutory aggravating circumstances along with evidence from guilt phase relevant to Enmund factors, regarding circumstances surrounding victim’s death. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333

(1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Evidence of detailed circumstances of underlying murder was admissible at resentencing in capital murder case to support Enmund factors, concerning whether defendant actually killed, attempted to kill, intended that killing take place and contemplated that lethal force would be employed. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Jury’s finding that defendant “intended that a killing take place,” which allowed imposition of death penalty, was supported by evidence that defendant gave guns to 2 accomplices, even though accomplices testified that while planning robbery, they had discussed that victim should not be hurt. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh’g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction on mitigating circumstance in death penalty phase that she would be 70 years old before she would have been eligible for parole; defendant’s age at time she would be eligible for parole, if given life sentence, was speculative. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh’g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to have listed as mitigating circumstance the fact that none of her 3 accomplices had received death penalty; jury was aware that none of her accomplices had received death penalty, and trial court informed jury that it should not limit its consideration to those mitigating circumstances listed. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh’g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Submission to jury of “especially heinous, atrocious or cruel” aggravating factor in capital murder prosecution without limiting instruction violated Eighth Amendment. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

In the penalty phase of a capital murder prosecution, the prosecutor's comment that "we have never heard one single witness say he ever felt sorry for what he did" was not impermissible, as it was simply an argument that none of the defendant's mitigation witnesses indicated that the defendant was sorry for killing the victim, and was not an argument for "lack of remorse" as an aggravating factor. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "especially heinous, atrocious or cruel" aggravating circumstance where the victims' bodies had contusions, one victim's finger had been cut off after he died, and the victims suffered painful deaths. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, there was sufficient evidence to warrant an instruction on the "avoiding lawful arrest" aggravating circumstance where all 4 of the victims had been shot, 3 of them had been bound, a truck belonging to one of the victims was found loaded with his possessions, the victims' home was burned to the ground as a result of an incendiary device, and there was testimony that the defendant's accomplice said they had to burn down the house to destroy the evidence. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A trial judge in a murder prosecution was well within his discretion in sentencing the 14-year-old defendant to life imprisonment for aiding and abetting in the murder, in spite of the defendant's argument that the judge abused his discretion by not stating in the record his reasons for declining to utilize possible alternative criminal sanctions for juvenile offenders provided for in § 43-21-159 of the Youth Court Act, where the judge stated that he was very much aware of the requirements in *May v. State* (Miss. 1981) 398 so2d 1331

because of the many cases he had handled dealing with teenagers charged with capital offenses; although minimal, the trial court adequately addressed the reasons for not utilizing the alternatives afforded. *Swinford v. State*, 653 So. 2d 912 (Miss. 1995).

A sentence of death was not so disproportionate as to require reversal, in spite of the defendant's argument that his mental condition and emotional history, including a diagnosis of schizophrenia, his pre-trial suicidal "gesture," and his "limited intelligence," mitigated against a sentence of death where the record did not indicate that the defendant was ever diagnosed as suffering from paranoid schizophrenia, a report from a mental hospital, at which the defendant was examined prior to trial, stated that the defendant exhibited few, if any, symptoms of schizophrenia and that he knew the difference between right and wrong in relation to his actions, and a community health center placed the defendant's level of intelligence on the low side of average. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weather- spoon v. State*, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the trial court did not err by excluding mitigating evidence in the form of testimony from the defendant's sister regarding incidents when the defendant "heard voices" where a proper foundation was not laid in that the trial court had no reason to believe that the witness had any independent knowledge of the events aside from her brother's telling her about them, the record was devoid of any medical testimony indicating that the defendant was schizophrenic at the time of the murder, and no medical experts testified on the defendant's behalf. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weather-*

spoon v. State, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the prosecutor's comments during closing argument portraying the victim as a "grandmother" who left home "wearing her mother's day present ring on her finger," and asking the jury not to forget the victim "because she deserves justice" did not constitute an impermissible argument to sentence the defendant to death out of vengeance and sympathy for the victim; the introduction of evidence concerning the background and character of the victim and the impact of the crime on the victim's family is not prohibited, as such evidence may be relevant to the jury's decision as to whether the death penalty should be imposed. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the trial court did not err in permitting evidence that the victim was 26 years old, had a 7-year-old son, had been married for 4 years, and was very shy and did not like to wear dresses because they exposed her legs where the evidence was proper and necessary to the "development of the case and true characteristics of the victim" and could not serve in any way to incite the jury. *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992).

A trial court's failure to hold a capital murder defendant's habitual offender status hearing prior to the sentencing phase of the trial did not warrant vacation of the defendant's life sentence, which was to be served without eligibility for parole by virtue of the defendant's habitual offender status, and remand for a new jury imposition of a life sentence with the possibility of parole, since the jury did not impose the death sentence on the defendant but instead sentenced him to life without parole. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

A trial court erred when it allowed the prosecutor to repeatedly explore the defendant's propensity for future crimes during the sentencing phase of a capital

murder prosecution, since propensity to commit future crimes is not one of the 8 aggravating circumstances authorized by § 99-19-101(5). *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, the trial court did not err in excluding testimony of the defendant's family as to the impact of a death sentence on them, testimony of the family of a man who had been convicted of capital murder and executed as to the impact of his death sentence and execution on them, and testimony of the defendant's attorney about events surrounding the execution of that man, whom he had represented on appeal; such testimony is not relevant to the consideration of whether the death sentence should be imposed. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

In a capital murder trial, the habitual offender status phase must be conducted prior to the sentencing phase. At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole. *Turner v. State*, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

The new rule announced in *Willie v. State* (Miss. 1991) 585 So. 2d 660—that a jury may not "doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators" when determining the sentence to be imposed in a capital murder case—is to be applied prospectively from July 24, 1991; thus, the new rule did not apply to a defendant who was tried, convicted and sentenced to death before July 24, 1991. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

Testimony during the sentencing phase of a capital murder prosecution as to the victim's housekeeping habits did not constitute inadmissible victim impact statements where the evidence was offered to support the State's proof of an attempted robbery inasmuch as the victim was found in her home which was in a state of

disarray. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In the sentencing phase of a capital murder prosecution, the trial court did not abuse its discretion in excluding the prison record of the defendant's accomplice who allegedly dominated the defendant and forced him to commit the murders since the prison record did nothing to focus on the defendant's character or susceptibility to domination or on the circumstances of the crime. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

During the sentencing phase of a murder trial, evidence that the defendant had declared bankruptcy and was separated from his wife was admissible to rebut the defendant's testimony that he had a steady job and loved his family. *Cole v. State*, 525 So. 2d 365 (Miss. 1987), cert. denied, 488 U.S. 934, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988), reh'g denied, 488 U.S. 1023, 109 S. Ct. 826, 102 L. Ed. 2d 815 (1989), denial of post-conviction relief aff'd, 608 So. 2d 1313 (Miss. 1992), 608 So. 2d 1331 (Miss. 1992), cert. denied, 508 U.S. 962, 113 S. Ct. 2936, 124 L. Ed. 2d 685 (1993), post-conviction relief granted, 666 So. 2d 767 (Miss. 1995).

Although the facts of a homicide have been proved by direct evidence and the judge deems the fact of guilt clearly established and the plea is insanity, nevertheless under this section the defendant may offer evidence of his good character for peace. *Maston v. State*, 83 Miss. 647, 36 So. 70 (1904).

4. Plea of guilty.

Defendant's unsupported allegation that his guilty plea to the murder of his girlfriend was involuntary and the result of coercion by his attorney could properly be rejected by the trial court in considering defendant's motion for postconviction relief without the holding of an evidentiary hearing as defendant's claim was not supported by the record; the trial court could properly impose a life sentence without referring the matter to a jury.

Riley v. State, 848 So. 2d 888 (Miss. Ct. App. 2003).

A trial court erred in allowing a defendant to plead guilty to both capital murder and the underlying felony of burglary which elevated the murder to capital murder; sentencing the defendant separately for both felony murder and the underlying felony violated his right against double jeopardy. *Fuselier v. State*, 654 So. 2d 519 (Miss. 1995).

5. Instructions.

Jury instruction on the sentence of life imprisonment without parole for capital murder did not violate the prohibition against ex post facto laws even though the statute authorizing the punishment, Miss. Code Ann. § 97-3-21, was not in effect at the time of the crime. *Swann v. State*, 806 So. 2d 1111 (Miss. 2002).

Instruction at penalty phase of capital murder prosecution that mitigating circumstances must outweigh aggravating circumstances does not shift state's burden of proving the aggravating circumstances. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

It was proper to instruct jurors at penalty phase of capital murder prosecution that they should disregard sympathy in reaching their sentencing decision. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instruction which prohibits, expressly or impliedly, consideration of mitigating circumstances not found unanimously is flawed and requires reversal. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Court was not required to specifically instruct the jury considering death penalty that they did not have to find mitigating circumstances unanimously in order for particular juror to consider them. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Jury considering death penalty can impliedly be charged with knowledge that unanimous finding of mitigating circumstances is not required where jury has been instructed that no degree of consen-

sus on mitigating circumstances is required. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Courts are encouraged to instruct jurors considering death penalty that, even if all 11 other jurors find that a certain mitigating circumstance does not exist, juror who believes that it does exist must find that mitigating circumstance and weigh it in further deliberations. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instruction at penalty phase of capital murder prosecution did not provide for unanimous decision for death and unanimous decision for life but, rather, for unanimous decision for death and decision for life; instruction did not require that jury unanimously find for life sentence. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Trial judge's instruction that jurors should return to jury room to clarify ambiguity in jury's findings that supported sentence of death did not taint verdict; jury had death penalty instruction with it, and court directed jury to re-form verdict "if it is the decision of the jury." *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Whimsical or residual doubt instructions are not required as a mitigating circumstance in death penalty cases. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

State has no burden to rebut mitigating evidence and, thus, capital murder defendant was not entitled to requested sentencing instruction directing jury that credible evidence of mitigating factors may be considered when weighing mitigating against aggravating circumstances unless state rebuts evidence beyond reasonable doubt. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g

denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

"Catch-all" mitigating factors in capital murder sentencing proceeding encompasses all nonstatutory mitigating circumstances, including defendant's remorse, and, thus, defendant was not entitled to separate mitigating instruction that he had demonstrated extreme remorse for crimes committed. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Method of execution was of no concern to jury and, thus, capital murder defendant was not entitled to sentencing phase instruction informing jurors that defendant would be executed by lethal injection if sentenced to death. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase jury instructions on use of mercy, pity or sympathy; trial court has discretion to give mercy instructions. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to requested sentencing phase instructions directing jury that death sentence should not be selected if any juror has doubt about proper punishment and that jury was not required to sentence him to death; requests were for mercy instructions, which trial court has discretion to give. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Court could strike for cause prospective juror in capital murder case who repeatedly stated that she was disposed to return life sentence, rather than death sen-

tence, and did not know if she could base her decision on evidence and law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Instruction that in deciding whether to impose death penalty, jury was "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," was proper. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction at death penalty phase of trial that jury had to consider sympathy and mercy on her behalf; several instructions had directed jury that it was required to consider mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant is not entitled to mercy instruction at death penalty phase of trial. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Defendant was not entitled to instruction that life sentence rather than death penalty was presumed to be appropriate sentence unless presumption was overcome. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Instruction that for jury to impose death penalty, it had to find that mitigating circumstances did not outweigh aggravating circumstances, did not improperly allow jury to impose death penalty based solely on presence of aggravating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Failure to include a jury foreman signature line under the life imprisonment op-

tion in a sentencing verdict instruction in a death penalty case will no longer be tolerated by the Supreme Court; this facial defect may be cured simply by reversing the order of the options in the sentencing instruction so that the life option is listed first. *Colosimo v. Senatobia Motor Inn, Inc.*, 662 So. 2d 552 (Miss. 1995).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction permitting imposition of the death penalty only if the aggravating circumstances outweighed the mitigating circumstances. *Davis v. State*, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

In the sentencing phase of a capital murder prosecution, a limiting instruction for the "especially heinous, atrocious or cruel" aggravating circumstance was proper where it comported with the requisite narrowing language found in *Coleman v. State* (Miss. 1979) 378 so2d 640. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not unconstitutionally limit consideration of emotional disturbance mitigation evidence to "extreme" emotional disturbance by submitting an instruction on "extreme mental or emotional disturbance" where the instructions on mitigating factors, when read as a whole, provided ample opportunity for the jury to give consideration to any emotional disturbance the defendant may have suffered. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in refusing to give peremptory instructions requiring the jury to find 5 mitigating factors which the defendant claimed were undisputed, since the existence of mitigating factors should be left to the jury's consideration; while it is constitutionally required that a jury not be precluded from considering any mitigating factor, a jury is not required to find such

factors. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in instructing the jurors that they should consider the detailed circumstances of the offense when making their decision where the instructions as a whole properly instructed the jury as to the framework within which it was to consider mitigating and aggravating circumstances. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

A sentencing instruction in a capital murder prosecution properly defined the “especially heinous, atrocious, or cruel” aggravating factor, and thus there was no violation of the Eighth Amendment to the United States Constitution, where the instruction defined the term “heinous, atrocious, or cruel” as “those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciencelessness or pitilessness of the crime which is unnecessarily torturous to the victim.” *Hansen v. State*, 649 So. 2d 1256 (Miss. 1994), reh’g denied, cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh’g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A capital murder defendant is not entitled to a “mercy” instruction. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh’g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that “robbery is a crime of violence” when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store

and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and § 97-3-73 the statute under which the defendant pled guilty-defines the crime of robbery as the act of taking another’s personal property “by violence to his person or by putting such person in fear of some immediate injury to his person.” *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh’g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, the definition of the “especially heinous, atrocious, or cruel” aggravating factor contained in the limiting instruction was constitutionally adequate where the instruction described an especially heinous, atrocious or cruel capital offense as a “conscienceless or pitiless crime which is unnecessarily torturous to the victim” and which can be shown by the fact that the defendant “utilized a method of killing which caused serious mutilation where there is a dismemberment of the corpse, where the defendant inflicted physical or mental pain before death, where there was mental torture and aggravation before death or where a lingering or torturous death was suffered by the victim.” *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh’g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In the sentencing phase of a capital murder prosecution, a jury instruction which provided a step-by-step guide in arriving at a verdict did not impermissibly limit the consideration of mitigating evidence, in spite of the defendant’s argument that the language of the instruction could have misled the jury to believe that a finding of mitigating circumstances

must be unanimous because “everything else” required a unanimous finding, where the mitigating circumstances portion of the instruction did not contain the word “unanimous” or “unanimously,” and the instruction would not have implied to any reasonably literate juror that he or she should await unanimity before considering a mitigating circumstance. *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh’g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

A trial court in a capital murder prosecution did not err in excusing a juror for cause where the juror stated that she opposed the death penalty and would not impose the death penalty under any circumstances. *Russell v. State*, 607 So. 2d 1107 (Miss. 1992).

A murder defendant was not denied a fair trial on the ground that the trial court refused to accept his challenges for cause to 3 potential jurors where the defendant used peremptory challenges to remove those jurors, since the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury; so long as the jury that sits is impartial, the fact that the defendant had to use peremptory challenges to achieve that result does not mean that the defendant was denied his or her constitutional rights. *Mettetal v. State*, 602 So. 2d 864 (Miss. 1992).

Personal opposition to capital punishment is not a constitutional impediment to juror service so long as the juror is able to set aside his or her personal belief and fairly consider all sentencing options under the law; it was therefore error for a trial court to refuse defense counsel an opportunity to further voir dire potential jurors who had expressed reluctance to vote for the death penalty. *Balfour v. State*, 598 So. 2d 731 (Miss. 1992).

Prospective jurors in a capital murder prosecution who had stated their opposition to the death penalty were improperly excluded without allowing the defense counsel the opportunity to question them. However, this error was harmless beyond

a reasonable doubt where the answers the jurors gave were substantially clear, it was reasonably certain that the jurors were “Witherspoon-excludable,” and it was unlikely that voir dire examination by the defense counsel would have rehabilitated the jurors sufficient to take them out of Witherspoon. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh’g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh’g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A defendant was denied his constitutional right to a fair trial by an impartial jury in the sentencing phase of a capital murder prosecution where, upon conclusion of the guilt phase but before the sentencing phase began, the jury prematurely deliberated and sent a note to the judge indicating their decision that the defendant should be sentenced to death. Rather than questioning the jurors in order to determine whether each of them could remain impartial during the sentencing phase, the judge merely instructed the jurors to “refrain from further deliberations,” which was insufficient to insure that the defendant’s right to a fair hearing was not prejudiced. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

That murder was committed (1) while engaged in crime of robbery and (2) for pecuniary gain may not be given as two separate and independent aggravating circumstances, as they essentially comprise one. When life is at state, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind it as separate aggravators. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

A prospective juror may not be struck from the jury venire for cause simply because the juror voiced general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. If a juror indicates that if he or she was convinced of the guilt of the defendant and the circumstances warranted a verdict of guilty, he or

she could return a verdict of guilty although that verdict could result in the death penalty, then the juror may not be struck from the jury venire for cause, despite his or her objections and concerns. A prospective juror may be struck if the juror indicates that he or she cannot consider and decide the facts impartially or cannot conscientiously apply the law or the court's instructions. The juror need not expressly state that he or she absolutely refuses to consider the death penalty; an equivalent response made in any reasonable manner which indicates that the juror's position is firm will suffice. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

The denial of a challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Thus, a trial court's refusal to remove 6 jurors for cause did not deprive the defendant of a fair trial where only one of the 6 actually served on the jury and she was not challenged at a time when the defense had 12 peremptory challenges, the defense still had one challenge left as well as an alternate challenge at the completion of the selection process, and the defense counsel never raised any objection to the other 5 jurors. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

In a capital murder prosecution, the court's failure to excuse for cause a potential juror who stated during voir dire that in order for him not to impose the death penalty the defendant would have to prove beyond a reasonable doubt that he should not be executed, was not reversible error where defense counsel used his twelfth peremptory challenge to remove the juror, defense counsel had not exhausted his peremptory challenges and did not challenge anyone else for cause or ask for more peremptory challenges. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

"Death qualification" of jurors prior to the guilt phase in a capital murder prosecution

did not deprive the defendant of a jury composed of a fair cross section of the community. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev'd on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

A capital murder defendant's motion to reduce his sentence of death to a life sentence would be denied, and his alternative motion to vacate and set aside his death sentence and remand the cause for a new sentencing hearing would be granted, where the defendant sought relief based on the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance without further guidance concerning the meaning of this aggravating circumstance, and he contended that *Maynard v. Cartwright* (1988, US) 100 L. Ed. 2d 372, 108 S. Ct. 1853 and *Clemons v. Mississippi* (1990, US) 108 L. Ed. 2d 725, 110 S. Ct. 1441 were intervening decisions within the meaning of § 99-39-27(9). *Smith v. State*, 648 So. 2d 63 (Miss. 1994).

In a homicide prosecution, where the state was permitted to challenge for cause three jurors who expressed conscientious scruples against imposing the death penalty, an order sentencing the defendant to death must be reversed; upon reversal of the order, the trial judge must remand for a new trial as to punishment, or if the district attorney and the trial judge should so agree, might sentence the defendant to life imprisonment without the intervention of the jury. *Rouse v. State*, 222 So. 2d 145 (Miss. 1969).

Jurors in murder prosecution who have conscientious convictions against inflicting death penalty are not qualified. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

In qualifying the jurors in murder prosecution, it is the duty of the judge to inquire of the jurors, and the duty of the jurors to answer under oath, whether they have conscientious convictions against inflicting the death penalty. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

No set words or phrases are required or prescribed in propounding question to prospective jurors in murder prosecution whether they have conscientious convictions

tions against inflicting death penalty. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

Use of word "hesitate," by court in asking prospective jurors in course of voir dire examination in murder prosecution if any would hesitate to inflict capital punishment if the law authorized it and the evidence justified it, was improper, but did not constitute reversible error where court reworded the question upon defendants' objection. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

In a prosecution for murder, the court properly excluded from the jury persons who stated that they had conscientious scruples against the infliction of capital punishment. *Borowitz v. State*, 115 Miss. 47, 75 So. 761 (1917).

6. Jury.

7. —Qualifications.

Prosecutor's question to potential jurors asking whether they could conceive of imposing death penalty in murder case with no eyewitness was proper means of probing into their prejudices to get insight into their thoughts. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Trial court acted within its discretion in excusing 4 potential jurors who stated that they probably could not impose death penalty when there were no eyewitnesses or fingerprints linking defendant to crime, and stated that they would need "a lot stronger proof" to change their position. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Decision of whether or not to excuse potential juror based on bias against death penalty is left to trial judge's discretion. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

For trial court to excuse potential juror for bias against death penalty, juror need not expressly state that he or she abso-

lutely refuses to consider death penalty; equivalent response made in any reasonable manner indicating juror's firm position will suffice. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Prospective jurors in capital cases may only be excluded for cause based upon their views on capital punishment when those views would prevent or substantially impair performance of their duties as jurors in accordance with their instructions and oath. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror who is opposed to death penalty indicates that, if convinced of defendant's guilt, he or she could return verdict of guilty which might result in death penalty, juror cannot be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

If prospective juror is irrevocably committed to vote against death penalty regardless of facts and circumstances, juror can be struck from jury. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Four prospective jurors in capital murder case were properly excused after stating their inability to impose death penalty. *Taylor v. State*, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996), reh'g denied, 519 U.S. 1085, 117 S. Ct. 755, 136 L. Ed. 2d 692 (1997).

Defense counsel's extensive voir dire of venire members regarding attitudes toward death penalty precluded claim on appeal that trial court's inadequate voir dire questioning permitted seating of jurors with bias in favor of death penalty. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520

U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Any juror who would impose death sentence regardless of facts and circumstances of capital murder conviction cannot follow dictates of law and is subject to be removed through use of complementary challenge for cause. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Police officer was not required to be removed from capital murder jury panel, even though during general voir dire of venire he had stated that due to seriousness of charge of capital murder guilty verdict should be followed by death penalty, and officer admitted to knowing some details of case; officer had further stated that he believed his decision whether to impose death penalty would be based on circumstances and that he could be fair and impartial, and there was no automatic rule that law enforcement officers or their relatives could be challenged for cause. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed from capital murder panel, even though during initial voir dire he had raised his hand and commented, regarding death penalty, that "if the jury reached a decision of guilty, I would automatically vote" for death; when questioned individually, prospect stated that he would weigh evidence and that he could put aside his views and listen to evidence and instructions. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed from capital murder jury panel, even though he nodded his head affirmatively during group voir dire when asked whether he would automatically vote for death penalty, whether he believed in death penalty, and whether he would vote with majority of other jurors as to sentence; under further questioning he stated that he would evaluate the evidence and impose penalty which seemed most logical, and when informed that his vote was an individual choice prospect replied that he would vote whichever way evidence

pointed, would be fair and impartial and would follow law. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Prospective juror was not required to be removed for cause from jury panel in capital murder case, even though he initially stated he would vote for death penalty upon capital conviction, and later that he would be predisposed to vote for death all things being equal; prospect also stated that he would follow instructions given by court and review facts before reaching decision, and that his decision would be based upon how evidence "came about" in penalty phase of trial. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Even if trial court erred in capital murder case by failing to strike for cause prospective juror who allegedly stated he would always vote for death penalty, defendant's right to impartial jury was not violated, where prospective juror did not serve on defendant's jury panel, and defendant was not forced to use peremptory strike to keep him off panel. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Circuit court should take substantial role in conducting voir dire to determine whether prospective jurors would vote automatically for death penalty regardless of aggravating and mitigating circumstances. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

A trial judge in a capital murder prosecution did not abuse his discretion by excusing a potential juror who initially indicated that she could not impose the death penalty, even though she subsequently indicated that there were some circumstances under which she could impose the death penalty, where she failed to clearly indicate that she was willing to set aside her own beliefs and follow the instructions and law as to the death penalty.

Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996), reh'g denied, 518 U.S. 1039, 117 S. Ct. 7, 135 L. Ed. 2d 1102 (1996).

A prosecutor's request of jurors during individual voir dire to give the particular circumstances that each would require in order to return a death sentence were not improperly designed to extract a promise from the jurors that they would certainly vote in favor of the death penalty given a specific set of circumstances, and therefore did not violate the defendant's constitutional rights. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995), reh'g denied, 514 U.S. 1123, 115 S. Ct. 1992, 131 L. Ed. 2d 878 (1995), post-conviction relief denied, 687 So. 2d 1124 (Miss. 1996), cert. denied, 521 U.S. 1108, 117 S. Ct. 2488, 138 L. Ed. 2d 996 (1997).

The 1968 decision of the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, is not retroactive and was not applicable to a guilty plea entered in 1960 by a defendant charged with murder who, at the time of the decision of *Jackson*, was serving a life sentence in the penitentiary as a consequence. *King v. Cook*, 211 So. 2d 517 (Miss. 1968).

A defendant who in 1960 entered a plea of guilty to an indictment for murder and received a life sentence which he was currently serving, following the decision in 1968 of the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, filed a petition for a writ of habeas corpus alleging that the death penalty provision of Code 1942, § 2217 of the Mississippi Code violated the Fifth and Sixth Amendments of the United States Constitution and § 14 of the Mississippi Constitution. In affirming the denial of the writ, the court held that the *Jackson* rule was inapplicable to the Mississippi general statute on murder for the reason that an accused entering a plea of guilty to a charge of murder under Code 1942, § 2217 is not assured of not receiving the death penalty; for the trial court cannot be required to accept a guilty plea in a capital case and pronounce a sentence of less

than death, but may require a jury trial in which the imposition of the death sentence is within the sole province of the jury. *King v. Cook*, 211 So. 2d 517 (Miss. 1968).

The trial judge cannot be compelled to accept a plea of guilty in capital cases. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881 (1947).

It is discretionary with the trial judge whether he will accept a plea of guilty in a capital case; if he does so he must see to it, first, that the plea is entirely voluntary and that defendant fully realizes and is competent to know the consequences of such plea, and second, a competent and impartial jury must be empanelled to consider the material circumstances of the crime fully enough to adjudge whether the death sentence should be imposed. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881 (1947).

The death penalty is within the sole province of the jury. *Dickerson v. State*, 202 Miss. 804, 32 So. 2d 881 (1947).

On murder conviction, it is within the province of the jury to fix the penalty at death or life imprisonment. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

Where defendants had been convicted of murder and sentenced to death, the supreme court had no power to reverse and remand the case on the mere ground that another jury might fix the punishment at life imprisonment because of the youth and indiscretion of the defendants since the exercise of clemency is vested in the executive. *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760 (1944).

Since the jury is vested with the power to determine whether the death penalty should be inflicted in a murder prosecution, the issue of life or death should be decided by the jury, uninfluenced by extraneous and highly prejudicial issues. *Russell v. State*, 185 Miss. 464, 189 So. 90 (1939).

8. —Powers and duties.

A trial court's failure to give a limiting instruction with respect to the "especially heinous, atrocious or cruel" aggravating circumstance did not constitute harmless error where the jury was instructed as to only 2 aggravating circumstances, the "especially heinous" factor was argued al-

most exclusively to the jury as a reason to impose the death penalty, and there was no way of knowing beyond a reasonable doubt that a jury would have found, had it been so instructed, that "the actual commission of the felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992).

A trial court's failure to give a limiting instruction in conjunction with the "especially heinous, atrocious, or cruel" aggravating circumstance did not constitute harmless error, even though the jury was allowed to consider 2 additional aggravating circumstances, where the "especially heinous" factor was argued almost exclusively to the jury as a reason to impose the death penalty, and it could not be said beyond a reasonable doubt that under the facts of the case the result would have been the same had the "especially heinous" aggravating circumstance been properly defined in the jury instructions. *Jones v. State*, 602 So. 2d 1170 (Miss. 1992).

In the penalty phase of a capital murder prosecution, the trial court's instruction on the "especially heinous, atrocious or cruel" statutory aggravating circumstance was proper where the court instructed the jury that the term "heinous, atrocious, or cruel" meant "those situations where the actual commission of the capital felony was accomplished by such additional acts to set the crime apart from the norm of capital felonies by the consciousness or pitilessness of the crime which is unnecessarily torturous to the victim." *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

A defendant enjoys no right to be spared the death penalty because the jury entertains a whimsical or residual doubt of his

or her guilt, though counsel remains free to argue to the jury any such doubt. Thus, a trial court did not err in refusing a defendant's requested "whimsical doubt" instruction where the record did not reflect that the defendant's counsel was forbidden to argue whimsical or residual doubt to the jury. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of a capital murder prosecution, the defendant was not entitled to an instruction affirmatively instructing the jurors that they should individually consider the evidence in mitigation; the instructions given were sufficient where the mitigating circumstances portion of the instruction did not contain "unanimous" or "unanimously," only the aggravating circumstances part of the instruction contained those words, and there was no instruction implying or intimating that a juror should await unanimity before considering a mitigating circumstance. *Hansen v. State*, 592 So. 2d 114 (Miss. 1991), cert. denied, 504 U.S. 921, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992), reh'g denied, 505 U.S. 1231, 112 S. Ct. 3060, 120 L. Ed. 2d 924 (1992), post-conviction relief granted, 649 So. 2d 1256 (Miss. 1994), cert. denied, 516 U.S. 986, 116 S. Ct. 513, 133 L. Ed. 2d 422 (1995), reh'g denied, 516 U.S. 1085, 116 S. Ct. 801, 133 L. Ed. 2d 748 (1996).

In the sentencing phase of capital murder prosecution, an instruction cautioning the jury "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was a proper statement of the law because it did not inform the jury that it was required to disregard in toto sympathy and left the jury the option to vote for or against the death penalty. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

In the penalty phase of a capital murder prosecution, a jury instruction stating that the jury "may objectively consider the

detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant,” was not defective, notwithstanding the defendant’s claim that the use of the word “may” allowed the jury to permissively consider mitigating circumstances instead of requiring them to do so, since the instruction did not place limitations on what mitigating circumstances the jury could consider. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev’d in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In the sentencing phase of a capital case, an instruction stating that in order to return the death penalty the jury was required to find that the mitigating circumstances did not outweigh the aggravating circumstances, did not improperly shift the burden of proof from the prosecution to the defense. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev’d in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

A limiting instruction during the penalty phase of a capital murder prosecution concerning the “heinous, atrocious, or cruel” aggravating factor was adequate where the court instructed the jury that the word “heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.” These instructions adequately defined each of the 3 potential aggravating factors in terms the average lay person (juror) could understand and the language used was neither vague nor unclear. *Shell v. State*, 554 So. 2d 887 (Miss. 1989), rev’d in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990), on remand, 595 So. 2d 1323 (Miss. 1992).

In the penalty phase of a capital case, the jury’s consideration of whimsical doubt as a mitigating factor was not impaired by the trial court’s denial of a jury instruction on whimsical doubt where defense counsel was permitted to argue whimsical doubt to the jury. *Minnick v. State*, 551 So. 2d 77 (Miss. 1988), rev’d on other grounds, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), on remand, 573 So. 2d 792 (Miss. 1991).

The judgment as to the sentence of one convicted of murder would be reversed to permit the jury to fix punishment, where although the judge instructed the jury to fix punishment at life imprisonment if it should find the defendant guilty, the jury returned a verdict merely finding the defendant guilty as charged, whereupon the court sentenced the defendant to serve a life term in the state penitentiary. *Ray v. R.G. LeTourneau, Inc.*, 220 So. 2d 837 (Miss. 1969).

9. Deferral of sentence.

It was improper for the trial court to indefinitely defer the defendant’s sentencing because the statute requires that every person convicted of murder “shall” be sentenced to imprisonment for life in the state penitentiary. *House v. State*, 754 So. 2d 1147 (Miss. 1999).

10. Sentencing Hearings.

Defendant’s capital murder conviction was proper pursuant to Miss. Code Ann. § 97-3-21 because he did not need to receive a sentencing hearing since, even absent a procedural bar, if the State was not seeking the death penalty, the only possible sentence for conviction of capital murder was life without parole. *Davis v. State*, 914 So. 2d 200 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

RESEARCH REFERENCES

ALR. Acquittal on homicide as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Homicide by fright or shock. 47 A.L.R.2d 1072.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

CJS. 41 C.J.S., Homicide §§ 366 et seq.

Practice References. McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).
Mississippi Penal Code Annotated (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

§ 97-3-23. Homicide; death following duels fought out of state.

Every person who shall, by previous appointment, agreement, or understanding made in this state, fight a duel without the jurisdiction of this state, and, in so doing, shall inflict a wound upon his antagonist or any other person, whereof the person thus injured die within this state, and every second engaged in such duel, shall be guilty of murder in this state, and may be indicted, tried, and convicted in the county where such death shall happen.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 2 (5); 1857, ch. 64, art. 166; 1871, § 2629; 1880, § 2876; 1892, § 1150; Laws, 1906, § 1228; Hemingway's 1917, § 958; Laws, 1930, § 986; Laws, 1942, § 2216.

Cross References — Penalty for murder, see § 97-3-21.

Crime of dueling, see §§ 97-39-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

It was not improper for prosecution, during closing argument, to project on wall words referring to well-known bombing incident, despite claim that specter of incident was raised for sole purpose of exciting passion of jury in prosecution for possession of explosives; defendant had strenuously asserted throughout trial

that materials confiscated were not peculiarly adapted to aid in commission of crime, and prosecutor was trying to graphically demonstrate for jury that materials were indeed so adapted, using example jury would be able to understand. *Brewer v. State*, 704 So. 2d 70 (Miss. 1997), reh'g denied, 702 So. 2d 133 (Miss. 1997).

§ 97-3-25. Homicide; penalty for manslaughter.

Any person convicted of manslaughter shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or both, or in the penitentiary not less than two years, nor more than twenty years.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 3 (20, 21); 1857, ch. 64, art. 183; 1871, § 2646; 1880, § 2894; 1892, § 1167; Laws, 1906, § 1245; Hemingway's 1917, § 975; Laws, 1930, § 1003; Laws, 1942, § 2233.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Requisites of indictment for manslaughter, see § 99-7-37.

Conviction of constituent offense, see § 99-19-5.

JUDICIAL DECISIONS

1. In general.
2. Penitentiary sentences.
3. Fines and assessments.

1. In general.

Had defendant not pled guilty to manslaughter and demanded to go to trial for murder, he still possessed no right for a jury to decide his sentence, as the sentence was mandatory; defendant forfeited no right to have a jury decide his sentence by pleading guilty to the lesser crime of manslaughter. *Smith v. State*, 922 So. 2d 43 (Miss. Ct. App. 2006).

Evidence was sufficient to convict defendant of manslaughter where testimony was presented that he was seen with a gun during the altercation, a muzzle flash from his gun, and that bullet casings from a weapon matching defendant's gun were recovered; while there was testimony that at least one other person drew a gun inside the club that night, the jury decided to give that testimony less weight than the testimony supporting defendant's guilt. *Anderson v. State*, 856 So. 2d 650 (Miss. Ct. App. 2003).

Defendant's sentence of eight years for manslaughter was not cruel and unusual when defendant could have received up to 20 years. *Wade v. State*, 802 So. 2d 1023 (Miss. 2001).

A sentence of 20 years for a conviction of manslaughter was not cruel and unusual punishment, notwithstanding that the defendant was 40 years old and in poor health when sentenced. *Harried v. State*, 773 So. 2d 966 (Miss. Ct. App. 2000).

In a homicide prosecution resulting in a conviction for manslaughter, an order of restitution in the amount of \$12,828.50 was error where there was no evidence that the trial judge considered the factors set forth in § 99-37-3(2), the trial judge did not specify a time for payment or a method of payment, and there was no express finding that the defendant had assets to pay any part of the amount ordered, though the judge implicitly found that the defendant had assets to pay part of the restitution amount by directing that a lien be placed against the defendant's workers' compensation benefits. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

Exclusion of evidence as to victim's character was not abuse of discretion where defendant was not claiming self-defense. *Weeks v. State*, 493 So. 2d 1280 (Miss. 1986).

The inclusion in manslaughter instruction of parenthetical statement to the effect that in the event defendant is convicted it will be the duty of the court to sentence him to a term of years in the state penitentiary was error in view of the fact that the penalty for manslaughter as provided by statute may be either a fine or imprisonment. *Smith v. State*, 288 So. 2d 720 (Miss. 1974).

A 15 year sentence for the shooting death of an innocent bystander was within the limits set by Code 1942 § 2233 and was neither cruel nor unusual punishment. *Pace v. State*, 285 So. 2d 906 (Miss. 1973).

One again convicted of manslaughter, on a retrial ordered on the court's own motion, may be given by the same judge a heavier sentence than that imposed on the former trial. *Sanders v. State*, 239 Miss. 874, 125 So. 2d 923, 85 A.L.R.2d 481 (1961).

Imposing twenty-year sentence on defendant convicted of manslaughter for driving truck while drunk and colliding with another car causing death of passenger in other car was not cruel and unusual punishment. *Lester v. State*, 209 Miss. 171, 46 So. 2d 109 (1950).

Where evidence was sufficient to sustain verdict of manslaughter and sentence was within the limits prescribed by the statutes, supreme court had no authority to reduce it or to reverse on account of excessiveness of sentence imposed. *Griffin v. State*, 195 So. 472 (Miss. 1940).

In assessing the punishment under this section [Code 1942, § 2233], an exceedingly wide discretion is vested in the court, and the imposition or sentence should be controlled by the facts of the case, the jury's recommendation having weighty force, but not controlling. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740 (1939).

While the imposition of a sentence of seventeen years for manslaughter, not-

withstanding the recommendation of the jury for mercy, appeared to be excessive, such sentence would not be reversed on appeal, since the trial court was vested with a wide discretion in such matters, but would be left for correction by the governor. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740 (1939).

2. Penitentiary sentences.

Inmate was not entitled to post-conviction relief simply because he was sentenced to 10 years for the shooting into a dwelling house, which was the maximum sentence, even though he was a first time offender, because sentences were generally upheld on appeal if they were within the statutory range. *Johnson v. State*, 908 So. 2d 900 (Miss. Ct. App. 2005).

Petitioner's argument that the sentence imposed was disproportionate to the sentences imposed on similarly situated defendants within the same circuit court district was rejected where petitioner's sentence for manslaughter (20 years with 2 years suspended), was within the applicable statutory guidelines; the fact that other criminal defendants in the same county circuit court who pled guilty to manslaughter received shorter sentences than petitioner had no decisive bearing on whether or not petitioner's sentence was disproportionate. *Jones v. State*, 885 So. 2d 83 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Trial court did not abuse its discretion in sentencing defendant to 18 years despite the fact that this was his first felony conviction and that he was in a drunken state at the time the crime was committed. *Wash v. State*, 880 So. 2d 1054 (Miss. Ct. App. 2004).

Defendant's sentence of nineteen and one-half years incarceration and six months suspended plus five years of probation does not equate to twenty-five years of time-served, and the sentence is thus not in violation of this section or § 47-7-37. *Carter v. State*, 754 So. 2d 1027 (Miss. 2000).

Defendant's maximum sentence of 20 years' imprisonment, pursuant to this section, following her conviction for manslaughter, was not excessive; however, the trial court erred in founding the sentence on the unverified statement of a juror

which defendant was not allowed to refute. *Ford v. State*, 437 So. 2d 13 (Miss. 1983).

Where upon conviction of manslaughter defendant was sentenced to a term of a year and a half at a state penitentiary the sentence was improper and case would be remanded for proper sentence. *Lampkin v. State*, 214 Miss. 735, 59 So. 2d 335 (1952).

A one-year sentence in the state penitentiary for manslaughter was improper under this section [Code 1942, § 2233]. *Anderson v. State*, 213 Miss. 439, 57 So. 2d 169 (1952).

3. Fines and assessments.

Defendant's conviction for manslaughter was affirmed as the evidence indicated that defendant went to his estranged wife's boyfriend's apartment and shot and killed the boyfriend; the trial court did not err in admitting photographs of the crime scene and the autopsy, as the evidence was relevant to the circumstances surrounding the crime, and the two twenty-year consecutive sentences that were imposed for defendant's convictions for manslaughter and aggravated assault did not constitute cruel and unusual punishment. *Lewis v. State*, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Where a defendant is convicted of manslaughter under Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 99-19-32(1), and the sentence imposed is a term of imprisonment in the penitentiary, the fine provision of Miss. Code Ann. § 97-3-25 is not applicable. However, where the offense is punishable by imprisonment in the penitentiary for more than one year and the imposition of a fine is not provided elsewhere, Miss. Code Ann. § 99-19-32(1) is applicable and allows for imposition of a fine not in excess of \$ 10,000. *Felder v. State*, 876 So. 2d 372 (Miss. 2004).

In viewing Miss. Code Ann. §§ 97-3-25, 99-19-32(1), and § 47-7-49 in *pari materia*, the trial court was within its discretion to order defendant, convicted of manslaughter and sentenced to a term of imprisonment, to pay not only a \$10,000 fine, but also a \$ 10,000 assessment to the Mississippi Crime Victims' Compensation Fund. *Felder v. State*, 876 So. 2d 372 (Miss. 2004).

Cited in *Barnes v. State*, 920 So. 2d 1019 (Miss. Ct. App. 2005), cert. dis-

missed, 920 So. 2d 1008 (Miss. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005).

RESEARCH REFERENCES

ALR. Corporation's criminal liability for homicide. 83 A.L.R.2d 1117.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 11 A.L.R.5th 497.

Homicide: Liability where death immediately results from treatment or mis-

treatment of injury inflicted by defendant. 50 A.L.R.5th 467.

CJS. 41 C.J.S., Homicide §§ 366 et seq.

Practice References. McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-27. Homicide; killing while committing felony.

The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except those felonies enumerated in Section 97-3-19(2)(e) and (f), or while such other is attempting to commit any felony besides such as are above enumerated and excepted, shall be manslaughter.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 3 (6); 1857, ch. 64, art. 170; 1871, § 2633; 1880, § 2880; 1892, § 1154; Laws, 1906, § 1232; *Hemingway's* 1917, § 962; Laws, 1930, § 990; Laws, 1942, § 2220; Laws, 1994 Ex Sess, ch. 27, § 1, eff from and after passage (approved August 23, 1994).

Cross References — Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Self-defense.
3. Indictment.
4. Evidence; generally.
5. —Threats.
6. Instructions.

1. In general.

Defendant charged with capital offense of killing while engaged in commission of child abuse or battery was not entitled to lesser included offense instruction on manslaughter based on killing while committing a felony. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Existence of two separate statutes under which defendant could be prosecuted for killing during course of committing felonious child abuse, only one of which could result in capital murder conviction, did not give prosecutor impermissible discretion to impose death penalty, in violation of Eighth Amendment, where jury was instructed that it could impose life sentence. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant could be prosecuted for capital murder based on felony murder, even though he could also have been charged with manslaughter. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519

U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Instructing jury that defendant could be sentenced to life in prison precluded claim that overlapping statutes for felonious child abuse and manslaughter, one which permitted death penalty and another that did not, gave prosecutors and juries unfettered discretion to impose the death penalty, in violation of Eighth Amendment rights. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Under this section and § 97-3-35, manslaughter is killing without malice, either in the course of a felony other than rape, burglary, arson or robbery or in the heat of passion. Accordingly, since there was no evidence of "heat of passion," and the robbery element was uncontested, the evidence could not support a verdict of manslaughter without capital murder. *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134 (1983).

Where the evidence showed that defendant and his brothers kidnapped the deceased, and during the commission of this crime, she was killed by one of defendant's brothers alone without any participation by the defendant, defendant could be guilty of no greater crime than manslaughter. *Griffin v. State*, 293 So. 2d 810 (Miss. 1974).

In the absence of a showing of malice on the part of the defendant and of a lawful arrest on the part of the deceased officer, slaying of the officer by the defendant enroute to the jail was manslaughter. *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816 (1948).

One who kills another, not in malice, but to prevent an unlawful arrest of himself by such other, is guilty not of murder, but of manslaughter. *Fletcher v. State*, 129 Miss. 207, 91 So. 338 (1922), modified on suggestion of error, 129 Miss. 578, 92 So. 556 (1922).

A husband is not guilty of murder, but of manslaughter only, who instantly shoots and kills his wife or her paramour on discovering them in the very act of adul-

tery. *Rowland v. State*, 83 Miss. 483, 35 So. 826, 1 Am. Ann. Cas. 135 (1904).

2. Self-defense.

Where the accused's uncontradicted testimony that after he was awakened in the early morning hours by the noise of someone breaking into his home, he seized his gun and went to the back of the house where he saw the form of a man coming toward him, and upon inquiring who it was, the man cursed him and continued to advance, so that he, apprehending that the man was about to do him some great bodily harm or kill him, then fired in defense of his own life, was, under the circumstances, reasonable, and, therefore, must be accepted as true, and the accused was entitled to a peremptory instruction. *Lee v. State*, 232 Miss. 717, 100 So. 2d 358 (1958).

Persons committing felony, armed to resist arrest, and not surrendering when called on by officers attempting to arrest them, cannot shoot even to defend their lives without first offering to surrender, regardless of whether officers fired first shot. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 46 A.L.R. 895 (1926).

Aggressor resisting eviction by owner of premises not entitled to plead self-defense. *Cotton v. State*, 135 Miss. 792, 100 So. 383 (1924).

3. Indictment.

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to this section [Code 1942, § 2220] and against the peace and dignity of the State of Mississippi, the indictment adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827 (1955).

4. Evidence; generally.

Even by his own argument, defendant was responsible for aggravated assault and a reduced charge of manslaughter, to which he had plead guilty because he had

heard the factual basis which the district attorney's office stated was proof should defendant's case go to trial and defendant had previously told the court that he had no disagreement with those statements. *Graham v. State*, 914 So. 2d 1256 (Miss. Ct. App. 2005).

Where a number of extenuating circumstances in favor of the accused were disclosed by the record, the ends of justice would be better served by reversing and remanding the case and permitting another jury to pass on the issue as to whether or not the accused had good cause to believe, and did believe, in view of the disparity in size of the two men, that he was in either real or apparent danger of great bodily harm at the hands of the deceased at the time he shot him. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461 (1957).

In prosecution for causing death by unlawful operation for abortion where a properly qualified pathologist testified as to cause of death, drawings showing relative location of the several organs were admissible in evidence even though they were abstract. *Lackey v. State*, 215 Miss. 57, 60 So. 2d 503 (1952).

Evidence obtained at the time and place of killing showing existence of moonshine still, which was being operated, may be offered in evidence. *Pickett v. State*, 139 Miss. 529, 104 So. 358 (1925).

Evidence of commission of felony by accused prosecuted for murder of officer attempting to arrest parties committing it, admissible. *Lee v. State*, 137 Miss. 329, 102 So. 296 (1924); *Hurd v. State*, 137 Miss. 178, 102 So. 293 (1924).

Where killing occurred in quarrel over improper relations with defendant's wife, and self-defense claimed, it was prejudicial error to exclude wife's testimony that she wrote letter found by accused on decedent. *Leverett v. State*, 112 Miss. 394, 73 So. 273 (1916).

In murder prosecution, held error to exclude evidence that defendant went to place of killing for purpose of repossessing his child from his divorced wife, child having been awarded him and stolen by wife, and not with intent of killing deceased. *Mathison v. State*, 87 Miss. 739, 40 So. 801 (1906).

5. —Threats.

Uncommunicated threats of deceased against defendant in manslaughter prosecution, admissible to throw light on who was aggressor. *Hambrick v. State*, 138 Miss. 729, 103 So. 364 (1925); *Beauchamp v. State*, 128 Miss. 523, 91 So. 202 (1922); *Mott v. State*, 123 Miss. 729, 86 So. 514 (1920); *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 112 Am. St. R. 446 (1905).

In prosecution for murder of constable, testimony that defendant, several weeks prior, uttered threats against any officer undertaking to arrest him, was admissible. *Boatwright v. State*, 120 Miss. 883, 83 So. 311 (1919).

6. Instructions.

Where defendant was tried for one count of negligent operation of a motor vehicle while under the influence of intoxicating liquors, aggravated assault for his injury of the driver, and five counts of manslaughter by culpable negligence for the deaths of five passengers, he was not entitled to an instruction that aggravated operation of a vehicle while under the influence (DUI), set out in Miss. Code Ann. § 63-11-30, was a lesser-included offense of manslaughter by culpable negligence. *Lawrence v. State*, — So. 2d —, 2005 Miss. App. LEXIS 552 (Miss. Ct. App. Aug. 16, 2005).

When defendant's victim was killed in the course of the commission of a burglary, he was not entitled to an instruction on manslaughter, because manslaughter was excepted from the provisions of Miss. Code Ann. § 97-3-27 by Miss. Code Ann. § 97-3-19(2)(e). *Coleman v. State*, 804 So. 2d 1032 (Miss. 2002).

Where most, if not all, of the evidence in a murder prosecution pointed to the codefendant as the shooter, the defendant was entitled to a manslaughter instruction. *Dabney v. State*, 717 So. 2d 733 (Miss. 1998).

Defendant who killed victim during commission of rape and armed robbery was not entitled to manslaughter instruction. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Defendant was not entitled to manslaughter instruction in capital murder prosecution where there was no evidence

that he did not intend to kill the victim or that the murder was committed in the heat of passion and evidence was presented as to brutal and intentional nature of the crime. *Blue v. State*, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Capital murder defendant prosecuted for killing while engaged in child abuse was not entitled to jury instruction on manslaughter as lesser included offense given that one act alone may constitute abuse or battery of child. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Capital murder defendant was not entitled to instruction on lesser included offense of manslaughter; that offense required absence of malice, defined as doing of wrongful act in such manner and under such circumstances that death of human being may result, and victim's manner of death, from breaking of neck bone as part of strangulation or drowning, precluded claim that defendant could have acted without malice. *Walker v. State*, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

A trial court did not err in refusing to grant a lesser included offense instruction for manslaughter in a capital murder prosecution arising from the commission of a murder while engaged in the commission of an armed robbery, since the manslaughter statute explicitly excepts robbery from its provisions. *Willie v. State*, 585 So. 2d 660 (Miss. 1991).

A trial court properly denied a murder defendant's request for a jury instruction on the lesser included offense of manslaughter where the evidence indicated that there had been a struggle in the victim's home, the defendant knocked the victim unconscious by hitting him with a blunt object with tremendous force, the defendant put the victim's unconscious body into the trunk of the victim's car and drove the car to another county, and the defendant poured gasoline on the victim and burned him to death hours later. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

A defendant who was indicted for mur-

der under § 97-3-19(2)(e) was not entitled to a manslaughter instruction under this section, where the victim was beaten to death and the injuries were consistent with injuries inflicted by hands and feet, and therefore no reasonable hypothetical juror could have found that the killing was without malice. *Berry v. State*, 575 So. 2d 1 (Miss. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2042, 114 L. Ed. 2d 126 (1991).

A trial court erred in refusing a murder defendant's proffered lesser included offense manslaughter instructions where, taking the evidence in the light most favorable to the defendant, the jury could have found that the defendant lacked the requisite intent of malice aforethought to assist in the murder but that he did participate in kidnapping the victim. *Welch v. State*, 566 So. 2d 680 (Miss. 1990).

A capital murder defendant was not entitled to a manslaughter instruction based upon his claim that he intended to strike the victim over the head with a shotgun and that in doing so it discharged. Having occurred during the course of a robbery, the homicide was capital murder, regardless of the intent of the defendant; there is nothing in § 97-3-19 which requires any intent to kill when a person is slain during the course of a robbery, and it is no legal defense to claim accident or that it was done without malice. Although this section authorizes a conviction of manslaughter only when a person is slain without malice during the commission of felonies generally, certain felonies, including robbery, are specifically excluded. *Griffin v. State*, 557 So. 2d 542 (Miss. 1990).

A capital murder defendant was entitled to a manslaughter instruction where the evidence indicated that the defendant was under the heavy influence of drugs at the time of the shooting, the defendant shot the victim while engaged in a felony other than those listed in this section, the defendant's pistol may have discharged as a result of reflective action rather than deliberate design, and the defendant scuffled with the victim, apparently with the defendant's gun in his hand, for a period of time without shooting the victim. *Mease v. State*, 539 So. 2d 1324 (Miss. 1989).

Capital murder defendant was not entitled to manslaughter instruction, where

neither his confession nor his testimony at trial supported a finding that the victim's death was the result of defendant's intent to commit larceny instead of robbery. *Cabello v. State*, 490 So. 2d 852 (Miss. 1986).

In a murder prosecution, where it was uncontradicted that at the time of the shooting, the victim was at the defendant's door, cursing him, making threats upon his life, and attempting to enter his room, the trial court was in error in refusing to instruct the jury that it could not find the defendant guilty of any crime greater than manslaughter. *McElwee v. State*, 255 So. 2d 669 (Miss. 1971).

Court did not commit reversible error in refusing the accused's instruction that if he had shot deceased in the lawful defense of his sister-in-law, wife of deceased, the

jury should acquit him, in view of insufficient proof that the sister-in-law was in any real or apparent danger of losing her life or sustaining great bodily harm at the hands of the deceased at the time he was shot. *Folks v. State*, 230 Miss. 217, 92 So. 2d 461 (1957).

In prosecution for causing death by unlawful operation for abortion, where the case was submitted on the theory of manslaughter, the instruction which followed the words of statute in defining crime and the findings necessary to verdict of guilty, was sufficient. *Lackey v. State*, 215 Miss. 57, 60 So. 2d 503 (1952).

Instruction authorizing conviction of manslaughter if killing result of simple negligence held erroneous. *Johnson v. State*, 124 Miss. 429, 86 So. 863 (1921).

RESEARCH REFERENCES

ALR. Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 A.L.R.2d 210.

Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 A.L.R.2d 1186.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 A.L.R.3d 1341.

What constitutes attempted murder. 54 A.L.R.3d 612.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

What constitutes termination of felony for purpose of felony-murder rule. 58 A.L.R.3d 851.

Judicial abrogation of felony-murder doctrine. 13 A.L.R.4th 1226.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 40, 64.

3 Am. Jur. Proof of Facts 2d, Homicide Outside of Common Design, §§ 7 et seq. (proof that lethal act of co-felon was outside of, or foreign to, common design).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS. 40 C.J.S., Homicide §§ 69 et seq.

Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

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Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-29. Homicide; killing while committing a misdemeanor.

The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in the attempt to commit any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter.

SOURCES: Codes, 1880, § 2881; 1892, § 1155; Laws, 1906, § 1233; Hemingway's 1917, § 963; Laws, 1930, 991; Laws, 1942, § 2221.

Cross References — Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where the State's evidence showed that defendant threatened that he would kill the victim and a neighbor saw him carrying the same sawed-off shotgun that killed her, the jury verdict finding him guilty of manslaughter was not contrary to the overwhelming evidence. Mississippi Crime Lab did not detect the presence of gunshot residue on the victim's hands after her alleged suicide. *Bergeron v. State*, 913 So. 2d 997 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Defendant's manslaughter conviction was proper where evidence was presented that defendant delivered a non-lethal gunshot wound to the victim's head; a witness stated that defendant had several large heavy tools in his possession with which he could cause blunt force trauma, and that the witness heard beating noises that sounded like "kicking a box." *Wilson v. State*, 853 So. 2d 822 (Miss. Ct. App. 2003).

Welfare worker exceeded scope of her knowledge and expertise, in prosecution for manslaughter of 11-month-old child, by testifying as lay witness that she was certain the child was given cocaine overdose, which was one cause of child's death, from an adult and through a vaporizer; welfare worker was not proffered as expert on methods of cocaine ingestion, and she had no personal knowledge of how cocaine got into child's bloodstream. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

"Culpable negligence," as required for manslaughter, is negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, safety of human life, and this shall be so clearly evidenced as to place it beyond every reasonable doubt. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

"Culpable negligence" required for manslaughter is conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the willful creation of an unreasonable risk. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Jury could have reasonably found, in prosecution for manslaughter of 11-month-old child, that defendants were culpably negligent in failing to obtain prompt medical attention and in failing to supervise their child with result that child ingested cocaine, regardless of how child ingested cocaine; it was the presence of cocaine in an 11-month-old child and not necessarily the way in which it got there that evidenced culpable negligence. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

It was not harmless error, in prosecution for manslaughter of 11-month-old child, to admit welfare worker's testimony that she was certain about method by which child ingested cocaine which caused death by overdose, even though such testimony was not necessary to establish culpable negligence; given welfare worker's certainty and her official capacity, her testimony likely was instrumental in the jury's decision. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Defendants, by failing to object at trial, waived any error in admission of police officer's testimony that he had asked one defendant, whose child died from cocaine overdose, whether cocaine was used as a tool to quiet the child. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Defendants were not harmed, in prosecution for manslaughter of their 11-month-old child, by admission of police officer's testimony that he had asked one defendant whether cocaine had been used to quiet the child, where officer qualified the statement by testifying that defendant had denied using cocaine in that way

or in any other way. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Evidence that defendant was found lying on ground next to pickup truck involved in fatal collision, that just prior to collision, survivor of collision saw only one person in truck, and that defendant gave statement to investigating officer that he was driving truck at time of collision, which statement defendant contradicted by testimony at trial, is sufficient to support finding that defendant was driver of truck at time collision occurred, for purposes of prosecution of defendant for manslaughter through culpable negligence. *McGrew v. State*, 469 So. 2d 95 (Miss. 1985).

This section was applicable where the killing occurred in a sudden fight at a time when the uncontradicted testimony showed that the deceased was attacking the defendant, and where there was no evidence of malice on the part of the defendant. *Barnes v. State*, 305 So. 2d 333 (Miss. 1974).

Where accused performed an operation on a pregnant woman to procure a miscarriage, and the woman died in consequence thereof, he was guilty of manslaughter. *State v. Proctor*, 102 Miss. 792, 59 So. 890 (1912).

RESEARCH REFERENCES

ALR. Inference of malice or intent to kill where killing is by blow without weapon. 22 A.L.R.2d 854.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide § 61, 64.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS. 40 C.J.S., Homicide §§ 69 et seq.

Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-31. Homicide; killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.

Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (11); 1857, ch. 64, art. 175; 1871, § 2638; 1880, § 2886; 1892, § 1159; Laws, 1906, § 1237; Hemingway's 1917, § 967; Laws, 1930, § 995; Laws, 1942, § 2225.

Cross References — Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. What constitutes unlawful act; generally.
3. —Particular acts.
4. Questions for jury.
5. Instructions.

1. In general.

Felony-murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), reh'g denied, 482 U.S. 921, 107 S. Ct. 3201, 96 L. Ed. 2d 688 (1987).

This section was applicable where the defendant unnecessarily killed the deceased while resisting an attack by the deceased, and where the defendant acted without malice or premeditated design to take the life of the deceased. *Barnes v. State*, 305 So. 2d 333 (Miss. 1974).

In the absence of a showing of malice on the part of the defendant and of a lawful arrest on the part of the deceased officer, slaying of the officer by the defendant enroute to the jail was manslaughter. *Shedd v. State*, 203 Miss. 544, 33 So. 2d 816 (1948).

To constitute murder, the malice must precede the unlawful act which is being attempted or committed by the person killed, where the killing is done in resisting his attempt to do an unlawful act. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Unwarranted conviction of manslaughter held harmless error under indictment for murder supported by evidence. *Calicoat v. State*, 131 Miss. 169, 95 So. 318 (1923).

Where indictment for murder was duly returned and accused properly tried thereon, objection founded on this section [Code 1942, § 2225] relates only to proceedings on the trial. *Brown v. State*, 98 Miss. 786, 54 So. 305 (1911).

2. What constitutes unlawful act; generally.

"Unlawful act" as used in this section [Code 1942, § 2225] refers to act of criminal nature, even though inferior to felony, and for killing to come within terms of this statute [Code 1942, § 2225], the killing must take place either during actual resistance to unlawful act, or immediately following its defeat and abandonment.

Cutrer v. State, 207 Miss. 806, 43 So. 2d 385 (1949).

Killing in resisting unlawful act not murder, though malicious. *Williams v. State*, 121 Miss. 433, 84 So. 8 (1919).

3. —Particular acts.

There was substantial evidence to support a manslaughter instruction under this section where the defendant testified that she killed her husband as he was attempting to commit an assault and battery upon her, and where there was evidence that, even though the husband may have already committed an assault and battery on her, or was in the process of trying to do so, the defendant's actions in killing him were "unnecessary". *May v. State*, 460 So. 2d 778 (Miss. 1984).

Where the state's evidence showed that the town marshal told the accused to get out of town and that he put his hand on the accused's back and bumped him and at which time the accused turned sidewise and struck deceased with a knife, inflicting a wound from which the marshal died, the marshal in so assaulting the accused was committing an unlawful act. *Coleman v. State*, 218 Miss. 246, 67 So. 2d 304 (1953).

Where killing took place while accused was allegedly ejecting decedent from her home after forbidding him to reenter, the fact that the law was being violated in accused's habitation did not deny her the right to defend or protect it from unwarranted intrusions or trespasses as a home. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

Where the evidence showed that the decedent was shot and killed by accused in ejecting him from her home, while decedent was committing an unlawful act, a wilful and forbidden trespass, and accused did not shoot him pursuant to her alleged threat that if he came back to the house she would kill him, but because of what transpired after he reentered the house, the trial court erred in not limiting the issue for the jury to the question of manslaughter or justifiable homicide, and conviction of murder must be reversed and case remanded for new trial. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599

(1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

This section [Code 1942, § 2225] was inapplicable to a situation where the defendant did not claim to have killed the deceased while resisting an attempt to commit an alleged trespass, but testified that he committed the killing to prevent deceased from killing him and his son. *Prine v. State*, 188 Miss. 147, 193 So. 446 (1940).

Evidence that the defendant just happened along and did not hear the conversation between his son and the deceased with respect to the title of certain property but that he killed the deceased to prevent him from killing defendant and his son, did not warrant the application of this section [Code 1942, § 2225] on the theory that defendant killed the deceased while resisting an attempt to commit an alleged trespass. *Prine v. State*, 188 Miss. 147, 193 So. 446 (1940).

With respect to the question whether deceased was committing a trespass so as to bring a prosecution for homicide within the purview of this section [Code 1942, § 2225], a person claiming wild and unoccupied land, in good faith, could not be guilty of a criminal trespass thereon. *Prine v. State*, 188 Miss. 147, 193 So. 446 (1940).

Evidence, in killing of constable who armed with void search warrant, after search had been made, forcibly entered defendant's house without permission and without stating his purpose, held not to authorize conviction of crime higher than manslaughter. *Jones v. State*, 170 Miss. 581, 155 So. 430 (1934).

Person is entitled to defend home with force against unlawful entries and to prevent crimes from being committed therein. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

Married woman's killing of deceased to prevent his re-entering her home and committing assault upon her held not to constitute murder. *Bowen v. State*, 164 Miss. 225, 144 So. 230 (1932).

Killing committed in resisting unlawful arrest or rescuing prisoner unlawfully arrested amounts to manslaughter only; evidence as to killing of officer, who was attempting illegally to make arrest for

misdeemeanor without warrant, held to warrant conviction for manslaughter only. *Bergman v. State*, 160 Miss. 65, 133 So. 208 (1931).

Situations under which felonious homicide is "manslaughter" stated. *Williams v. State*, 127 Miss. 851, 90 So. 705 (1922).

Killing of deputy sheriff in resisting unlawful act constituted manslaughter. *Williams v. State*, 121 Miss. 433, 84 So. 8 (1919).

4. Questions for jury.

In a prosecution for murder arising out of the killing of a man who was allegedly attacking the defendant's wife, the trial court properly refused the defendant's request for a directed verdict of acquittal under § 97-3-15 where the evidence was in conflict as to whether the victim had actually been attacking the defendant's wife; however, where the evidence did not rise to that high degree which would justify a jury in finding the defendant guilty of murder beyond a reasonable doubt, his motion for a directed verdict as to the charge of murder should have been sustained, leaving only the charge of manslaughter under this section to be considered by the jury. *Edge v. State*, 393 So. 2d 1337 (Miss. 1981).

The issue as to whether an admitted homicide is murder or manslaughter is ordinarily a question for the jury on conflicting evidence. *Kinthead v. State*, 190 So. 2d 838 (Miss. 1966).

The issue as to the truthfulness of the explanation of a defendant as to how an admitted homicide occurred is a question for the determination of the jury where there is substantial, direct or circumstantial evidence which contradicts the version offered by him. *Kinthead v. State*, 190 So. 2d 838 (Miss. 1966).

Where owner of a peach orchard who allegedly shot deceased while deceased was trespassing in the orchard, the question whether owner was guilty of murder or manslaughter was for the determination of the jury. *Martin v. State*, 217 Miss. 506, 64 So. 2d 629 (1953).

Submitting to jury question of defendant's guilt of murder is error when defendant cannot be convicted of anything more than manslaughter by reason of fact the immediately prior to defendant's shooting

of deceased, deceased, according to state's evidence, had committed unnecessary assault upon defendant's wife by striking her about the face with board and at time of shooting was holding or choking her and continued to hold or choke her until moment of last shot. *Cutrer v. State*, 207 Miss. 806, 43 So. 2d 385 (1949).

Whether accused, killing a visitor at her home in ejecting him therefrom after forbidding him to reenter, used more force than reasonably appeared to be necessary for that purpose, or whether she killed decedent in what reasonably appeared to be in her necessary self-defense, were questions for the jury to determine. *Bangren v. State*, 196 Miss. 887, 17 So. 2d 599 (1944), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

In prosecution for murder of divorced husband of defendant's sister, who was living in deceased's home prior to killing and was leaving deceased's home in response to defendant's order when killing occurred, whether defendant was guilty of murder or manslaughter held for jury. *Maddox v. State*, 173 Miss. 799, 163 So. 449 (1935).

Self-defense is a question for jury. *Williams v. State*, 121 Miss. 433, 84 So. 8 (1919).

5. Instructions.

In a prosecution for capital murder, defendant was entitled to present to the jury a manslaughter instruction on the theory that defendant had "unnecessarily" killed a police officer while the officer was allegedly attempting to commit an unlawful act, if upon remand the record presented the issue, provided that any instructions offered did not exclude from the jury's consideration whether the officer was making a lawful "stop and frisk." *Caldwell v. State*, 381 So. 2d 591 (Miss. 1980).

The trial court committed no reversible error in refusing to grant peremptory instruction to find the defendant not guilty of murder when he was not convicted of murder but was convicted of manslaughter, a crime that does not require proof of malice or premeditated design to kill. *Kinhead v. State*, 190 So. 2d 838 (Miss. 1966).

In a case where it was alleged that the defendant "stomped" the decedent to death it was not prejudicial error to grant the state's instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of Code 1942, § 2226, although more properly the instruction should have been framed under this section [Code 1942, § 2225]. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

In prosecution for murder, where defendant testified that he was shooting birds in the orchard and he did not see the deceased and that if he did shoot the deceased he did so unintentionally and accidentally, and the state contended that the shooting was intentional, it was not error for the court to refuse to give instruction that he could not be convicted of murder. *Martin v. State*, 217 Miss. 506, 64 So. 2d 629 (1953).

Where defendant's theft of a watermelon was not committed in the presence of deceased, a private person and owner of such watermelon, and deceased arrested defendant upon information gained from the defendant, the killing of the deceased by the defendant in escaping, without evidence of malice aforethought or premeditation, did not justify a conviction of murder and court below erred in refusing a requested instruction that under the evidence the jury could not find a verdict for a greater offense than manslaughter. *Walker v. State*, 188 Miss. 177, 189 So. 804 (1939).

Refusal of instructions relating to manslaughter if defendant killed deceased while resisting unlawful search held not erroneous in view of defense. *Richardson v. State*, 153 Miss. 654, 121 So. 284 (1929).

Manslaughter instruction where facts warranted conviction of murder and no element of manslaughter is shown, is prejudicial error. *Parker v. State*, 102 Miss. 113, 58 So. 978 (1912), overruled on other grounds, *Houston v. State*, 105 Miss. 413, 62 So. 421 (1913); *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916); *Moore v. State*, 86 Miss. 160, 38 So. 504 (1905); *Houston v. State*, 105 Miss. 413, 62 So. 421 (1913), overruled on other grounds, *Rester v. State*, 110 Miss. 689, 70 So. 881 (1916); *Calicoat v. State*, 131 Miss. 169, 95 So. 318 (1923).

RESEARCH REFERENCES

ALR. Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant. 56 A.L.R.3d 239.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary — modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mis-

treatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 46 et seq.

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS. 40 C.J.S., Homicide §§ 69 et seq.

§ 97-3-33. Killing trespasser involuntarily.

The involuntary killing of a human being by the act, procurement, or culpable negligence of another, while such human being is engaged in the commission of a trespass or other injury to private rights or property, or is engaged in an attempt to commit such injury, shall be manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (13); 1857, ch. 64, art. 177; 1871, § 2640; 1880, § 2888; 1892, § 1161; Laws, 1906, § 1239; Hemingway's 1917, § 969; Laws, 1930, § 997; Laws, 1942, § 2227.

Cross References — Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where, after conviction of the defendant on an indictment for murder, it was found by the court that in excusing jurors expressing scruples against imposition of death penalty the rules in such cases provided had been violated, a new jury

trial could be granted on the sole issue of punishment, without a new trial on the issue of defendant's guilt. *Irving v. State*, 228 So. 2d 266 (Miss. 1969), vacated in part, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972).

RESEARCH REFERENCES

ALR. Use of set gun, trap, or similar device on defendant's own property. 47 A.L.R.3d 646.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 46 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS. 40 C.J.S., Homicide §§ 69 et seq.

Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-35. Homicide; killing without malice in the heat of passion.

The killing of a human being, without malice, in the heat of passion, but

in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (10), (12); 1857, ch. 64, arts. 174, 176; 1871, §§ 2637, 2639; 1880, §§ 2885, 2887; 1892, §§ 1158, 1160; Laws, 1906, §§ 1236, 1238; Hemingway's 1917, §§ 966, 968; Laws, 1930, §§ 994, 996; Laws, 1942, §§ 2224, 2226.

Cross References — Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Requisites of indictment in homicide cases, see § 99-7-37.

JUDICIAL DECISIONS

1. In general.
2. Killing in cruel or unusual manner.
3. Provocation.
4. Self-defense.
5. Questions for jury.
6. Evidence; generally.
7. —Warranting manslaughter.
8. —Admissibility.
9. Instructions; generally.
10. —Warrantableness of manslaughter instructions.
11. — —Where evidence justifies murder conviction.
12. —Dangerous weapon.
13. —Request for instructions.
14. —Peremptory instructions.
15. —Reasonable doubt.

1. In general.

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. *State v. Shaw*, — So. 2d —, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003).

Statute defining manslaughter may be read in the disjunctive, and thus, killing of human being without malice, or by use of dangerous weapon without authority of the law and not in necessary self-defense, may be "manslaughter." *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

At trial of wife indicted for murder of her husband, testimony of defendant that during the confrontation, preceding the shooting, victim grabbed her by the hair

and pulled her to the ground, pulled her by the hair over to a picnic table and, after setting her on the picnic table, drew her head back, raised his fist to her head and said he was going to kill her, supported the giving of manslaughter instructions. *Mullins v. State*, 493 So. 2d 971 (Miss. 1986).

If, after day and one-half of hearing trial of murder and manslaughter case, jury deliberates from 3:21 p.m. until 10:38 p.m., 3 jurors express desire to recess deliberation, but trial court nonetheless sends jury back for further deliberations, verdict comes at 11:07 p.m., special interrogatory confines jury until 11:35 p.m., and there has been excessive deliberation time. *Isom v. State*, 481 So. 2d 820 (Miss. 1985).

Indictment for murder includes all lower grades of felonious homicide, including manslaughter, and failure of state to elect between murder and manslaughter does not leave defendant ignorant of charge in violation of Sixth Amendment of United States Constitution and § 26 of Mississippi Constitution. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

The trial court in a murder prosecution did not err in excluding testimony of psychologists as to defendant's state of mind at the time of the killing, where, as long as the complete defense of insanity was not at issue, expert psychiatric testimony was not available to either party to attempt to reduce the charge of murder under § 99-3-19 to one of manslaughter under § 99-3-35. *Taylor v. State*, 452 So. 2d 441 (Miss. 1984), but see *May v. State*, 524 So. 2d 957 (Miss. 1988).

Under this section and § 97-3-27, manslaughter is killing without malice, either in the course of a felony other than rape, burglary, arson or robbery or in the heat of passion. Accordingly, since there was no evidence of "heat of passion," and the robbery element was uncontested, the evidence could not support a verdict of manslaughter without capital murder. *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843, 104 S. Ct. 142, 78 L. Ed. 2d 134 (1983).

A homicide is only manslaughter where the deceased is shown to have been the aggressor. *Jordan v. State*, 248 Miss. 703, 160 So. 2d 926 (1964).

Malice is not a requisite ingredient of manslaughter. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702 (1955).

The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter. *Carter v. State*, 199 Miss. 871, 25 So. 2d 470 (1946).

Accused, who after engaging in combat, struck deceased with dangerous weapon, causing death, held guilty of manslaughter. *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

Situations under which felonious homicide is "manslaughter" stated. *Williams v. State*, 127 Miss. 851, 90 So. 705 (1922).

Conviction of manslaughter in prosecution for murder is an acquittal of murder. *Walker v. State*, 123 Miss. 517, 86 So. 337 (1920).

2. Killing in cruel or unusual manner.

Where the slayer shot the deceased with a pistol to prevent his choking him to death, the killing was not in a cruel and unusual manner within this section [Code 1942, § 2224]. *Klyce v. State*, 78 Miss. 450, 28 So. 827 (1900).

3. Provocation.

After defendant had a confrontation with his wife, she sat down outside a relative's home, and he fired a fatal shot into her head. The record supported the jury's verdict of murder, rather than manslaughter, because there was no evidence that the victim hit, kicked or provoked defendant. *Bradford v. State*, 910 So. 2d 1232 (Miss. Ct. App. 2005).

A person may form an intent to kill from a sudden passion induced by insult, provocation, or injury from another, and in that moment of passion, while still enraged, if he or she slays the other person, the homicide may be no greater than manslaughter, even though it is not committed in necessary self-defense, depending on the insult, provocation, or injury causing the anger. *Windham v. State*, 520 So. 2d 123 (Miss. 1987).

The trial court in a murder prosecution committed reversible error by refusing submitted instructions on manslaughter, where the testimony of the defendant and the two witnesses to the killing indicated that defendant and the victim, his wife, had been arguing immediately prior to his shooting her, and where one of the witnesses testified that, immediately prior to the shooting, defendant appeared to be very mad, and was walking round and round his wife in an obviously agitated and emotionally disturbed condition, in that such testimony clearly reveals sufficient evidence from which a jury could have concluded that defendant was guilty only of the lesser included offense of manslaughter. *Ruffin v. State*, 444 So. 2d 839 (Miss. 1984).

Words of reproach, criticism or anger do not constitute sufficient provocation to reduce an intentional and unjustifiable homicide from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Facts that accused was provoked over domestic difficulties with wife, that he was intoxicated, that he resented interference of deceased in his family row, neither singly nor collectively, were sufficient to reduce his crime from murder to manslaughter. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Evidence as to provocation and its effect to justified charge on manslaughter. *Hayley v. State*, 123 Miss. 87, 85 So. 129, 10 A.L.R. 462 (1920).

4. Self-defense.

According to his plea, defendant stated that he killed the victim in the heat of passion and that she did not pose a threat to his life, so he did not kill her out of self-defense. In a manner of speaking, he did plead "not in necessary self-defense."

Defendant's pro se argument that an element of the offense was not met in the latter regard was without merit, and his argument that counsel was ineffective was belied by the record, as had defendant gone to trial, he would have faced a possible conviction for depraved heart murder; thus, defendant had no grounds for post-conviction relief. *Barnes v. State*, 920 So. 2d 1019 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008 (Miss. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005).

Evidence at trial was controverted as to whether defendant acted in self-defense, such that the jury was entitled to find that defendant was not acting in self-defense when he purposely fired three gunshots into the victim. *Carter v. State*, 858 So. 2d 212 (Miss. Ct. App. 2003).

"Imperfect self-defense" theory is that defendant killed deceased without malice, under bona fide belief, but without reasonable cause therefor, that it was necessary for him so to do in order to prevent appellant from inflicting death or great bodily harm upon him. *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

Defense instruction that "if a person who is being unlawfully arrested resists that arrest and kills the party seeking to arrest him to prevent such arrest, and killing is not done with malice aforethought, killing is not murder, but manslaughter" was adequate to inform jury on theory of manslaughter as imperfect self-defense. *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

A defendant who left an altercation, armed himself with a kitchen knife, and returned to the fray with the intent to and did use the knife on the other party could not claim self defense. *Griffin v. State*, 495 So. 2d 1352 (Miss. 1986).

In a homicide prosecution, an accused was not entitled to a manslaughter instruction in absence of evidence that the unarmed victim had made a physical assault upon the accused. *Gates v. State*, 484 So. 2d 1002 (Miss. 1986).

In a manslaughter prosecution, instructions on the right to "act on appearances" and "self-defense" were properly refused where the defendant had testified that he did not strike the fatal blow and further, having claimed that he himself was

knocked down during the affray, said that he could not say who had struck him. *Mangrum v. State*, 232 So. 2d 703 (Miss. 1970).

Although the evidence was to some extent conflicting, state's showing that the deceased was not attacking the defendant with a weapon and that defendant's life was not in fact endangered at the time of the shooting justified a conviction of manslaughter. *McCarty v. State*, 230 Miss. 330, 92 So. 2d 853 (1957).

One believing his life to be in real or apparent danger at hands of another has right to shoot to kill. *McNeal v. State*, 115 Miss. 678, 76 So. 625 (1917).

5. Questions for jury.

Evidence that defendant lured the victim to a field and shot the victim in the back because defendant thought the victim had "snitched" to police about a burglary supported defendant's conviction for murder rather than manslaughter; whether the offense was murder or manslaughter was a question for the jury. *Hodge v. State*, 823 So. 2d 1162 (Miss. 2002).

Trial court did not commit error in not directing verdict for defendant at conclusion of state's case where jury could have believed version of facts, recounted in state's closing argument, that defendant parked his car behind building and tiptoed around it so as to surprise his victims, then kicked door in and entered with pistol blazing, wounding wife and killing victim, which inferences would support manslaughter verdict. *Jordan v. State*, 513 So. 2d 574 (Miss. 1987).

Where the testimony was disputed and contradictory, the question whether the verdict should be murder or manslaughter was for the jury, and the trial court committed no error in overruling the defendant's motion to reduce the charge. *Seymore v. State*, 261 So. 2d 453 (Miss. 1972).

The issue as to whether an admitted homicide is murder or manslaughter is ordinarily a question for the jury on conflicting evidence. *Kinkead v. State*, 190 So. 2d 838 (Miss. 1966).

Where the accused stabbed and killed deceased without justification, both guilt and the grade of the homicide were for

determination of the jury and the refusal of the court to give the accused's requested instruction which limited the grade of homicide to manslaughter was not an error. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702 (1955).

Ordinarily, whether a homicide is murder or manslaughter is a question for the jury. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474 (1946).

6. Evidence; generally.

Defendant's conviction for capital murder and arson was proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. Those actions did not constitute manslaughter in violation of Miss. Code Ann. § 97-3-35. *Fuqua v. State*, — So. 2d —, 2006 Miss. App. LEXIS 164 (Miss. Ct. App. Mar. 7, 2006).

Defendant's conviction for manslaughter in violation of Miss. Code Ann. § 97-3-35 was proper where the evidence sufficiently permitted a reasonable jury to determine that the defendant acted in the heat of passion by shooting the victim in reaction to the victim's initial assault upon him. *Miller v. State*, 919 So. 2d 1137 (Miss. Ct. App. 2005).

Sufficient evidence existed to convict defendant of manslaughter as three witnesses made photographic and in-court identifications of defendant, testifying that they had seen him shoot the victim, and defendant was the only one who testified that he had been home all night. *Wash v. State*, 880 So. 2d 1054 (Miss. Ct. App. 2004).

Where defendant aimed a loaded, cocked gun at a man's head, the man's companion tried to pull defendant away by grabbing his arm and was fatally shot in the process, and defendant presented no evidence of his own at trial, but merely attempted on appeal to attack the credibility of the State's witnesses, the evidence was sufficient to support his conviction for manslaughter. *Riley v. State*, 855 So. 2d 1004 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Evidence was sufficient, because the use of a knife to stab a victim to death was sufficient evidence to convict of manslaughter through the use of a deadly weapon, and based on witness testimony,

the evidence tending to negate the self-defense claim was sufficient to support a guilty verdict. *Martin v. State*, 818 So. 2d 380 (Miss. Ct. App. 2002).

Finding that state presented sufficient evidence that defendant acted with deliberate design in killing victim, so as to preclude directed verdict, was supported by defendant's statement to police following incident, transcript of 911 emergency call from victim, and testimony at trial, all of which indicated sufficient degree of recklessness and indifference to human life pointing to conviction, at the very least, for manslaughter or murder, and not culpable negligence. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

During a murder prosecution arising from the shooting death of the defendant's wife, the trial erred when it excluded evidence of the wife's prior threats with a butcher knife which she had made toward the defendant 2 weeks before her death, where the defendant claimed self-defense, since the evidence was relevant on the issue of the defendant's state of mind at the time of the shooting and on the issue of whether the victim may have been the initial aggressor. *Heidel v. State*, 587 So. 2d 835 (Miss. 1991).

Impeachment of testimony of defendant's wife, who had testified that she did not remember giving statement to anyone in hospital on night of incident, with testimony of officer who interviewed her at hospital was proper, and jury was properly instructed that such testimony was offered only to impeach testimony of witness, not as substantive evidence; questions laying predicate to introduction of prior inconsistent statements of witness included whether or not on specific date, at specific place, and in presence of specific persons, witness made statement in question. *Jordan v. State*, 513 So. 2d 574 (Miss. 1987).

Testimony which implicated defendant in igniting fire which resulted in death of victim was sufficient where witnesses testified they saw flame in defendant's hand; another witness saw defendant on passenger side of victim's car at window; and although she did not see flame, fire did begin on passenger side and moved quickly to engulf victim. *Parker v. State*,

514 So. 2d 767 (Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988).

Because the testimony of a doctor substantially contradicted the testimony of defendant and his witness, defendant was not entitled to a directed verdict at the end of the case on the basis of the rule that when defendant or the defendant's witnesses are the only eyewitnesses to a homicide, their version, if reasonable, must be accepted as true, unless contradicted in material particular by a credible witness. *Weeks v. State*, 493 So. 2d 1280 (Miss. 1986).

Notwithstanding a defendant's claim that the deceased was the aggressor and that it was in the heat of passion that the defendant hit the deceased several times, testimony that the defendant made threats against the deceased and that the defendant beat the deceased's wife, was sufficient to justify the jury's conclusion, in finding the defendant guilty of murder, that at all times the aggressor was not the deceased but the defendant. *Seymore v. State*, 261 So. 2d 453 (Miss. 1972).

Upon the trial of a defendant indicted for murder, the jury was amply warranted in concluding, on conflicting evidence, that the accused was guilty of manslaughter, pursuant to the manslaughter instruction granted the state. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273 (1956).

Although the accused had testified that the shooting of the deceased was accidental, and the other witnesses could not see the accused and the deceased wrestling over the gun at the time it went off, the rule that where a defendant is the only witness to a homicide, his version, if reasonable, must be accepted as true unless substantially contradicted in material particulars by state's credible witnesses, or by the physical facts or facts of common knowledge, was inapplicable, since the jury had before it testimony of events leading up to the shooting and of the fact that the accused made an unlawful entry into the deceased's house armed with a deadly weapon with the intention to shoot another. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269 (1956).

Accused's statement to a police officer in response to questioning that he had not

intended to shoot the deceased but had intended to shoot another, was not a confession but rather an admission. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269 (1956).

The killing with a deadly weapon is assumed to be malicious, and therefore murder, and before the presumption disappears the facts of the killing must appear in the evidence and must change the character of the killing, either showing justification or necessity, before it is reduced from murder; if the facts relied upon to change such presumption are unreasonable and improbable, or if they are contradicted by physical facts and circumstances in evidence, then the jury may find a verdict either of murder or manslaughter according to the circumstances and facts in evidence. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417 (1947).

Where the evidence disclosed that the stabbing of deceased occurred during a mutual fight and combat between deceased and accused and that the immediate cause thereof was the vile language directed by deceased to accused, the undisputed proof disclosed a situation where accused could not be guilty of an offense greater than manslaughter. *Anderson v. State*, 199 Miss. 885, 25 So. 2d 474 (1946).

7. —Warranting manslaughter.

Defendant's conviction for manslaughter in violation of Miss. Code Ann. § 97-3-35 was affirmed as two witnesses saw defendant shoot the victim three times after the victim had initially walked away from the argument with defendant and did not approach defendant's car until defendant went to follow him. *Shipp v. State*, 921 So. 2d 1280 (Miss. Ct. App. 2006).

In order to find defendant guilty of manslaughter, the jury had to find that (1) he killed a human being, (2) without malice, (3) in the heat of passion, (4) by the use of a deadly weapon, (5) without authority of law, and (6) not in necessary self-defense. The evidence was sufficient to convict defendant of manslaughter because (1) defendant and the victim got into a fight; (2) the victim retreated to the porch of a house, where defendant used a pipe to deliver a fatal blow to the victim's head; (3) it was not shown that defendant was acting in self-defense; and (4) defen-

dant fled the scene of the crime; thus, the trial court did not err in denying defendant's motion for a directed verdict. *Sullinger v. State*, — So. 2d —, 2006 Miss. App. LEXIS 25 (Miss. Ct. App. Jan. 10, 2006).

Defendant's manslaughter conviction was affirmed as two 10-year-old children testified that defendant killed the victim with a baseball bat, and even if the assault was in self-defense or defense of others, defendant acted unreasonably when he struck the victim in the head with the bat more than once. *Cooper v. State*, 911 So. 2d 665 (Miss. Ct. App. 2005).

Trial court did not err by refusing to grant defendant a directed verdict because defendant's testimony supported the jury verdict of manslaughter. Defendant admitted that he killed the victim during a dispute that involved physical violence and that he had repeatedly struck the victim on the head with a wooden board, and that he had stabbed the victim in the neck with a filet knife while the victim was on the ground; the state also offered sufficient evidence to allow the jury to find that defendant's actions were not in necessary self-defense. *Ward v. State*, — So. 2d —, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. Dec. 6, 2005).

Evidence was sufficient to support defendant's manslaughter conviction where the determination of whether defendant committed the crime while acting in the heat of passion was properly submitted to the jury for resolution, and the jury made the determination against defendant; the jury could, on the evidence presented, find defendant guilty of manslaughter. *Schankin v. State*, 910 So. 2d 1113 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Where defendant was indicted for murder under Miss. Code Ann. § 97-3-19(1)(a), and the State failed to prove the charge, the trial judge should have been authorized to issue a limited directed verdict as to the murder charge and allow the State to proceed on the lesser unindicted offense of manslaughter, under Miss. Code Ann. § 97-3-35. *State v. Shaw*, 880 So. 2d 296 (Miss. 2004).

Testimony that defendant voluntarily left his car to meet the much larger victim's challenge to fight, did not lock his car doors or attempt to leave the scene, and fatally stabbed the victim, was sufficient to prove that he intended to inflict serious physical injury to the victim during the course of mutual combat, and that no self-defense justification existed. *Robinson v. State*, 858 So. 2d 887 (Miss. Ct. App. 2003).

Where defendant aimed a loaded, cocked gun at a man's head, the man's companion tried to pull defendant away by grabbing his arm and was fatally shot in the process, and defendant presented no evidence of his own at trial, but merely attempted on appeal to attack the credibility of the State's witnesses, the evidence was sufficient to support his conviction for manslaughter. *Riley v. State*, 855 So. 2d 1004 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Where witnesses, including a defense witness, testified that defendant had a gun, and a victim was fatally shot, there was sufficient evidence to find defendant guilty of manslaughter. *Hope v. State*, 840 So. 2d 747 (Miss. Ct. App. 2003).

Evidence was legally sufficient to establish that the defendant was guilty of the offenses of manslaughter by culpable negligence and shooting into a motor vehicle where several eyewitnesses testified that the defendant fired his weapon into a vehicle approximately nine times and another witness stated that the defendant confessed that he had shot at someone and "he didn't know if they were dead or alive." *Ratcliff v. State*, 752 So. 2d 435 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction for manslaughter in the heat of passion where (1) shortly before the killing, the defendant had received two brutal beatings inflicted upon her head and body by the victim, (2) the defendant left the scene of the killing shortly before it occurred, armed herself, and returned to the scene, and (3) when the defendant reentered the scene, the victim took at least two steps towards her, whereupon she cursed and stated that "you ain't gonna hit on me no more," and she shot him one time. *Wade v. State*, 748 So. 2d 771 (Miss. 1999).

The court reversed the defendant's murder conviction and remanded for re-sentencing regarding a manslaughter charge where it was clear that the defendant's ill will toward the victim was engendered by the beating she had just endured by the victim; thus, this was a killing in the heat of passion and arguably also a case of imperfect self-defense. As such, manslaughter was the appropriate verdict. *Wade v. State*, 724 So. 2d 1007 (Ct. App. 1998), *aff'd*, 748 So. 2d 771 (Miss. 1999).

Conviction for manslaughter committed in heat of passion would not be sustained by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the 2 started joking around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying. *Hankins v. City of Grenada*, 669 So. 2d 85 (Miss. 1996).

The evidence was sufficient to support a conviction of manslaughter where the victim was shot to death, the defendant did not testify that he shot the victim in order to defend against the victim's assault but instead claimed that the gun accidentally discharged, and there was evidence in the record supporting the premise that the gun was fired in the heat of passion. *Green v. State*, 631 So. 2d 167 (Miss. 1994).

Defendant's statement that "I didn't mean to do it, baby, my baby" was sufficient evidence on which to base an instruction on manslaughter under this section and would have supported a verdict of guilty of manslaughter; if there is any evidence that may warrant a manslaughter instruction, certainly one should be given. *Roberts v. State*, 458 So. 2d 719 (Miss. 1984).

The facts which accused admitted on the witness stand showing to a moral certainty and beyond a reasonable doubt that she killed the deceased in the heat of passion with a dangerous weapon, and that at the time she was in no danger from the deceased of death or great bodily harm, warranted a conviction of manslaughter. *King v. State*, 185 Miss. 433, 188 So. 554 (1939).

Although the evidence was conflicting, proof for the state, which the jury had the right to accept, showing that the deceased was not attacking the defendant with a weapon and that defendant's life was not in fact endangered at the time of the shooting, justified a conviction of manslaughter. *Scott v. State*, 185 Miss. 454, 188 So. 546 (1939).

As to whether one guilty of murder or manslaughter, jury have wide discretion where quality of act in issue; verdict for manslaughter upon indictment for murder held authorized by the evidence. *Woodward v. State*, 130 Miss. 611, 94 So. 717 (1923).

8. —Admissibility.

Photographs taken by a pathologist in his postmortem examination of the decedent, showing internal organs removed, were admissible into evidence in a homicide prosecution where the photographs were probative and relevant in showing that blows administered by the defendant caused the death of the decedent. *Porter v. State*, 564 So. 2d 31 (Miss. 1990).

Admission of testimony of officer that when he arrived at scene of crime approximately 2 minutes after receiving call he asked victim what had happened and victim responded "I can't believe they set me on fire" was proper under *res gestae* exception to hearsay rule. *Parker v. State*, 514 So. 2d 767 (Miss. 1986), *cert. denied*, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988).

Trial judge was within his discretion in admitting photographs showing victim as rescuers attempted to cut his clothes from his body after fire was put out, because pictures had other people present therein and were descriptive of events described at trial, despite argument of defendant that such photographs should not have been admitted into evidence because he stipulated to identity of deceased and cause of death. *Parker v. State*, 514 So. 2d 767 (Miss. 1986), *cert. denied*, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988).

Trial judge committed error when he refused to allow defendant to offer into evidence testimony from previous trial, which had ended in mistrial, of person who had admitted and even bragged about

having thrown fatal match and then recanted, and in then not allowing defendant to call another witness to impeach testimony of one who recanted; first witness testimony was admissible under former testimony exception to hearsay rule, and impeaching witness testimony was admissible as impeachment of that testimony. *Parker v. State*, 514 So. 2d 767 (Miss. 1986), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988).

Color photographs of deceased and scene of crime are admissible into evidence at homicide trial, at which defendant is ultimately convicted of manslaughter, where photographs depict location of wound and tend to negate defendant's assertion that deceased had reached under shirt as if going for gun prior to shooting and where pictures of interior of bar in which shooting occurred tend to negate defendant's statement that he placed decedent in chair after shooting. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

It was not reversible error for trial court to refuse permission to introduce into evidence shells and cartridges found near the decedent's car, where there was no evidence to show that a shotgun was used in the altercation between defendant and her "boyfriend". *Lanier v. State*, 291 So. 2d 695 (Miss. 1974).

9. Instructions; generally.

In a manslaughter prosecution, defendant was entitled to an instruction as to his theory of case: that he was entitled to use a knife to defend himself from a much larger man capable of inflicting serious bodily harm with his hands alone; the failure to give this instruction was reversible error. *Robinson v. State*, 858 So. 2d 887 (Miss. Ct. App. 2003).

In a felony murder prosecution, the trial court did not err in denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Defendant was not entitled to a manslaughter instruction where the record showed that defendant made threats

against those he believed "snitched," and those statements showed defendant's malicious state of mind, which negated his ability to refute such inference. *Gray v. State*, 846 So. 2d 260 (Miss. Ct. App. 2002).

Absent evidence that defendant acted in heat of passion, court's manslaughter instruction was not warranted, and therefore giving "deliberate design" instruction and manslaughter instruction was harmless error. *Catchings v. State*, 684 So. 2d 591 (Miss. 1996).

It is possible for a "deliberate design" to kill a person to exist, as required for murder under § 97-3-19(1)(a), and the slaying nevertheless be no greater than manslaughter; thus, a special murder instruction, which instructed the jury that "deliberate design" can be formed at the very moment of the fatal act, and that if "deliberate design" existed then the defendant should be found guilty of murder, was in conflict with the manslaughter instruction based on this section, which defines manslaughter as "killing without malice in the heat of passion." *Windham v. State*, 520 So. 2d 123 (Miss. 1987).

Rule, that if the defendant or his witnesses are the only witnesses to an occurrence, then their testimony and version of the occurrence must be accepted as true unless substantially contradicted in material particulars by credible witnesses, physical facts or facts commonly known, is one of law to be applied by the court, and it is not a proper subject for a jury instruction. *Griffin v. State*, 495 So. 2d 1352 (Miss. 1986).

In murder prosecution, state is entitled, upon request, to instruction submitting lesser included offense of manslaughter committed in heat of passion to jury even though heat of passion is affirmative element of manslaughter not present in murder. *Cook v. State*, 467 So. 2d 203 (Miss. 1985).

Instruction which impermissibly directs jury to find defendant guilty of murder if homicide victim was willfully and deliberately killed by defendant without authority of law is not cured by giving of instruction properly setting forth distinction between murder and manslaughter. *Smith v. State*, 463 So. 2d 1028 (Miss.

1984), overruled on other grounds, *Ferrell v. State*, 733 So. 2d 788 (Miss. 1999).

In a murder prosecution, an instruction which substantially restricts or cuts off defendant's right to defend upon the ground of self-defense is erroneous and requires the grant of a new trial. *McMullen v. State*, 291 So. 2d 537 (Miss. 1974).

An instruction for the state to the effect that murder is the felonious killing of a human being with malice aforethought, and with premeditated design to take the life of the party killed; and that manslaughter is the felonious killing of a human being in the heat of passion and in sudden combat and without malice aforethought and without the deliberate design to take the life of the party killed is erroneous in that the first part of the instruction omits the essential ingredient that the killing was done "without authority of law", and the second part of the instruction is also defective because it does not incorporate the essential elements required by this section [Code 1942, § 2226] that the killing was "not in necessary self-defense." *Boyles v. State*, 223 So. 2d 651 (Miss. 1969), cert. denied, 396 U.S. 1005, 90 S. Ct. 558, 24 L. Ed. 2d 497 (1970).

A jury may return a verdict of manslaughter in a murder case, although there is no instruction given to the jury on manslaughter. *Farmer v. Thomas*, 207 So. 2d 96 (Miss. 1968).

Since even though the killing might have been done in the heat of passion, the defendant would have been guilty of manslaughter, the court did not commit reversible error in refusing defendant's instruction as to the burden of proof which would have permitted the jury to acquit if the killing had been done in the heat of passion; especially where, in view of the instructions granted to defendant, error if any, in refusing the instruction was harmless (overruling in part *Blalack v. State*, 79 M 517, 31 So 105). *Rivers v. State*, 245 Miss. 329, 97 So. 2d 236 (1957).

An instruction which defines manslaughter as unlawful and felonious killing without malice in the heat of passion, by the use of a dangerous weapon, without authority of law, and not necessarily self-

defense, either real or apparent, is correct. *Jones v. State*, 58 So. 2d 655 (Miss. 1952).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

The phrase in a manslaughter instruction "but in a cruel and unusual manner" is not proper where the homicide in question was in the most usual manner, insofar as the instrument (revolver) used to bring about the death was concerned. *Vance v. State*, 182 Miss. 840, 183 So. 280 (1938).

Instruction that killing of a human being without malice in heat of passion is manslaughter held erroneous for failure to include statutory requirement of use of deadly weapon without authority of law, and not in necessary self-defense. *Busby v. State*, 177 Miss. 68, 170 So. 140 (1936).

Charge on manslaughter, leaving out phrase "in the heat of passion," held not harmful to accused. *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

10. —Warrantableness of manslaughter instructions.

Based on testimony by defendant that "things were starting to escalate" with the victim, that he had been "sucker-punched" by the victim when he returned home that evening, and that a struggle between the two immediately ensued, and testimony by witnesses that defendant and the victim had been involved in a dispute at the beach earlier in the afternoon, a jury could determine that the defendant had killed the victim in the heat of passion, and not with malice aforethought, thus the trial court did not err by granting a manslaughter instruction. *Ward v. State*, — So. 2d —, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. Dec. 6, 2005).

Trial court did not err by failing to instruct a jury on the crime of manslaughter where the evidence showed that defendant and another person planned to kill a

victim several hours in advance of the crime. *Johnson v. State*, 876 So. 2d 387 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's statement that the victim died from a gunshot wound to the head resulting from an argument and physical struggle with defendant over household finances presented a prima facie case for manslaughter, and the trial court was fully justified in refusing defendant's requested instruction on circumstantial evidence. *Barnes v. State*, 854 So. 2d 1 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003).

In a felony murder prosecution, the trial court did not err denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

Because the evidence showed that defendant murdered the victim while the victim slept, there was no evidentiary basis that warranted a manslaughter instruction, as contended by defendant. *Evans v. State*, 844 So. 2d 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

The defendant in a murder prosecution was not entitled to have the jury instructed with regard to manslaughter based on heat of passion where the defendant testified at trial that he had nothing whatever to do with the killing at issue and other evidence only revealed that there was a shoving match between the defendant and the victim. *Turner v. State*, 773 So. 2d 952 (Miss. Ct. App. 2000).

The defendant in a murder prosecution was not entitled to have the jury instructed on manslaughter as a lesser included offense because there was no evidence that the defendant acted in the heat of passion or that the victim, his girlfriend, provoked him; the mere fact that they were arguing before the shooting was insufficient to reduce the crime to manslaughter, especially where the victim was shot in the back while she was running away from the defendant and screaming for help. *Avera v. State*, 761 So. 2d 900 (Miss. Ct. App. 2000).

In capital murder trial based on allegation that defendant killed child victim while engaged in commission of child abuse or battery, evidence that defendant used victim as shield while struggling with victim's mother was insufficient to support heat of passion manslaughter instruction, in view of evidence that defendant planned robbery of victim's home, had told victim's mother that he was going to kill her and her family, and did not stab victim until after struggle with mother. *Jackson v. State*, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

In prosecution for murder of policeman, trial court committed reversible error in denying defense request for instruction on involuntary manslaughter theory, which was warranted by the facts, and instead instructing jury on heat of passion theory, which had no evidentiary support. *Lanier v. State*, 684 So. 2d 93 (Miss. 1996).

Planning to conduct robbery of home at time when defendant believed residents would be at church and defendant's statements that he had come to kill residents precluded finding that killings were in heat of passion and, thus, defendant prosecuted on capital murder charges for killing while engaged in commission of child abuse was not entitled to jury instruction on lesser included offense on homicide for killing without malice in heat of passion. *Jackson v. State*, 672 So. 2d 468 (Miss. 1996), republished as corrected, 684 So. 2d 1213 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

No error was committed by a trial court in a capital murder prosecution in refusing to give a manslaughter instruction where the only justification for such an instruction would have been if the slaying had been committed in the heat of passion without premeditation, and premeditation was evidenced by the defendant's actions in arming himself with 2 deadly weapons, getting the victim into a car by trickery, and directing her at knife point to drive into a secluded wooded area miles away where he raped her, cut her throat, and then shot her. *Thorson v. State*, 653 So. 2d 876 (Miss. 1994).

A capital murder defendant was not entitled to a manslaughter instruction based on the defendant's contention that the victim's stabbing death was accidental, where statements regarding an accidental stabbing made by the defendant to a third party shortly after the incident were inconsistent, the autopsy revealed that the stab wound could not have been inflicted under any one of the inconsistent scenarios related by the defendant, and the defendant's scenarios of an accidental stabbing would constitute evidence of innocence of any crime rather than evidence of the crime of manslaughter. *Holland v. State*, 587 So. 2d 848 (Miss. 1991).

There was no evidence of sudden provocation that would warrant the giving of a manslaughter instruction in a prosecution for murder of the defendant's former wife, in spite of the testimony of attorneys who represented the defendant during his divorce proceedings and the testimony of the defendant's family, all of whom noticed a change in the defendant after the divorce, since a long-standing domestic dispute did not constitute grounds for a manslaughter instruction. *Graham v. State*, 582 So. 2d 1014 (Miss. 1991).

Evidence in a murder trial was insufficient to support a manslaughter instruction where the defendant did not testify, the only account of the slaying was the defendant's statements to the investigating officer and the testimony of eyewitnesses, there was no gross insult, and the defendant and the victim were not engaged in physical combat, and thus there was no evidence upon which any jury could rationally conclude that the defendant shot the victim as a result of provoked rage. *Barnett v. State*, 563 So. 2d 1377 (Miss. 1990).

A murder defendant's statement that he had gone crazy and could not stop, that the victim would not stop "messaging" with him, without explaining how the victim was "messaging" with him, did not indicate that the defendant acted in lawful self-defense or that the victim committed an outrageous act justifiably provoking the defendant into a rage, so as to entitle the defendant to a manslaughter instruction. *Nicolaou v. State*, 534 So. 2d 168 (Miss. 1988).

An instruction limiting the verdict to murder was erroneous where the evidence could have warranted a jury verdict of manslaughter. *McMullen v. State*, 291 So. 2d 537 (Miss. 1974).

Instruction on manslaughter in prosecution for murder, was proper where evidence on behalf of accused warranted conviction for manslaughter. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

11. — Where evidence justifies murder conviction.

In a felony murder prosecution, the trial court did not err denying defendant a lesser-included offense instruction on heat of passion manslaughter, Miss. Code Ann. § 97-3-35, as the granting of such an instruction would have been purely speculative and not supported by the evidence. *Moody v. State*, 841 So. 2d 1067 (Miss. 2003).

A defendant should not be denied a manslaughter instruction where he or she could have been lawfully indicted and prosecuted for manslaughter as easily as capital murder. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

It was not error for trial court to give jury manslaughter instruction where facts of case presented issue to jury on murder, despite defendant not asking for instruction and objecting to such instruction. *Crawford v. State*, 515 So. 2d 936 (Miss. 1987).

The trial court in a murder prosecution properly refused to instruct jury on the lesser-included offense of manslaughter, as defined in this section, since there was no evidentiary basis in the record that the defendant had acted without malice aforethought and in the heat of passion. *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984).

In a prosecution for capital murder of a police officer while acting within his official capacity, a manslaughter instruction was properly refused, where it was unwarranted by the evidence, and where the instruction tendered by the defendant was erroneous inasmuch as it omitted "by the use of a deadly weapon, without authority of law and not in necessary self-defense." *Johnson v. State*, 416 So. 2d 383 (Miss. 1982), writ denied, 449 So. 2d 1207 (Miss. 1984).

Trial court did not err in murder prosecution in granting an instruction advising the jury that should they convict defendant of manslaughter, the court might sentence defendant to the penitentiary for a term not to exceed 20 years. *Flanagan v. National Fire Ins. Co.*, 277 So. 2d 115 (Miss. 1973).

Where defendant was convicted of manslaughter under an instruction granted by the state to that effect and the evidence would have justified a conviction of murder, an instruction on manslaughter, even if not authorized by the evidence, was not reversible error. *West v. State*, 233 Miss. 730, 103 So. 2d 437 (1958).

Where the full acceptance of the state's evidence would have sustained a finding that the defendant was guilty of murder, but the jury could, and evidently did, find that the defendant shot in the heat of passion, instructions, both as to murder and manslaughter, were proper. *Barnett v. State*, 232 Miss. 208, 98 So. 2d 656 (1957).

Where the evidence is sufficient to convict for murder the defendant cannot complain of the granting of a manslaughter instruction, if he has been convicted of manslaughter. *Woods v. State*, 229 Miss. 563, 91 So. 2d 273 (1956).

Granting to state of two instructions defining manslaughter and authorizing verdict in that degree is not reversible error in murder prosecution in which there is present no element of manslaughter and jury finds defendant guilty of murder. *Merrell v. State*, 39 So. 2d 306 (Miss. 1949).

Where defendant is convicted of manslaughter on a charge of murder, he cannot complain of the giving of a murder instruction, as he was not prejudiced thereby. *Crockerham v. State*, 202 Miss. 25, 30 So. 2d 417 (1947).

12. —Dangerous weapon.

Omission of statutory phrase "by use of dangerous weapon" in manslaughter instruction is harmless where all witnesses, including defendant, have testified that deceased was killed with pistol belonging to defendant and instructions are not otherwise erroneous. *Kelly v. State*, 463 So. 2d 1070 (Miss. 1985).

In a case where it was alleged that the defendant "stomped" the decedent to

death it was not prejudicial error to grant the state's instruction that manslaughter is the killing of a human being without malice with a dangerous weapon in the language of this section [Code 1942, § 2226], although more properly the instruction should have been framed under Code 1942, § 2225. *King v. State*, 251 Miss. 161, 168 So. 2d 637 (1964).

In a prosecution for manslaughter where instruction to the jury omitted the words "by the use of a dangerous weapon," which are contained in the statutory definition of the crime of manslaughter, the omission was harmless. *Robinson v. State*, 223 Miss. 303, 78 So. 2d 134 (1955).

13. —Request for instructions.

Where the accused stabbed and killed the decedent without justification, under the state's evidence it was not incumbent on the prosecution to request a manslaughter instruction, although it would have been proper to do so. *Rogers v. State*, 222 Miss. 609, 76 So. 2d 702 (1955).

Accused, convicted of manslaughter, cannot complain on appeal of court's failure to define manslaughter, if he did not ask for such instruction. *Dalton v. State*, 141 Miss. 841, 105 So. 784 (1925).

14. —Peremptory instructions.

Defendant was not entitled to peremptory instruction that jury must rest its verdict exclusively on testimony of defendant and his wife, who were sole eyewitnesses to events, where defendant's account given to officers shortly after incident differed in material particulars from his testimony at trial; in first statement, defendant merely said that he had shot wife and victim, without mentioning any struggle; defendant's statement made at police station and testimony at trial was of struggle between defendant and victim; struggle of magnitude described by defendant should reasonably have been mentioned to officers at scene and those who later investigated incident. *Jordan v. State*, 513 So. 2d 574 (Miss. 1987).

Instruction given by court, after jury states that it is hung at vote of 10 votes in favor of murder verdict and 2 in favor of manslaughter verdict which in effect peremptorily directs jury to return manslaughter conviction without regard to

personal convictions of jurors is impermissibly coercive where instruction is given after jury has deliberated for equivalent of full day without agreeing and verdict convicting defendant of manslaughter instead of murder is returned within minutes after instruction is given. *Isom v. State*, 481 So. 2d 820 (Miss. 1985).

15. —Reasonable doubt.

In a manslaughter prosecution arising out of use of deadly weapon, the lower court did not commit error in refusing to grant accused's requested instruction, purporting to define the doctrine of rea-

sonable doubt, where the accused had obtained other instructions which correctly stated the applicable rules of law relating to the presumption of innocence and requirement of proof of guilt beyond every reasonable doubt. *Whitehead v. State*, 246 Miss. 530, 151 So. 2d 196 (1963).

Where practically all of the evidence was direct testimony, the defendant was not entitled to an instruction that the state's proof must exclude every other reasonable hypothesis consistent with his innocence. *Reed v. State*, 229 Miss. 440, 91 So. 2d 269 (1956).

RESEARCH REFERENCES

ALR. Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary — modern cases. 73 A.L.R.4th 993.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 48 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

CJS. 40 C.J.S., Homicide §§ 69 et seq.

Law Reviews. 1984 Mississippi Supreme Court Review: Criminal Law. 55 Miss. L. J. 77, March, 1985.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-37. Homicide; killing of an unborn child; "human being" includes unborn child at every stage of gestation from conception until live birth for purposes of offenses of assault and homicide; "unborn child" defined; intentional injury to pregnant woman; penalties; provisions of section not applicable to legal medical procedures, including abortion.

(1) For purposes of the offenses enumerated in this subsection (1), the term "human being" includes an unborn child at every stage of gestation from conception until live birth and the term "unborn child" means a member of the species homo sapiens, at any stage of development, who is carried in the womb:

- (a) Section 97-3-7, simple and aggravated assault and domestic violence;
- (b) Section 97-3-15, justifiable homicide;
- (c) Section 97-3-17, excusable homicide;
- (d) Section 97-3-19, capital murder;
- (e) Section 97-3-27, homicide while committing a felony;
- (f) Section 97-3-29, homicide while committing a misdemeanor;

- (g) Section 97-3-33, killing a trespasser unnecessarily;
- (h) Section 97-3-35, killing without malice in the heat of passion;
- (i) Section 97-3-45, homicide by means of a dangerous animal;
- (j) Section 97-3-47, all other homicides;
- (k) Section 97-3-61, poisoning with intent to kill or injure.

(2) A person who intentionally injures a pregnant woman is guilty of a crime as follows:

(a) If the conduct results in a miscarriage or stillbirth by that individual, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00), or both.

(b) If the conduct results in great bodily harm to the embryo or fetus, a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(c) If the conduct results in serious or aggravated physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than one (1) year or a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(d) If the conduct results in physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than ninety (90) days or a fine of not more than Five Hundred Dollars (\$500.00), or both.

(3) The provisions of this section shall not apply to any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother's legal guardian, or to the lawful dispensing or administration of lawfully prescribed medication.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (8); 1857, ch. 64, art. 172; 1871, § 2635; 1880, § 2883; 1892, § 1156; Laws, 1906, § 1234; Hemingway's 1917, § 964; Laws, 1930, § 992; Laws, 1942, § 2222; Laws, 2000, ch. 337, § 1; Laws, 2004, ch. 515, § 3; Laws, 2004, ch. 521, § 1, eff from and after July 1, 2004.

Joint Legislative Committee Note — Section 3 of ch. 515 Laws, 2004, effective from and after passage (approved May 4, 2004), amended this section. Section 1 of ch. 521, Laws, 2004, effective from and after July 1, 2004 (approved May 6, 2004), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 521, Laws, 2004, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The first 2004 amendment (ch. 515) substituted "unborn child" for "unborn quick child" in (1); substituted "murder as defined in Section 97-3-19" for "a felony punishable by imprisonment for not more than twenty (20) years or a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00), or both" in (2)(a); rewrote (3); and added (4).

The second 2004 amendment (ch. 521) rewrote (1) and (3) to revise the offenses of assault and homicide so as to include an unborn child at every stage of gestation from conception until live birth within the definition of "human being."

Cross References — Suspension or revocation of a physician's license for participating in an abortion, see § 73-25-29.

Penalty for manslaughter, see § 97-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Evidence.

1. In general.

In order to sustain a conviction under this section, it is not necessary to prove that the defendant knew that the mother was pregnant or that the deceased baby was "quick." *Sitton v. State*, 760 So. 2d 28 (Miss. Ct. App. 1999).

In a prosecution for manslaughter arising from an automobile accident in which a woman and her twin unborn fetuses were killed, the court properly admitted into evidence an autopsy photograph of the unborn twins since it was of considerable probative value in demonstrating that the babies were "quick." *Sitton v. State*, 760 So. 2d 28 (Miss. Ct. App. 1999).

Evidence was sufficient to show child was "quick" as used in statute and to support conviction for manslaughter in death of unborn fetus where state presented testimony of husband of victim to effect that at times prior to shooting he had placed his hand over victim's stomach and had felt unborn child move and expert medical testimony showed that babies move in womb from roughly 10th week of gestation and this baby was almost 32 weeks. *Willis v. State*, 518 So. 2d 667 (Miss. 1988).

Evidence was sufficient to support conviction for manslaughter in death of unborn fetus, despite claim of defendant that state failed to prove willful intent to harm child, where defendant threatened victim and then willfully fired 4 shots at her with shotgun, knowing this would likely result in death of unborn child. *Willis v. State*, 518 So. 2d 667 (Miss. 1988).

Evidence was sufficient to show defendant knew victim was pregnant and to support conviction for manslaughter in death of unborn fetus where there was undisputed testimony that woman was obviously pregnant, in her 7th month,

there was substantial evidence that defendant knew victim personally and also knew or should have known of her pregnancy, and defendant lived with victim's brother-in-law about 1/10 mile away and visited often in home during her pregnancy; photographs of victim confirmed obviousness of her pregnancy. *Willis v. State*, 518 So. 2d 667 (Miss. 1988).

Where defendant allegedly murdered the mother of an unborn quick child, resulting in the death of the child, that the act did not merge into one crime of murder under this section, and, therefore, the death of the unborn child could support a separate charge of manslaughter. *State v. Willis*, 457 So. 2d 959 (Miss. 1984).

A state may not require that abortions, prior to the end of the first trimester, be performed only in hospitals. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

Prior to the end of the first trimester of pregnancy, an attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment, the patient's pregnancy should be terminated, and if such a decision is reached, the physician's judgment may be effectuated by an abortion free of interference by the state. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

From and after the end of the first trimester of pregnancy, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Roe v. Wade*, 410 U.S. 113, 93

S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

State regulation protective of fetal life after viability has both logical and biological justifications, and if a state is interested in protecting fetal life after viability, it may proscribe abortion during that period except when it is necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147

(1973), concurring opinion, 410 U.S. 179, 93 S. Ct. 756, 35 L. Ed. 2d 147 (1973), dissenting opinion, 410 U.S. 179, 93 S. Ct. 762, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

2. Evidence.

A photograph of two unborn fetuses was properly admitted into evidence as the picture was of considerable probative value in demonstrating that the babies were "quick", and where the photograph showed two well-formed infants lying on a blanket, the fetuses were clean, and the only visible inference of injury was the presence of several small birthmarks on the face of one infant. *Sitton v. State*, 760 So. 2d 28 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 A.L.R.2d 949.

Pregnancy as element of abortion or homicide based thereon. 46 A.L.R.2d 1393.

Entrapment defense in sex offense prosecutions. 53 A.L.R.2d 1156.

Homicide based on killing of unborn child. 40 A.L.R.3d 444.

Proof of live birth in prosecution for killing newborn child. 65 A.L.R.3d 413.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following

unattended birth, to establish culpable homicide. 40 A.L.R.4th 724.

Am Jur. 40 Am. Jur. 2d, Homicide, §§ 8, 9.

49 Am. Jur. Proof of Facts 2d 191, Damages for Wrongful Death of Child.

Lawyers' Edition. Validity, under Federal Constitution, of abortion laws. 28 L. Ed. 2d 1053.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-39. Homicide; drunken doctor, etc., unintentionally causing death.

If any physician or other person, while in a state of intoxication, shall, without a design to effect death, administer or cause to be administered, any poison, drug, or other medicine, or shall perform any surgical operation on another, which shall cause the death of such other person, he shall be guilty of manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (17); 1857, ch. 64, art. 181; 1871, § 2644; 1880, § 1892, § 1165; Laws, 1906, § 1243; Hemingway's 1917, § 973; Laws, 1930, § 1001; Laws, 1942, § 2231.

Cross References — Suspension or revocation of physician's license, see § 73-25-27. Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

ALR. When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 A.L.R.3d 195.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Am Jur. 40 Am. Jur. 2d, Homicide § 93.
CJS. 40 C.J.S., Homicide § 91.

§ 97-3-41. Homicide; overloading boat.

Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such quantity of lading, that by means thereof such boat or vessel shall sink or upset, and thereby any human being shall be drowned or otherwise killed, shall be guilty of manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (15); 1857, ch. 64, art. 179; 1871, § 2642; 1880, § 2890; 1892, § 1163; Laws, 1906, § 1241; Hemingway's 1917, § 971; Laws, 1930, § 999; Laws, 1942, § 2229.

Cross References — Liability of ships and vessels for causing injury or death, see § 11-7-175.

Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

ALR. Criminal liability for injury or death caused by operation of pleasure boat. 8 A.L.R.4th 886.

Am Jur. 40 Am. Jur. 2d, Homicide § 92.

CJS. 40 C.J.S., Homicide, § 91.

Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-43. Homicide; ignorant or negligent management of steamboat or railroad engine.

If any captain, engineer, or any other person having charge of a steamboat or railroad engine connected with a car or cars used for the conveyance of passengers; or if the engineer or other person having charge of the boiler of such boat or engine, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, or for the purpose of unusual speed, create or allow to be created such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, or shall thereby cause the said engine or cars to run off of said railroad track, or from any other ignorant or gross neglect shall permit or cause such cars or engine to be thus thrown, by which bursting, breaking, or running off the track any person shall be killed, every such captain, engineer, or other person, shall be guilty of manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (16); 1857, ch. 64, art. 180; 1871, § 2643; 1880, § 2891; 1892, § 1164; Laws, 1906, § 1242; Hemingway's 1917, § 972; Laws, 1930, § 1000; Laws, 1942, § 2230.

Cross References — Actions for wrongful death, see § 11-7-13.
 Liability of ships and vessels for causing death or injury, see § 11-7-175.
 Liability of railroads for causing death or injury, see §§ 77-9-229 et seq.
 Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

<p>Am Jur. 40 Am. Jur. 2d, Homicide §§ 91, 92. CJS. 40 C.J.S., Homicide § 91.</p>	<p>Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.</p>
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§ 97-3-45. Homicide; owner of dangerous animal.

If the owner of a mischievous animal, knowing its propensity, wilfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large, or not confined, kill any human being who shall have taken reasonable precautions to avoid the animal, such owner shall be guilty of manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (14); 1857, ch. 64, art. 178; 1871, § 2641; 1880, § 2889; 1892, § 1162; Laws, 1906, § 1240; Hemingway's 1917, § 970; Laws, 1930, § 998; Laws, 1942, § 2228.

Cross References — Penalty for manslaughter, see § 97-3-25.

RESEARCH REFERENCES

<p>ALR. Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant. 81 A.L.R.3d 638.</p>	<p>Am Jur. 40 Am. Jur. 2d, Homicide § 95. CJS. 40 C.J.S., Homicide § 91.</p>
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§ 97-3-47. Homicide; all other killings.

Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (19); 1857, ch. 64, art. 182; 1871, § 2645; 1880, § 2893; 1892, § 1166; Laws, 1906, § 1244; Hemingway's 1917, § 974; Laws, 1930, § 1002; Laws, 1942, § 2232.

Cross References — Penalty for manslaughter, see § 97-3-25.

JUDICIAL DECISIONS

1. In general.
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1. In general.

Defendant's unlawful killing of the victim clearly met all of the elements outlined in Miss. Code Ann. § 97-3-47, and the jury would have been entitled to find him guilty of manslaughter on the record before the appellate court; there was no error in defendant's representation at the plea proceeding, much less any error so prejudicial to rise to the level required by Strickland and Bevill; thus, defendant failed to prove an exception to the procedural bar for post-conviction relief. *Smith v. State*, 922 So. 2d 43 (Miss. Ct. App. 2006).

Where defendant presented evidence that he was insane when he caused a fatal auto accident, and the State did not prove beyond a reasonable doubt that he was sane, his manslaughter conviction was against the overwhelming weight of evidence and he was entitled to a new trial. *Hawthorne v. State*, 883 So. 2d 86 (Miss. 2004).

Evidence was more than sufficient to allow the case to go to a jury, and the jury's verdict was not against the overwhelming weight of the evidence: a witness testified as to the events that led to the shooting including that defendant had the gun in his hands, and defendant admitted having fired the shot that killed the victim. *Pitts v. State*, 832 So. 2d 1281 (Miss. Ct. App. 2002).

While much of the reported case law on the statute deals with manslaughter convictions based on the theory of culpable negligence, the language of the statute is sufficient to encompass the other general form of common law involuntary manslaughter. *Miller v. State*, 733 So. 2d 846 (Miss. Ct. App. 1998).

Conviction of manslaughter by culpable negligence was supported by evidence that defendant and victim had been playing with gun all day, defendant picked up bracelet and asked victim if he could wear it, victim told him no, the 2 started joking around and horseplaying, defendant grabbed gun and cocked it, defendant put gun to victim's head, gun went off, and defendant fell to ground and started crying; defendant's actions showed conscious, wanton, and reckless disregard of likely fatal consequences of his willful act that created unreasonable risk. *Hankins v. City of Grenada*, 669 So. 2d 85 (Miss. 1996).

The evidence was insufficient to support a manslaughter conviction where a witness told at least 2 people that the victim was reaching for a pistol at the time of the incident and a gun was found on the ground near the victim's body; although on the witness stand the witness denied making these statements, he was forced to admit that he had signed a written statement to that effect. *Kirkland v. State*, 573 So. 2d 681 (Miss. 1990).

The evidence was not sufficient to establish that the defendant was guilty of manslaughter by culpable negligence with respect to an automobile accident where the State proved only that the defendant's car collided with the rear of a pickup truck and that the defendant was driving while intoxicated, the defendant and his passenger testified that the defendant was driving well, and not recklessly, negligently, unlawfully, or at a high rate of speed, and no other witnesses contradicted the testimony of the defendant and his passenger. However, the evidence was sufficient to support a conviction for the lesser included offense of negligently killing another while under the influence of intoxicating liquor. *Evans v. State*, 562 So. 2d 91 (Miss. 1990).

This section is an involuntary manslaughter statute and applies whether the instrument causing death was a motor vehicle or some other instrument or instrumentality. *Craig v. State*, 520 So. 2d 487 (Miss. 1988).

Prosecuting examination may examine defendant in manslaughter prosecution who raises defenses of justifiable homicide by reason of self-defense as well as excusable homicide by reason of accident or misfortune regarding why defendant did not back off or flee when deceased pulled knife on defendant where jury is specifically instructed that defendant is under no duty to flee but rather has right to stand ground. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

It is for jury to decide whether slaying constitutes manslaughter or justifiable homicide by reason of self-defense or excusable homicide by reason of accident or misfortune where evidence shows that during course of argument, deceased displayed knife, defendant pulled gun, pointed it at deceased and cocked it, and during ensuing scuffle, gun discharged, striking deceased. *Burge v. State*, 472 So. 2d 392 (Miss. 1985).

Where the victim was found in a ditch near the defendant's pickup truck with his breastbone and all of his ribs broken, and with a punctured lung, and he died of massive hemorrhage and pulmonary edema and congestion, and there was strong circumstantial evidence pointing to the defendant as the assailant of the victim, including the defendant's admission to state witnesses that he had been drinking heavily that day and that he had struck the victim although he did not intend to kill him, the evidence was sufficient to support a conviction of manslaughter. *Vaughn v. Electrolux Corp.*, 245 So. 2d 24 (Miss. 1971).

Under an indictment for manslaughter, evidence that the killing was murder is admissible. *Andrews v. State*, 237 Miss. 875, 116 So. 2d 749 (1960).

In a suit to cancel a claim of husband to property of wife on the ground that he had feloniously slain his wife in Ohio and thereby forfeited his right to the property under Code 1942, § 479, the fact that the husband pleaded guilty to manslaughter

in Ohio does not admit a wilful killing but the husband should be allowed to introduce evidence to explain the circumstances of killing. *Henry v. Toney*, 211 Miss. 93, 50 So. 2d 921 (1951).

In manslaughter, the malice or intent to kill must arise from a present provocation and this provocation must stem from the deceased. *Gaddis v. State*, 207 Miss. 508, 42 So. 2d 724 (1949).

Simple negligence will not support a conviction under this provision. *General Contract Purchase Corp. v. Armour*, 125 F.2d 147 (5th Cir. 1942).

As respects degree of negligence necessary to constitute manslaughter, criminality cannot be predicated on mere negligence or carelessness, but may be predicated on gross negligence or carelessness constituting such a departure from what would be conduct of ordinarily careful and prudent man under same circumstances as to furnish evidence of indifference to consequences. *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936).

2. Unlawful act or procurement.

A father who punished his child and as result of which the child died, was guilty of manslaughter even though he did not intend to kill the child. *Hancock v. State*, 209 Miss. 523, 47 So. 2d 833 (1950).

Where one accused of manslaughter under this section [Code 1942, § 2232] feloniously put in motion a series of five successive events, causally and naturally connected from beginning to end, without the intervention of any distinctly separate and independent agencies to interrupt and overcome the progress of the events in their natural course, accused's wrong was not only a contributing cause but was the proximate cause of death. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133 (1946).

Where the evidence was such that the jury could infer that the defendant began the difficulty with the deceased, and even though the deceased was the aggressor, the act was unlawful, the killing being the unanticipated result flowing from the fight in which fists and feet were used, a verdict of manslaughter was justified. *McCaffrey v. State*, 185 Miss. 659, 187 So. 740 (1939).

Evidence that accused gave six-year-old child three swallows of whisky, that child

died of alcoholic poisoning, and that smaller quantities of whisky would be necessary to endanger life of child than in case of adult held insufficient to sustain conviction of manslaughter under culpable negligence statute, in absence of expert testimony that three swallows of whisky is sufficient, as probability, to kill or seriously injure healthy six-year-old child. *Jabron v. State*, 172 Miss. 135, 159 So. 406 (1935).

Evidence held sufficient to support manslaughter, where defendant permitted wife to shoot herself. *Gregory v. State*, 152 Miss. 133, 118 So. 906 (1928).

Killing held to amount to no more than manslaughter, where defendant was resisting unlawful act. *Fletcher v. State*, 129 Miss. 207, 91 So. 338 (1922), modified on suggestion of error, 129 Miss. 578, 92 So. 556 (1922).

3. Culpable negligence; generally.

Defendant's conviction for capital murder and arson was proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. Those actions did not constitute culpable negligence manslaughter under Miss. Code Ann. § 97-3-47. *Fuqua v. State*, — So. 2d —, 2006 Miss. App. LEXIS 164 (Miss. Ct. App. Mar. 7, 2006).

Where defendant, a security guard, shot a man inside a car, who had allegedly waived a gun at defendant, and defendant argued the evidence only supported a charge of culpable negligence manslaughter, in each of the cases cited by defendant, the killing had been unintentional, but in defendant's case, there was no evidence in the record to suggest that defendant did not intend to shoot, and substantial evidence supported defendant's conviction for depraved heart murder. *Steele v. State*, 852 So. 2d 78 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

In a prosecution under Miss. Code Ann. § 97-3-47, where defendant admitted giving the victim two oxycodone pills (for which he had a prescription) and finding her unconscious the next morning; the victim's brother testified that he saw defendant attempt to inject the victim with the drug, that she later appeared intoxicated, became ill, and vomited; and a

pathologist testified that the oxycodone level in the victim's blood was about 5 ½ times higher than the toxic level of oxycodone, the trial court properly denied defendant's motion for a peremptory instruction, as the evidence sufficiently proved that the defendant was guilty of culpable negligence. *Nichols v. State*, 868 So. 2d 355 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

The mere act of taking a four year old child on a camping excursion to an area by a river does not, of itself, demonstrate such an indifference for the safety of the child as to rise to the level of culpable negligence for purposes of a criminal manslaughter charge; furthermore, demonstrating the close proximity of the river to the camping area is not enough, standing alone, to criminalize a custodial parent's failure to provide flotation devices for the children to wear. *Edwards v. State*, 755 So. 2d 443 (Miss. Ct. App. 1999).

The evidence was sufficient to support the conviction of a 14 year old defendant for manslaughter where, after being scolded by several children for his teasing another child about her excessive weight, he shot the overweight child in the head after she asked him to "stop playing." *Towner v. State*, 726 So. 2d 251 (Miss. Ct. App. 1998).

The crime of aggravated DUI proscribed in § 63-11-30(4) is a lesser included offense necessarily encompassed under the crime of manslaughter by culpable negligence set forth in this section. *Mayfield v. State*, 612 So. 2d 1120 (Miss. 1992).

Depraved-heart murder as defined in § 97-3-19(1)(b) and culpable-negligence manslaughter as defined in this section are distinguishable simply by degree of mental state of culpability, in that depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied; thus, an instruction on depraved-heart murder did not amount to a "denial, or substantial diminishing, of a manslaughter consideration" by the jury. *Windham v. State*, 602 So. 2d 798 (Miss. 1992).

Evidence indicating that defendant had alcohol problem for previous 15 years, offered in rebuttal to testimony of defendant that he had never been admitted to

hospital for alcohol abuse except on one occasion, was not admitted in error where evidence was overwhelming that defendant was guilty. *Whitley v. State*, 511 So. 2d 929 (Miss. 1987).

"Culpable negligence," as used in this section, means negligence evincing a reckless disregard for the value of human life, and carries the same legal meaning whether the instrument causing the death is an automobile or something less commonplace; thus, the record in a manslaughter prosecution supported the jury verdict of culpable negligence where it disclosed, *inter alia*, that defendant, while drunk, had driven into the wrong lane of traffic on a straight stretch of road with an unobstructed view. *Gandy v. State*, 373 So. 2d 1042 (Miss. 1979).

The actions of a 17-year-old defendant in driving a school bus after being instructed not to, reversing the usual route and driving in the opposite direction so that children were not discharged at the side of the road but had to pass in front of the bus to reach the side of the road, failing to count children as they left the bus, and not watching those counted until they had passed in front of the bus and reached a position of safety, amounted to simple negligence but not criminal or culpable negligence supporting a conviction of manslaughter for the death of a child who was run over and killed by the bus driven by the defendant. *Bethea v. Bethea*, 259 So. 2d 686 (Miss. 1972).

In a manslaughter prosecution, when the testimony of negligence reaches that degree of carelessness which is denominated as gross negligence and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent person under the circumstances, so as to furnish evidence of indifference to consequences, the issue becomes a question for the jury at that point. *Day v. Phelps*, 244 So. 2d 18 (Miss. 1971).

The character of one's conduct as culpable negligence within the meaning of this section [Code 1942, § 2232] is affected by the circumstances. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945).

Indifference to consequences must, to constitute culpable negligence within the

meaning of this section [Code 1942, § 2232], involve a disregard for the safety of human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945).

To sustain a conviction of criminal homicide attributable to negligence, it must be shown that a homicide was not improbable under all facts existing at the time. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945).

One may violate the law and yet not be culpably negligent in fact. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

Culpable negligence within the meaning of the statute is that degree of negligence or carelessness which is denominated as gross negligence and which constitutes a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of indifference to consequences, and the statute does not apply to a case of simple or mere negligence. *Scott v. State*, 183 Miss. 788, 185 So. 195 (1938).

"Culpable negligence" within statute declaring that killing of a human being by culpable negligence is manslaughter held to mean that degree of negligence or carelessness which is denominated as "gross negligence" and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man under same circumstances as to furnish evidence of indifference to consequences. *Shows v. State*, 175 Miss. 604, 168 So. 862 (1936).

Culpable negligence within manslaughter statute is omission to do something, or doing something which reasonable, prudent person would or would not do. *Robertson v. State*, 153 Miss. 770, 121 So. 492 (1928).

One pointing loaded pistol at another and discharging it by act of culpable negligence, resulting in death, is guilty of manslaughter. *Robertson v. State*, 153 Miss. 770, 121 So. 492 (1928).

4. —As wanton disregard to human life.

Defendant argued that the trial court erred in denying his motion for a directed verdict because his actions did not constitute culpable negligence, which was required to sustain a conviction for man-

slaughter. However, the jury heard evidence that he was driving at a high speed, ran through the red light, hit the victim without applying his brakes, and then deliberately evaded the police; the evidence was sufficient to demonstrate a wanton disregard for the safety of human life, and it was sufficient to establish culpable negligence. *Montgomery v. State*, 910 So. 2d 1169 (Miss. Ct. App. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005).

Under this section culpable negligence is "the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof." In order to maintain the charge, the State must prove, beyond a reasonable doubt, guilt of such gross negligence on the occasion complained of as to evince a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of an act under the surrounding circumstances as to render such conduct tantamount to wilfulness. *Evans v. State*, 562 So. 2d 91 (Miss. 1990).

Defendant's negligence did not reach the degree required to establish culpable negligence within the meaning of this section, where the version of the death given by defendant, that he was unloading his shotgun and, believing there was no shell in the chamber, pointed the gun toward the ceiling and pulled the trigger, resulting in the death of his fiancée, was uncontradicted, where the record failed to show any horseplay with the shotgun, drunkenness, brawling, or any other reckless conduct tantamount to a wanton disregard of human life, and where no evidence suggested that defendant had intentionally killed his fiancée; thus, his conviction would be reversed. *Phillips v. State*, 379 So. 2d 318 (Miss. 1980).

Involuntary manslaughter by culpable negligence within the meaning of Code 1942 § 2232, is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the wilful creation of an unreasonable risk. *Campbell v. State*, 285 So. 2d 891 (Miss. 1973).

"Culpable negligence", as used in the statute is negligence of a higher degree

than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt. *Moore v. State*, 238 Miss. 103, 117 So. 2d 469 (1960); *Grinnell v. State*, 230 So. 2d 555 (Miss. 1970).

The term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and this shall be so clearly evidenced as to place it beyond reasonable doubt. *Sullivan v. State*, 213 Miss. 14, 56 So. 2d 93 (1952), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

Culpable negligence within the meaning of this section [Code 1942, § 2232] is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as the result of the wilful creation of an unreasonable risk thereof. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945); *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133 (1946); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950).

Culpable negligence within the meaning of this section [Code 1942, § 2232] is not merely such negligence as in a civil case would be gross negligence, but must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and must be so clearly evident as to place it beyond a reasonable doubt. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945); *Downs v. State*, 206 Miss. 831, 41 So. 2d 19 (1949); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950).

5. Negligent operation of vehicle on highway; generally.

In the absence of proof that defendant's drinking prior to operating an automobile on the highway proximately caused the death of another, she should not be convicted of manslaughter under this section. *Frazier v. State*, 289 So. 2d 690 (Miss. 1974).

Where the only eyewitnesses to a fatal accident were the defendant and his passenger, and both testified that the deceased jumped in front of the defendant's automobile at a time when the automobile was traveling on the roadway in a prudent and reasonable manner, and the only evidence adverse to the defendant was testimony from one witness that he noticed the odor of intoxicating liquor around the defendant's vehicle, but would not say that the defendant was intoxicated, and the fact that defendant's automobile traveled a distance after striking the deceased, the closeness of the question of the defendant's criminal liability under the culpable negligence statute and the fact that the defendant received none but abstract instructions, and none on his theory of the case, required that another jury decide the matter under proper instruction. *Cook v. State*, 248 So. 2d 434 (Miss. 1971).

Where the defendant was charged with culpable negligence in the operation of an automobile on a public highway, resulting in the death of another, he was entitled to have admitted the testimony of qualified witnesses that he had the general reputation in the community of his residence of being a careful driver. *Rosser v. State*, 230 Miss. 573, 93 So. 2d 470 (1957).

Where a motorist killed three persons who were standing on the shoulder of the highway, each homicide constituted a single and separate offense for which the defendant may be tried without being put in jeopardy for the same offense. *Burton v. State*, 226 Miss. 31, 79 So. 2d 242 (1955).

In prosecution under this section [Code 1942, § 2232] for involuntary manslaughter with motor vehicle, it must be shown that homicide was not improbable under all facts existing at time, in order to sustain conviction of criminal homicide attributable to negligence. *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950).

Defendant's criminal liability is to be determined primarily by what occurred at the time of, and immediately prior to his striking and running over the victim, but the jury is entitled to consider his subsequent conduct, including his denial to the officers that he had had any accident at all, as a circumstance in determining whether his entire conduct had been char-

acterized by a spirit of wanton disregard for the safety of others. *Cutshall v. State*, 203 Miss. 553, 35 So. 2d 318 (1948).

Where a witness in prosecution for manslaughter by culpable negligence in the operation of a motor car was permitted to examine his prior written statement to refresh his recollection, admission of testimony to the limited extent that the witness' memory was refreshed by the statement and the questions of the prosecuting attorney predicated thereon did not violate Section 26 of the Constitution on the ground that the written statement was given in the absence of defendant and without the privilege of cross-examination, where it was not introduced in evidence as an ex parte statement or deposition and the jury was not permitted to read, or hear the statement read, on the trial. *Cutshall v. State*, 203 Miss. 553, 35 So. 2d 318 (1948).

The gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945); *Coleman v. State*, 208 Miss. 612, 45 So. 2d 240 (1950); *Hatcher v. State*, 230 Miss. 257, 92 So. 2d 552 (1957); *Smith v. State*, 233 Miss. 886, 103 So. 2d 360 (1958).

In manslaughter prosecution of truck driver charged with culpable negligence in driving truck over center line of highway at high rate of speed resulting in a "side-swiping" of another truck and the killing of a passenger, evidence as to whether defendant was driving over center line of highway as charged held for jury. *Shows v. State*, 175 Miss. 604, 168 So. 862 (1936).

Motorists' habitual violation of statute, limiting speed in closely built-up territory to twenty miles an hour, and disregard of pedestrians' right by many motorists, furnish no excuse for courts to refuse to enforce law or depart therefrom in case wherein facts justify conviction of motorist for manslaughter in causing pedestrian's death by wilful violation of speed law. *Wilson v. State*, 173 Miss. 372, 161 So. 744 (1935).

Culpable negligence of defendant charged with manslaughter, based on al-

leged negligent operation of automobile, held for jury. *Bradford v. State*, 158 Miss. 210, 127 So. 277 (1930).

6. —Culpable negligence found or supported.

In a prosecution for manslaughter arising out the negligent operation of a motor vehicle on the highway, the conviction would be affirmed where the evidence established that the defendant had driven his truck into the path of an on-coming vehicle, that the defendant had made no attempt to avoid the accident, and that his blood contained a level of alcohol sufficient to impair his reflexes. *Atkinson v. State*, 392 So. 2d 205 (Miss. 1980).

Notwithstanding that defendant's automobile did not strike the automobile driven by the deceased, and that the negligence of the driver whom defendant was racing in applying his brakes in such a manner as to cause his automobile to skid into the oncoming automobile driven by the deceased was the immediate cause of death, the defendant aided and abetted the other driver in the doing of an act obviously dangerous to persons using the highway in reckless and utter disregard for human life and constituted culpable negligence within the meaning of Code 1942 § 2232. *Campbell v. State*, 285 So. 2d 891 (Miss. 1973).

Evidence which established that the defendant collided with the victims' truck while traveling a speed of 70 to 75 miles per hour in the wrong lane of a dry road surface, while the weather was clear, was sufficient to sustain an involuntary manslaughter conviction. *Patrick v. State*, 249 So. 2d 667 (Miss. 1971), cert. denied, 404 U.S. 1038, 92 S. Ct. 712, 30 L. Ed. 2d 730 (1972).

A father pursued by a patrolman because of driving without lights is properly convicted of negligent manslaughter where he instructed his 16-year-old son to drive as fast as possible and not stop, and the car struck another. *Griffin v. State*, 242 Miss. 376, 135 So. 2d 198 (1961).

One operating automobile at 55-65 m.p.h. along a relatively narrow street in a thickly built-up residential neighborhood, striking and killing a child, may properly be convicted of "culpable negli-

gence". *Moore v. State*, 238 Miss. 103, 117 So. 2d 469 (1960).

In a prosecution for manslaughter with an automobile, the jury was amply justified in finding under the evidence that the accused was guilty of culpable negligence in hitting a child riding a bicycle. *Hatcher v. State*, 230 Miss. 257, 92 So. 2d 552 (1957).

Where there was evidence that accused recklessly and with a wilful and wanton disregard of the safety of others and of human life, attempted at a high rate of speed to pass a car at the crest of a hill, before he could see where he was going, or who was coming toward him and as a direct result of culpable negligence he collided with an oncoming automobile, and killed a passenger, the evidence sustained conviction for manslaughter. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827 (1955).

Accused's culpable negligence in turning into the path of and colliding with oncoming automobile was the proximate cause of the death of passenger in latter vehicle, where evidence showed that the collision resulted in bodily injuries to deceased, causing her to lose a considerable quantity of blood, and a partial paralysis on her right side, necessitating her taking to bed, where she remained until as a consequence pneumonia developed and the pneumonia resulted in her death. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133 (1946).

Evidence warranted jury finding that truck driver, in turning out to pass truck in front of him and into the path of oncoming automobile, could have seen, if he had looked, such automobile, in support of conviction of manslaughter for death of passenger in such automobile, in the resulting collision. *Henderson v. State*, 199 Miss. 629, 25 So. 2d 133 (1946).

Motorist exceeding speed fixed by law fails to exercise legal measure of due care prescribed by state, and speed so much above legal rate as to leave no doubt that excess was intentional and wilful constitutes culpable want of due care as respects injuries proximately resulting therefrom, so that homicide proximately caused by such wilful excessive speed is manslaughter. *Wilson v. State*, 173 Miss. 372, 161 So. 744 (1935).

Evidence of motorist's wilful and intentional operation of automobile at speed grossly exceeding statutory limit across pedestrians' path alongside railroad track at street crossing and death of pedestrian as proximate or concurrently proximate result of such law violation held to sustain conviction of manslaughter. *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

7. —Culpable negligence not found or supported.

The passing of an overtaken vehicle to the right, when done under circumstances not involving apparent or appreciable danger to human life, is not culpable negligence within the purview of this section [Code 1942, § 2232]. *Goudy v. State*, 203 Miss. 366, 35 So. 2d 308 (1948).

The careless and negligent driving of an automobile on the wrong side of a highway is not culpable negligence per se within the meaning of this section [Code 1942, § 2232]. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945).

The statute does not apply to a case in which the uncontradicted proof was that a motorist was driving between 40 and 45 miles an hour outside of a business or residential district, that although it was dark, his lights were in good condition and lighted the road ahead of him, that although it was snowing, the visibility was good, that he was watching the road as he went, and that there was no sign or intimation on the highway of a small neighborhood road out of which an unlighted bicycle came darting at 25 miles an hour. *General Contract Purchase Corp. v. Armour*, 125 F.2d 147 (5th Cir. 1942).

That a motorist was driving too fast, and because of an attempt to turn at an intersection, and in order to avoid a collision with another automobile, he lost control of his car, ran over the deceased and struck a post near the sidewalk, consisted of simple or mere negligence not within the purview of the statute. *Scott v. State*, 183 Miss. 788, 185 So. 195 (1938).

8. —Driving while intoxicated.

Court affirmed defendant's conviction of negligently causing the death of another while operating a vehicle under the influence of cocaine because the properly admitted urine analysis showed that defen-

dant had ingested cocaine, and the court was unable to say that a reasonable juror could not have found beyond a reasonable doubt that defendant was guilty. *Jones v. State*, 881 So. 2d 209 (Miss. Ct. App. 2002).

There was insufficient evidence to support a conviction of culpable negligence manslaughter where (1) the evidence sufficiently established the requisite antecedent link between the defendant's operation of the motor vehicle in an intoxicated state and the car crash that resulted in the victim's death, and (2) the defendant's conduct demonstrated a sufficient wanton and reckless disregard for the safety of human life and an apathy for the consequences of his actions as to make that conduct comparable to willfulness. *Beckham v. State*, 735 So. 2d 1059 (Miss. Ct. App. 1999).

Interim digital display of defendant's alcoholic blood level by intoxilyzer was admissible in prosecution for vehicular homicide while under influence of intoxicating liquor, despite fact that test was not completed due to failure of defendant to blow into device for sufficient period of time; both administering officer and officer who calibrated intoxilyzer testified that interim reading would only show erroneously low level, not erroneously high level, of blood alcohol, intoxilyzer was shown to be working properly, and defendant did not attack officers' credentials or their relevant experience or object to their opinion testimony. *Temple v. State*, 679 So. 2d 611 (Miss. 1996).

Defendant convicted of vehicular homicide while under influence of intoxicating liquor showed no prejudice from denial of his pretrial motion for continuance even though counsel was appointed eight days prior to trial and had two other trials scheduled in interim, as defendant made adequate presentation of evidence, and, despite suggestion that, with more time, defendant could have supplied expert testimony refuting intoxilyzer testimony, record reflected no posttrial effort to demonstrate that such testimony was available. *Temple v. State*, 679 So. 2d 611 (Miss. 1996).

An officer's failure to inform the defendant that he had a right to refuse the

officer's request for a blood sample did not render the test results inadmissible in a manslaughter prosecution against the defendant where the officer had probable cause to obtain the blood sample in that the officer knew that the defendant was the driver of an automobile which had collided head on with another vehicle, the collision occurred on a straight and level highway when the road condition was dry, the officer knew that at least two people were dead in the vehicle which the defendant hit, the officer had observed a beer in the defendant's vehicle, and the defendant had slurred speech and dilated pupils. For a search which would otherwise be illegal, absent consent, knowledgeable waiver of one's constitutional right not to be searched is guaranteed by Article 3, § 23 of the Mississippi Constitution. However, blood searches which are based upon probable cause are not illegal, and, therefore, the question of the defendant's knowledgeable waiver was not relevant. *Longstreet v. State*, 592 So. 2d 16 (Miss. 1991).

Evidence that the defendant ran a stop sign while intoxicated and collided with a truck resulting in the death of a passenger was not sufficient to prove manslaughter by culpable negligence under this section but was sufficient to support a conviction for the lesser included offense of negligently killing another while under the influence of an intoxicating liquor pursuant to § 63-11-30. *Childs v. State*, 521 So. 2d 882 (Miss. 1988).

Results of blood-alcohol test performed on defendant after automobile accident resulting in death of 2 people were admissible where officers at scene of accident smelled alcohol and saw several beer cans and whiskey bottle on floorboard, at hospital informed defendant that he was being charged with 2 counts of manslaughter, read defendant his rights, and requested and obtained his consent for blood sample; evidence was sufficient to provide probable cause to search for and seize evidence of intoxication; contention of defendant that test results should not have been admissible because evidence indicated he was unable to consent was rejected, although testimony showed that defendant was belligerent and slurred his

speech, was unco-operative, and unsuccessfully resisted efforts to procure blood sample. *Whitley v. State*, 511 So. 2d 929 (Miss. 1987).

In prosecution for vehicular manslaughter, defendant's culpable negligence was established by evidence that defendant's vehicle eased off road along straight and level stretch of interstate highway, striking rear of decedent's vehicle which was wholly off highway and displaying tail-lights, and that defendant smelled of alcohol, slurred his speech, and evidenced a .19 percent level of blood alcohol. *Gibson v. State*, 503 So. 2d 230 (Miss. 1987).

Admission into evidence of results of blood alcohol test at trial for manslaughter and aggravated assault arising out of a motor vehicle accidents was reversible error, where deputy sheriff who investigated the accident had insufficient probable cause to request a blood alcohol test for defendant driver, in view of deputy's statement that he smelled no odor of alcohol on defendant either at the accident scene or at the hospital, he observed no whiskey bottles or beer cans in defendant's car, no aspect of defendant's speech, appearance or behavior indicated that he was under the influence of alcohol, and deputy admitted that the real reason for requesting the blood alcohol test was because it was sheriff department policy to do so when someone was killed in an automobile accident. *Cole v. State*, 493 So. 2d 1333 (Miss. 1986).

Evidence was insufficient to support a manslaughter conviction arising out of an automobile accident, where, although defendant was intoxicated, he was driving in the proper lane of travel, there was no evidence that his automobile had been operating in an unsafe manner, the victim's automobile was parked in the middle of defendant's lawful lane of traffic with no lights on at 2 a.m., and skid marks at least 82 feet 9 inches before the point of impact indicated that he took reasonable evasive action once he saw the victim's vehicle. *Dickerson v. State*, 441 So. 2d 536 (Miss. 1983).

Where defendant's conviction for manslaughter grew out of an automobile accident which occurred at a time when he was said to have been driving on the

wrong side of the road, while intoxicated, at a speed of over 100 miles an hour, there was more than ample testimony to sustain the charge that the accident and death of the driver of the automobile struck by the defendant was the result of defendant's culpable negligence within the meaning of this section [Code 1942, § 2232]. *Chaffin v. State*, 227 So. 2d 478 (Miss. 1969).

One who, in the nighttime and in a drunken condition, drives an automobile on a public highway, proceeding upgrade at a rate of speed of approximately 75 miles per hour, zigzagging from side to side and driving on the wrong side of the highway, evinces a wanton and reckless disregard for the safety of human life, and such indifference to the consequences of his act as to render his conduct tantamount to wilfulness as to be guilty of manslaughter. *Hynum v. State*, 222 Miss. 817, 77 So. 2d 313 (1955).

Evidence that defendant was drunk while driving truck on the highway, that he was weaving from side to side on the highway, and collided with another car, killing a passenger therein, sustained conviction under this section [Code 1942, § 2232]. *Lester v. State*, 209 Miss. 171, 46 So. 2d 109 (1950).

Regardless of the deserved condemnation of drunken driving and the fact that it often results in criminal and culpable negligence, mere intoxication of the driver of an automobile at the time of an accident is not sufficient to sustain a conviction of manslaughter; and an instruction in such case should clearly connect the fact of intoxication causally with the resultant death and should be made a factor in the definition of culpable negligence. *Lee v. State*, 192 Miss. 785, 7 So. 2d 875 (1942).

The fact of intoxication in the driving of an automobile is not sufficient to sustain conviction for manslaughter unless it thereby contributed to the death by constituting an element of culpable negligence. *Lee v. State*, 192 Miss. 785, 7 So. 2d 875 (1942).

That the defendant was driving while intoxicated, is sufficient in a prosecution for the misdemeanor but for it to be a factor in a case involving culpable negligence it must create an abnormal mental and physical condition which tends to de-

prive one of the clearness of intellect and control of himself which he would otherwise possess, and in order for the influence of intoxicating liquors to be a factor in showing criminally culpable negligence causing death it must contribute proximately both to the establishment of such negligence and to the resultant death. While the jury would be warranted in taking into account any mental and physical condition which they found due to the influence of intoxicating liquor, it is not the fact but the effect of the intoxication which is relevant. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

While the driving of a vehicle by one under the influence of intoxicating liquor is a misdemeanor, and the driving of an automobile in this condition is therefore per se negligence, it does not mean that such evidence constitutes a prima facie case of manslaughter, and although a jury may find that the conduct of the operator of an automobile constituted gross negligence, the violation of the statute is not culpable negligence per se. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

Driving while under the influence of intoxicating liquor, and the culpable negligence resulting in the death of a human being are separate offenses for which one could be separately prosecuted, and neither prosecution would bar the other. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

Driving automobile while intoxicated, in violation of statute, is negligence and is culpable, if intoxication is such as to render driver incapable of driving with care essential to safety of occupants and others. *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

At common law, homicide of which intoxication rendering automobilist incapable of driving with care essential to safety of others is proximate cause, is "manslaughter." *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

9. Indictment.

In a prosecution for manslaughter by negligent operation of an automobile, the citation of an incorrect statute in the indictment, later amended to substitute this section, did not constitute reversible error since the citation of the statute in an

indictment is mere surplusage. *Cowan v. State*, 399 So. 2d 1346 (Miss. 1981).

The trial court was correct in overruling defendant's demurrer to the indictment in a prosecution for manslaughter, notwithstanding the contention that the indictment should have charged that the death had occurred "by culpable negligence" and that use of the word "willfully" resulted in a charge of voluntary rather than involuntary manslaughter. *Yazzie v. State*, 366 So. 2d 240 (Miss. 1979).

Where an indictment charged that the defendant unlawfully, feloniously and by culpable negligence, did kill a person contrary to Code 1942, § 2220 and against the peace and dignity of the State of Mississippi, the indictment adequately charged the defendant with the offense of manslaughter by culpable negligence in operation of an automobile, despite the mistake in citation of the statute, inasmuch as reference to the code section in the indictment was surplusage and unnecessary to the charge of the crime for which the defendant was tried. *Dendy v. State*, 224 Miss. 208, 79 So. 2d 827 (1955).

Manslaughter indictment charging culpable negligence held not defective because not setting forth conduct constituting culpable negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

Manslaughter indictment charging defendant wilfully and feloniously killed certain person by culpable negligence held not defective because of word "wilful." *Williams v. State*, 161 Miss. 406, 137 So. 106 (1931).

Indictment for manslaughter setting up alleged negligence in operation of automobile was sufficient against demurrer. *Bradford v. State*, 158 Miss. 210, 127 So. 277 (1930).

10. Burden and degree of proof.

In order to maintain the charge that the accused had killed a human being through culpable negligence, it was incumbent upon the state to prove beyond a reasonable doubt that the accused was guilty of such gross negligence as to evince on his part a wanton and reckless disregard for the safety of human life, or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wil-

fulness. *Hynum v. State*, 222 Miss. 817, 77 So. 2d 313 (1955).

In prosecution for manslaughter by culpable negligence, state has burden of showing beyond reasonable doubt and to exclusion of every other reasonable hypothesis that defendant is guilty of such culpable negligence as to justify conviction of manslaughter. *Downs v. State*, 206 Miss. 831, 41 So. 2d 19 (1949).

In a prosecution under this section [Code 1942, § 2232] for the killing of a human being through culpable negligence, it is not necessary to allege or prove that the killing was wilfully done, but it is incumbent upon the state to prove beyond a reasonable doubt that defendant was guilty of such gross negligence as to evince a wanton or reckless disregard for the safety of human life or such an indifference to the consequences of his act under the surrounding circumstances as to render his conduct tantamount to wilfulness. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945).

11. Instructions; generally.

Where the objective of an instruction is to distinguish culpable negligence manslaughter from depraved heart murder, "culpable negligence" should be defined as "negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." *Clayton v. State*, 652 So. 2d 720 (Miss. 1995).

It was not error for a trial court to refuse to give a defendant's requested instruction regarding manslaughter by culpable negligence, which offered the civil definition of negligence to permit the jury to compare civil negligence with the culpable negligence required for conviction under this section, since such an instruction is not required for comparison purposes. However, this does not mean that trial courts should never give an instruction for such purposes; it is a practice that should be encouraged, especially since juries are inclined to convict under this section when the evidence rises to no more than simple negligence. *Robinson v. State*, 571 So. 2d 275 (Miss. 1990).

The use in an instruction for the prosecution under Code 1942, § 2232 of the term "gross negligence" rather than the

statutory term "culpable negligence" was not erroneous in view of the fact that the instruction also referred to the commission of acts evidencing a complete disregard for human life. *Parks v. State*, 267 So. 2d 302 (Miss. 1972), cert. denied, 411 U.S. 947, 93 S. Ct. 1923, 36 L. Ed. 2d 408 (1973).

In a murder prosecution, refusal of the trial court to grant an instruction that if the jury should not be satisfied in their own minds beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that the defendant had wilfully, unlawfully, feloniously, and of his malice aforethought, killed and murdered the victim, then it could not find him guilty of anything, was proper where there was evidence from which the jury was fully justified in returning a verdict of guilty of manslaughter. *Pitts v. State*, 257 So. 2d 521 (Miss. 1972).

An instruction defining manslaughter by culpable negligence was proper under the facts of a homicide prosecution, in which it was shown that the defendant had recklessly shot at and into a house known to be occupied by human beings. *Roberson v. State*, 257 So. 2d 505 (Miss. 1972).

In a prosecution for involuntary manslaughter by culpable negligence, a charge to the jury defining culpable negligence as such negligence as evinces a flagrant and reckless disregard for the safety of others or wilful indifference to the injury liable to follow, was erroneous as defining gross negligence rather than culpable negligence. *Grinnell v. State*, 230 So. 2d 555 (Miss. 1970).

Instructions in prosecution under this statute [Code 1942, § 2232] held erroneous in charging the jury that they could find the defendant guilty if he was driving while intoxicated. *Jones v. State*, 244 Miss. 596, 145 So. 2d 446 (1962).

While, in a prosecution for manslaughter arising out of an automobile accident, the trial court might properly have granted an instruction announcing the rule of reasonable doubt and informing the jurors that each and every one must believe defendant guilty beyond a reasonable doubt before he should vote to convict, it was not error to refuse to

so instruct where other instructions announced the same rules of applicable law and prescribed the duties of the jurors. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360 (1958).

Where, in a prosecution for manslaughter arising out of an automobile accident, much of the testimony was given by eyewitnesses to the event, the accused could not complain of the court's refusal to instruct that the jurors should believe the accused guilty beyond every reasonable doubt and to the exclusion of every reasonable hypothesis before voting to convict, which instruction was applicable to cases resting entirely upon circumstantial evidence. *Smith v. State*, 233 Miss. 886, 103 So. 2d 360 (1958).

In a prosecution for murder an instruction that if jury believed from the evidence that the defendant intentionally and unlawfully pointed a pistol at and toward a crowd not in self-defense and not in unlawful discharge of an official duty and discharged the pistol so intentionally pointed or aimed and by this discharge killed the deceased, then the jury should return a verdict of not guilty was improper. *Bass v. State*, 54 So. 2d 259 (Miss. 1951).

It is not error to grant to state manslaughter instruction, it being contended by defense that accused was either guilty of murder or was justified in committing homicide in necessary self-defense, when under all of evidence accused cannot be properly convicted of greater offense than manslaughter and even that offense is not satisfactorily proved beyond every reasonable doubt. *Leflore v. State*, 44 So. 2d 393 (Miss. 1950).

Instruction that "culpable negligence" within the meaning of this section [Code 1942, § 2232] "is that degree of negligence or carelessness which is denominated as gross negligence and which constitutes a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of indifference to consequence," constituted reversible error. *Reynolds v. State*, 199 Miss. 409, 24 So. 2d 781 (1946).

Instruction in prosecution against motorist for killing a human being through

culpable negligence, defining the offense in terms of gross negligence, constituted prejudicial error. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945); *Gardner v. State*, 23 So. 2d 925 (Miss. 1945).

It is reversible error to give an instruction, in manslaughter prosecution for culpable negligence in operating motor vehicle, misleading the jury into believing that mere passing of truck on a hill and curve is, of itself, culpable negligence. *McKinney v. State*, 196 Miss. 826, 18 So. 2d 446 (1944).

In a trial on a charge of manslaughter based on culpable negligence in the driving of a truck, an instruction to the jury that it was a violation of the criminal law to drive a motor vehicle on the highway while under the influence of intoxicating liquor, and that if they believed the defendant unlawfully operated a truck on the highway while under the influence of intoxicating liquor, and in a manner constituting culpable negligence, and that as an approximate result thereof the decedent was killed, it would be their duty to find the defendant guilty as charged, was prejudicial error, since it characterized certain acts as crimes so as to place the jury in the position of finding the defendant guilty of one crime because guilty of another. *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941).

In prosecution for manslaughter by automobile, instruction that, if defendant was exceeding twenty miles per hour and exceeding speed at which reasonable or prudent man would have driven, he was guilty of culpable negligence, and authorizing conviction if death was proximate result of such culpable negligence, held reversible error. *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936).

In prosecution for manslaughter by automobile, error in instruction for state which was concrete and stated facts warranting conviction for acts constituting mere negligence held not cured by abstract instruction given for defendant defining culpable negligence. *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936).

In prosecution of truck driver for killing another through culpable negligence, instruction which gave such definitions for

"culpable negligence" as the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do under circumstances surrounding particular case, held reversible error as authorizing conviction on simple negligence. *Shows v. State*, 175 Miss. 604, 168 So. 862 (1936).

Instruction on rate of speed on highway where territory contiguous thereto was closely built up held erroneous under evidence. *Bradford v. State*, 158 Miss. 210, 127 So. 277 (1930).

Instruction jury could not convict defendant for manslaughter, but of murder, or nothing, held properly refused. *Robertson v. State*, 153 Miss. 770, 121 So. 492 (1928).

12. —Peremptory instructions.

A defendant who was convicted of involuntary manslaughter was entitled to a peremptory instruction based on the *Weathersby Rule*, and the trial court erred in failing to direct a verdict for him where the defendant was the only eyewitness, there was no substantial contradiction in the defendant's statements before and during the trial, and the State presented no evidence which substantially contradicted the defendant's version of the altercation between the victim and the defendant, which indicated that the victim was the aggressor and that the victim died because of a heart attack which was not caused by any action of the defendant. *Pritchett v. State*, 560 So. 2d 1017 (Miss. 1990).

In a manslaughter prosecution, evidence, including testimony that the defendant at 6:30 p.m. was so operating his automobile as to weave from side to side on the road making it difficult for other motorists to pass, that at 7:30 p.m. he was driving in the center of the road and drove his automobile on the side of the road occupied by an oncoming truck driven by the deceased, and that after the accident a pint bottle of whisky about three-quarters empty was found at his feet, but not including positive evidence that the defendant was drunk or had been drinking, at best created a mere suspicion that the defendant was intoxicated, and failed to sustain submission of the question to the jury, so that a motion for a directed verdict

in the defendant's favor should have been sustained. *Day v. Phelps*, 244 So. 2d 18 (Miss. 1971).

In prosecution for manslaughter by culpable negligence in operation of automobile on highway, peremptory instruction for defendant should have been granted by trial court at conclusion of evidence which showed that defendant was driving car in prudent and proper manner, free of recklessness prior to accident and that when confronted with emergency created by oncoming speeding automobile and presence of boy on bicycle in center of road and sudden darting of boy toward right lane of traffic, defendant immediately swerved car to right onto shoulder of highway and made every reasonable effort to avoid striking boy, even to extent of wrecking his automobile. *Downs v. State*, 206 Miss. 831, 41 So. 2d 19 (1949).

Error in conviction of crime under this section [Code 1942, § 2232] on insufficient evidence may be raised for the first time on appeal, even though defendant made no request for a peremptory charge; however, defendant would not be discharged but case would be remanded to permit defendant to make request for peremptory charge in lower court. *Ruffin v. State*, 203 Miss. 1, 32 So. 2d 882 (1947).

In prosecution for manslaughter by automobile, where case presented fact issue as to whether defendant was guilty of gross negligence in driving truck, peremptory instruction for defendant held not warranted. *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936).

13. Deliberations of jury; verdict.

Evidence did not support murder defendant's proposed instructions on culpable negligence; defendant went to convenience store where former paramour worked, the two argued, former paramour locked herself in office, defendant became belligerent and former paramour refused

to open door, defendant went to automobile and returned with shotgun, defendant shot door several times in attempt to enter room, defendant shot door knob off with first shot, and defendant then loaded and fired three more shots through door while former paramour screamed and frantically attempted to summon help. *Clark v. State*, 693 So. 2d 927 (Miss. 1997).

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. *Horn v. State*, 216 Miss. 439, 62 So. 2d 560 (1953).

14. Corpus Delicti.

In defendant's manslaughter trial, two eyewitnesses and a police officer testified as to the extent and severity of the victim's injuries immediately after the accident. The victim's wife testified that her husband had not been involved in any other accidents in which he could have sustained severe injuries, and she also testified that he died four days later in a hospital; thus, the State proved its corpus delicti and, in any event, an autopsy was not required to establish corpus delicti. *Montgomery v. State*, 910 So. 2d 1169 (Miss. Ct. App. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005).

15. Double jeopardy.

Denial of the inmate's petition for post-conviction relief was proper where double jeopardy protection was not implicated because Miss. Code Ann. § 63-11-30(5) required an element not required by Miss. Code Ann. § 97-3-47, namely, that of intoxication. *Ramage v. State*, 914 So. 2d 274 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Criminal responsibility of drug-gist for death or injury in consequence of mistake. 55 A.L.R.2d 714.

Necessity that trial court charge upon motive in homicide case. 71 A.L.R.2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. 86 A.L.R.2d 611.

Homicide: identification of victim as person named in indictment or information. 86 A.L.R.2d 722.

Who other than actor is liable for manslaughter. 95 A.L.R.2d 175.

Homicide: Failure to provide medical or surgical attention. 100 A.L.R.2d 483.

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of motor vehicle. 20 A.L.R.3d 473.

Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 A.L.R.3d 589.

Homicide predicated on improper treatment of disease or injury. 45 A.L.R.3d 114.

Homicide by withholding food, clothing, or shelter. 61 A.L.R.3d 1207.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury. 78 A.L.R.3d 1132.

Propriety of predicated manslaughter conviction on violation of local ordinance or regulation, not dealing with motor vehicles. 85 A.L.R.3d 1072.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. 40 A.L.R.4th 702.

Homicide: physician's withdrawal of life supports from comatose patient. 47 A.L.R.4th 18.

Homicide: Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant. 50 A.L.R.5th 467.

Adequacy of defense counsel's representation of criminal client — conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness. 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness. 79 A.L.R.5th 419.

Am Jur. 40 Am. Jur. 2d, Homicide § 95.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 40-57 (homicide).

7 Am. Jur. Trials, Homicide §§ 1 et seq.

13 Am. Jur. Trials, Vehicular homicide §§ 1 et seq.

CJS. 40 C.J.S., Highways § 248.

40 C.J.S., Homicide § 91.

Law Reviews. Murder and Manslaughter in Mississippi: Unintentional Killings, 71 Miss. L.J. 1, Fall, 2001.

§ 97-3-49. Suicide; aiding.

A person who wilfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of felony and, on conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (7); 1857, ch. 64, art. 171; 1871, § 2634; 1880, § 2882; 1892, § 1299; Laws, 1906, § 1373; Hemingway's 1917, § 1109; Laws, 1930, § 1138; Laws, 1942, § 2375.

Cross References — Assisted suicide not an authorized health care decision, see § 41-41-227.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Where a defendant has committed an intentional tort, questions of whether the deceased was induced to take his life by an irresistible impulse and whether the intentional tort was a substantial factor in causing his suicide are ordinarily issues for the jury. *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968).

Where the plaintiffs' evidence made a jury issue of whether as a result of the defendants' intentional torts in the illegal, improper, and perverted use of process for an ulterior motive or purpose, the de-

cedent acted under an irresistible impulse and committed suicide, he would, had he lived, have a good cause of action against the defendants, and under the wrongful death statute his widow and children are entitled to recover damages which decedent could have recovered. *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968).

There is rebuttable presumption against suicide. *Jefferson Std. Life Ins. Co. v. Jefcoats*, 164 Miss. 659, 143 So. 842 (1932).

RESEARCH REFERENCES

ALR. Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide. 17 A.L.R.4th 1128.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. 40 A.L.R.4th 702.

Liability of attorney for suicide of client

based on attorney's professional act or omission. 41 A.L.R.4th 351.

Am Jur. 40 Am. Jur. 2d, Homicide §§ 619 et seq.

12 Am. Jur. Proof of Facts, Suicide, Proofs 1-3.

33 Am. Jur. Proof of Facts 2d 211, Privileged Use of Force in Self-Defense.

CJS. 40 C.J.S., Homicide § 149.

83 C.J.S., Suicide § 4.

§ 97-3-51. Interstate removal of child under age fourteen by noncustodial parent or relative.

(1) For the purposes of this section, the following terms shall have the meaning herein ascribed unless the context otherwise clearly requires:

(a) "Child" means a person under the age of fourteen (14) years at the time a violation of this section is alleged to have occurred.

(b) "Court order" means an order, decree or judgment of any court of this state which is competent to decide child custody matters.

(2) It shall be unlawful for any noncustodial parent or relative with intent to violate a court order awarding custody of a child to another to remove the child from this state or to hold the child out of state after the entry of a court order.

(3) Any person convicted of a violation of subsection (2) of this section shall be guilty of a felony and may be punished by a fine of not more than Two Thousand Dollars (\$2,000.00), or by imprisonment in the state penitentiary for a term not to exceed three (3) years, or by both such fine and imprisonment.

(4) The provisions of this section shall not be construed to repeal, modify or amend any other criminal statute of this state.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (27, 29); 1857, ch. 64, arts. 186, 188; 1871, §§ 2649, 2651; 1880, §§ 2897, 2899; 1892, § 1171; Laws, 1906, § 1249; Hemingway's 1917, § 979; Laws, 1930, § 1007; Laws, 1942, § 2237; Former § 97-3-51, repealed, 1980, ch. 394; added, 1984, ch. 469; Laws, 1995, ch. 583, § 1, eff from and after July 1, 1995.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Venue in kidnapping cases, see § 99-11-13.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. False imprisonment as included offense with charge of kidnapping. 68 A.L.R.3d 828.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

Validity of state statute providing for termination of parental rights. 22 A.L.R.4th 774.

Court-authorized permanent or temporary removal of child by parent to foreign country. 30 A.L.R.4th 548.

Coercion, compulsion, or duress as defense to charge of kidnapping. 69 A.L.R.4th 1005.

Parties' misconduct as ground for declining jurisdiction under sec. 8 of the Uniform Child Custody Jurisdiction Act. 16 A.L.R.5th 650.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 A.L.R.5th 283.

Am Jur. 1 Am. Jur. 2d, Abduction and Kidnapping §§ 35 et seq.

59 Am. Jur. 2d, Parent and Child § 108.

§ 97-3-53. Kidnapping; punishment.

Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.

This section shall not be held to repeal, modify or amend any other criminal statute of this state.

SOURCES: Codes, 1942, § 2238; Laws, 1932, ch. 301; Laws, 1974, ch. 576, § 3; Laws, 2004, ch. 365, § 1, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment rewrote the first paragraph to revise the elements, including intent, necessary to secure a conviction for kidnapping.

Cross References — Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Abduction for purposes of marriage, see § 97-3-1.

Murder in commission of kidnapping as capital murder, see § 97-3-19.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Elements of offense.
3. Evidence.
4. Double jeopardy.
5. Sentencing; generally.
6. —Sentence by court.
- 7-15. [Reserved for future use.]

II. UNDER FORMER § 97-3-51.

16. In general.
17. Indictment.
18. Jury question.
19. Evidence.

I. UNDER CURRENT LAW.

1. In general.

Trial court properly accepted defendant's guilty plea to kidnapping, Miss. Code Ann. § 97-3-53; there was a factual basis for the acceptance, as defendant's act of forcing bank employees into a vault while defendant was robbing the bank constituted kidnapping. *Salter v. State*, 876 So. 2d 412 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Kidnapping statute, Miss. Code Ann. § 97-3-53, is not unconstitutionally vague because the use of other descriptive words in § 97-3-53, such as e.g. and inveigle, leave defendants well informed of the crimes of which they are accused. *Perkins v. State*, 863 So. 2d 47 (Miss. 2003).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

Under former provisions, when defendant was tried and convicted of rape,

robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Evidence of the physical facts, the place of the slaying, and confessions of defendant, were sufficient to establish the corpus delicti of the crime of kidnapping in violation of this section, so as to support a jury instruction following that statute in a prosecution for murder while engaged in the commission of the crime of kidnapping. *Wilcher v. State*, 448 So. 2d 927 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984), habeas corpus conditionally granted, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

In a prosecution for burglary, armed robbery, and kidnapping, the defendant's request for a directed verdict or a preemptory instruction on the ground that the evidence did not establish that he had intended to secretly confine the victim was properly rejected where the evidence established that the entire incident consumed at least five or six hours and the defendant and his victim had been in two public places for only a short period of time, with the victim confined in his own automobile for the remainder of the time. *Woods v. State*, 393 So. 2d 1319 (Miss. 1981).

Defendant's motion for a directed verdict in a kidnapping prosecution was improperly denied where the record did not disclose any evidence of secret confinement and where there was no credible

evidence that the victim was unlawfully or forcibly restrained by defendant. *Hinson v. State*, 360 So. 2d 934 (Miss. 1978).

A comma should have been placed in Code 1942 § 2238 after the words “or shall inveigle or kidnap another person (,)” so that the following clause “with intent to cause such person to be secretly confined or imprisoned against his or her will,” is a part of the entire sentence and refers to “forceably seize and confine” as well as to the clause “or shall inveigle or kidnap any other person.” *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

This section [Code 1942, § 2238] is not solely or primarily concerned with the kidnapping of children but is broader and treats two other types of kidnapping. *Brooks v. State*, 236 So. 2d 751 (Miss. 1970).

The state has the choice of indicting an alleged kidnapper under either Code 1942, § 2237 or § 2238. *Brooks v. State*, 236 So. 2d 751 (Miss. 1970).

Recommendation of defendant to mercy of court in verdict finding defendant guilty of kidnapping child held not to vitiate verdict. *Allen v. State*, 166 Miss. 551, 148 So. 634 (1933).

2. Elements of offense.

Kidnapping is not a specific intent crime; therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become kidnapping as opposed to the actual intent to kidnap. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Trial court did not err in failing to grant defendant's motion for a directed verdict on the charge of kidnapping because the fact that a mother knew where several children were during the commission of an assault did not invalidate a kidnapping conviction; the children were restrained in a closet during the mother's assault, and the father was not aware of the children's whereabouts. *Perkins v. State*, 863 So. 2d 47 (Miss. 2003).

When defendant forced his girlfriend into her kitchen, and then into a bedroom where he kept her confined for a considerable length of time, all the while holding a stun gun, which he had used to stun her, the evidence presented at trial was suffi-

cient to sustain defendant's conviction; the prosecution did not have to show asportation. *Russell v. State*, 832 So. 2d 551 (Miss. Ct. App. 2002), cert. denied, 832 So. 2d 533 (Miss. Ct. App. 2002).

One may commit the crime of kidnapping either by secretly confining a victim or by confining or imprisoning another against his or her will regardless of whether the confinement is secret; the element of secrecy is not fundamental to a kidnapping charge. *Culbert v. State*, 800 So. 2d 546 (Miss. Ct. App. 2001).

The adverb “secretly” modifies the verb immediately following; thus, with this reading the term “secretly confined” and the term “imprisoned” each stand alone as terms of art possessed of separate meanings. *Conley v. State*, 790 So. 2d 773 (Miss. 2001).

Inveigling has no component of force, but only of coaxing; one does not forcibly inveigle; thus, one can be convicted of kidnapping based on coaxing a victim into a vehicle with the intent secretly to confine her against her will. *Myers v. State*, 770 So. 2d 542 (Miss. Ct. App. 2000).

In order to convict a person of kidnapping, it must be shown that he seized and confined the victim “with the intent to secretly confine or imprison.” *Chevalier v. State*, 730 So. 2d 1111 (Miss. 1998).

Asportation was not element of kidnapping. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In a prosecution for capital murder while engaged in the crime of kidnapping, an instruction as to the underlying felony of kidnapping was proper even though it did not include “asportation” as an element of the crime. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

This section does not require the indictment to allege transportation of the victim. *Carr v. State*, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Since kidnapping is not a specific intent crime, it is sufficient that the circum-

stances resulted in such a manner as to effect a kidnapping as opposed to an actual intent to kidnap, i.e., it is not necessary to establish the mental state of intent by direct evidence. Additionally, the fact that the confinement is minor is of no consequence so long as it is present. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

An indictment was sufficient in charging the crime of kidnapping when it charged defendant with forcibly seizing and confining victim against his will and depriving him of his liberty, since this section does not require any allegation of transportation. *Brewer v. State*, 459 So. 2d 293 (Miss. 1984).

Under this section, crime of kidnapping may be accomplished by trickery and deceit as well as by force and jury issue is presented on whether defendant by his trickery intended to cause others to be secretly confined against their will where by defendant's confession he stated he intentionally gave victims wrong directions to his home so as to get them into deserted place, with intent to rob them after he got them there. *Wilcher v. State*, 448 So. 2d 927 (Miss. 1984), cert. denied, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984), habeas corpus conditionally granted, 978 F.2d 872 (5th Cir. 1992), reh'g denied, 981 F.2d 1254 (5th Cir. 1992), cert. denied, 510 U.S. 829, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993), vacated in part, 635 So. 2d 789 (Miss. 1993).

An indictment charging that defendant did wilfully, feloniously and without lawful authority forceably seize and confine an individual without her consent and against her will, contrary to the provisions of Code 1942 § 2238, and contrary to the statute in such cases made and provided and against the peace and dignity of the state, did not charge the crime of kidnapping under either Code 1942 §§ 2237 or 2238. *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

In order for one to be guilty of the crime of kidnapping, the victim must be unlawfully removed from a place where he has a right to be, to another place. *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

3. Evidence.

Owner testified that he locked the door-knob and shut the door after allowing defendant to enter his mobile home, and both the owner and a victim testified that defendant declined to sit down and that she stood facing them with her back to the door; according to the victim, defendant had her hand on the doorknob before three masked men rushed through the door, and she never saw any of the masked men point a gun at defendant. Also, immediately after the men left, defendant refused to help the victim untie the owner; thus, the evidence was sufficient, and defendant's convictions for burglary of a dwelling, robbery, kidnapping, and auto theft were not against the weight of the evidence. *Brown v. State*, 926 So. 2d 283 (Miss. Ct. App. 2006).

Evidence was sufficient to sustain defendant's convictions for aggravated assault, kidnapping, and unlawful possession of a firearm where, according to the victim's testimony, she was accosted by defendant who grabbed her, placed a gun to her head, and physically forced her into a van against her will; an eyewitness testified that he saw the victim jump out of the van and saw the van swing back in such a fashion so as to accomplish a "perfect hit" on the woman in flight. In addition, the State presented two witnesses attesting to the fact that defendant was in possession of a firearm, and it introduced the gun into evidence with additional proof that the gun was recovered when defendant was arrested. *Jones v. State*, 920 So. 2d 465 (Miss. 2006).

Defendant's conviction for attempted kidnapping in violation of Miss. Code Ann. § 97-3-53 and Miss. Code Ann. § 97-1-7 was proper where the evidence was sufficient to support the conviction. The evidence established that, among other things, defendant chased the victim down the street and grabbed her. *Carter v. State*, — So. 2d —, 2006 Miss. App. LEXIS 77 (Miss. Ct. App. Jan. 31, 2006).

Where the victim attempted to escape the home where defendant was murdering his wife, and defendant chased her and caught her in the neighbor's yard, telling her that he had a gun and he would shoot her, the evidence was sufficient to support

his conviction for kidnapping. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

There was sufficient evidence to support defendant's kidnapping conviction under Miss. Code Ann. § 97-3-53; the two victims' testimony established the necessary elements of kidnapping: they were persuaded to enter defendant's vehicle on the promise of a ride home, but were taken against their will to another location. *Davis v. State*, 863 So. 2d 1000 (Miss. Ct. App. 2004).

Defendant had the criminal intent required to commit the crime of kidnapping where: (1) when defendant decided to drive away with the victim in the car, he knew he was taking her against her will, (2) criminal intent to kidnap was not absent merely because defendant would not have driven off with the victim if she could have opened the door, and (3) defendant knew he was taking the victim away against her will when he drove the car away. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

There was sufficient evidence to support defendant's conviction for kidnapping because there was blood found inside of the victim's car, the victim was found in a ditch along a road where defendant proceeded, defendant was seen at a convenience store where the victim's car was found, and defendant presented a bloody dollar bill to the cashier for change. *Crosby v. State*, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Defendant claimed he intended to steal a car, and told the victim to get out, but, due to the failure of the door to open, he drove away with her still inside the car; his kidnapping conviction was affirmed, as the State had not been required to prove defendant had the specific intent to kidnap the woman, only that the surrounding circumstances effectively resulted in a kidnapping. *Murphy v. State*, — So. 2d —, 2003 Miss. App. LEXIS 683 (Miss. Ct. App. Aug. 5, 2003).

Evidence was sufficient to support a conviction for kidnapping where (1) a witness saw the defendant drag the victim

into the woods, (2) it was undisputed fact that the victim was high on drugs and drunk on alcohol on the night in question, which suggested that she might not have knowingly gone along with the defendant and his coperpetrators, that is, she was inveigled, (3) the defendant and his coperpetrators refused the victim's request to go back to a bar and retrieve her things, and (4) a struggle was suggested by the abused and mangled condition of the victim's body. *Williams v. Puckett*, 283 F.3d 272 (5th Cir. 2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 504, 154 L. Ed. 2d 411 (2002).

Evidence was sufficient to sustain defendant's convictions for kidnapping because defendant forcibly entered the victim's home with a shotgun in his hands and several rounds of ammunition; he also had two knives, duct tape, and a cord in his pockets, and the victims testified that they were scared; one victim stated that the victim was not free to leave. *Smiley v. State*, 798 So. 2d 584 (Miss. Ct. App. 2001).

Asportation was sufficiently proved to sustain a charge of kidnapping with respect to the actions of defendant, who, after his escape from jail, entered an automobile agency, demanded transportation, accosted two employees with a pistol and forced one of them to move from one part of the building to the other and held him prisoner there, since, though the employee was not removed from the premises of his employment, the asportation and confinement were intended by defendant to make good his escape and were not merely incidental to another and lesser crime; in such circumstances, the fact of confinement or asportation is sufficient to support kidnapping without regard to distance moved or time of confinement. *Cuevas v. State*, 338 So. 2d 1236 (Miss. 1976).

When one is forced at gunpoint to enter an automobile, and while confined therein is driven away against his will from a place where he has a right to be, en route and to a destination unknown to his friends and acquaintances, he is, within the meaning of § 2238, "secretly confined and imprisoned." *Fox v. Kouba*, 288 So. 2d 842 (Miss. 1974).

4. Double jeopardy.

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. *Moore v. State*, — So. 2d —, 2006 Miss. App. LEXIS 86 (Miss. Ct. App. Jan. 31, 2006).

A defendant's right to be shielded from double jeopardy was violated where the defendant was convicted and punished for both kidnapping under this section and capital murder while engaged in the crime of kidnapping under § 97-3-19(2)(e); since the defendant was indicted, tried and found guilty of capital murder under § 97-3-19(2)(e) with the kidnapping as the underlying felony, and thereafter exposed to trial for his life, the State was precluded from punishing him further for the kidnapping. *Meeks v. State*, 604 So. 2d 748 (Miss. 1992).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. *Brock v. State*, 530 So. 2d 146 (Miss. 1988).

There is no legal impediment to the State's mounting of three separate prosecutions for kidnapping under this section, forcible rape, and armed robbery, even though the three offenses arise out of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pre-trial and trial purposes, the trial court properly held that the de-

fendant had consciously waived any objections he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724 (Miss. 1984).

5. Sentencing; generally.

Trial court erred in sentencing defendant to 35 years each for six convictions for kidnapping because Miss. Code Ann. § 97-3-53 set the maximum punishment at 30 years. *Perkins v. State*, 863 So. 2d 47 (Miss. 2003).

While this section places a limit of 30 years on the sentence which may be imposed by the court for kidnapping if the jury fails to find that a life sentence should be imposed, § 97-3-65 does not impose a limitation for the penalty for rape although it, also, allows the jury to fix a penalty at life imprisonment; if the jury does not so fix the penalty under § 97-3-65, then it may be fixed for any term, less than life, as the court in its discretion may determine. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

Sentence of 45 years imprisonment for kidnapping exceeds sentence authorized under this section and requires resentencing. *Smith v. State*, 477 So. 2d 259 (Miss. 1985).

In a prosecution for burglary, armed robbery, and kidnapping in which the defendant had been sentenced to serve 15 years under the burglary verdict and a life sentence under each of the armed robbery and kidnapping verdicts after the jury had been unable to agree upon a penalty under the armed robbery and kidnapping charges, the case would be remanded to the trial court for resentencing where the trial court had failed to indicate whether the sentences were to run consecutively or concurrently and where, since the jury had been unable to arrive at a sentence for either of these convictions, the maximum sentence permissible for the kidnapping conviction under this section was 30 years and the maximum sentence for the armed robbery conviction was only the number of years that reasonably would be calculated to be less than life for that particular accused. *Woods v. State*, 393 So. 2d 1319 (Miss. 1981).

A defendant convicted of kidnapping was improperly sentenced to life imprisonment under this section where it was impossible to ascertain from the indictment whether defendant had been indicted under this section or § 97-3-51, which carried a maximum punishment of ten years imprisonment; when the facts which constitute a criminal offense may fall under either of two statutes, or when there is a substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. *White v. State*, 374 So. 2d 225 (Miss. 1979).

The legislature did not intend to inflict the death penalty for such minor offenses as seizing and holding another in a fist fight or seizing, hugging and kissing a woman without her consent. *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

6. —Sentence by court.

A trial court's sentencing of a defendant to life imprisonment after the defendant pled guilty to kidnapping constituted plain error, since a defendant convicted under this section may not be sentenced to life imprisonment unless the jury fixes the penalty at life. Since the defendant pled guilty to the charge of kidnapping, the issue of his sentence was not submitted to a jury, but rather to the trial judge, who had the authority to fix the penalty at not less than one year nor more than 30 years in the state penitentiary under the statute. *Grubb v. State*, 584 So. 2d 786 (Miss. 1991).

On convictions for kidnapping and rape pursuant to this section and § 97-3-65, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed

without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

Where a jury merely finds a defendant guilty of kidnapping under this section [Code 1942, § 2238] and does not fix the punishment at death or life imprisonment, the trial court shall sentence the defendant to the penitentiary for a term of not less than one year or more than 30 years. *Brooks v. State*, 236 So. 2d 751 (Miss. 1970).

Where jury merely found defendant guilty of kidnapping child, and did not fix punishment at death or life imprisonment, court's sentence to penitentiary held proper. *Allen v. State*, 166 Miss. 551, 148 So. 634 (1933).

7-15. [Reserved for future use.]

II. UNDER FORMER § 97-3-51.

16. In general.

Since kidnapping is not a specific intent crime, it is sufficient that the circumstances resulted in such a manner as to effect a kidnapping as opposed to an actual intent to kidnap, i.e., it is not necessary to establish the mental state of intent by direct evidence. Additionally, the fact that the confinement is minor is of no consequence so long as it is present. *Williams v. State*, 544 So. 2d 782 (Miss. 1987), post-conviction relief denied, 669 So. 2d 44 (Miss. 1996).

Since the doctrine of collateral estoppel contemplates a prior adjudication of an issue by the trier of the facts, the doctrine did not require the court to decline a verdict of guilty of aggravated assault, returned along with a verdict of not guilty of attempted kidnapping, both charges arising from the same facts, since the 2 indictments had been consolidated and

simultaneously submitted to the jury, and there had been no prior adjudication of any issue. *Johnson v. State*, 491 So. 2d 834 (Miss. 1986).

A defendant previously convicted of kidnapping was not subjected to double jeopardy at his subsequent trial for rape of his kidnaper victim since he had committed two separate offenses when he had raped his kidnaper victim. The trial court properly admitted evidence and exhibits of the crime of rape at the kidnapping trial since evidence of other crimes is admissible to prove motive and a connection between the act proposed to be proved and the crime charged. *Hughes v. State*, 401 So. 2d 1100 (Miss. 1981).

In order for one to be guilty of the crime of kidnapping, the victim must be unlawfully removed from a place where he has a right to be, to another place. *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

Where a defendant intends to kidnap a child within the meaning of this section [Code 1942, § 2237], his ultimate motive in confining or depriving her of her liberty is immaterial. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537 (1957).

Guardian cannot be convicted for seizing ward. *Hemphill v. State*, 127 Miss. 805, 90 So. 488 (1922).

Father who by agreement surrenders minor child to wife, not guilty of kidnapping because he enticed child away from her. *State v. Powe*, 107 Miss. 770, 66 So. 207 (1914).

17. Indictment.

A defendant convicted of kidnapping was improperly sentenced to life imprisonment under this section where it was impossible to ascertain from the indictment whether defendant had been indicted under this section or § 97-3-51, which carried a maximum punishment of ten years imprisonment; when the facts which constitute a criminal offense may fall under either of two statutes, or when there is a substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment. *White v. State*, 374 So. 2d 225 (Miss. 1979).

An indictment charging that defendant did wilfully, feloniously and without lawful authority forcibly seize and confine

an individual without her consent and against her will, contrary to the provisions of Code 1942 § 2238, and contrary to the statute in such cases made and provided and against the peace and dignity of the state, did not charge the crime of kidnapping under either Code 1942 §§ 2237 or 2238. *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973).

The state has the choice of indicting an alleged kidnapper under either Code 1942, § 2237 or § 2238. *Brooks v. State*, 236 So. 2d 751 (Miss. 1970).

This section [Code 1942, § 2237] not only makes it a crime to forcibly seize and confine another, but it also makes it a crime to inveigle another and then kidnap such other person with the intent to cause him to be deprived of his liberty; and an indictment which charges that the victim was "forcibly inveigled" is sufficient. *Buckley v. State*, 223 So. 2d 524 (Miss. 1969).

An indictment which in substance charged that the accused did unlawfully and feloniously make an assault upon the victim and did forcibly lay hold of her and unlawfully and forcibly did seize, confine and kidnap her, without her consent, and against her will, with the intent to cause her to be deprived of her liberty was not duplicitous because the means of carrying out the crime of kidnapping charged involves an element which would constitute the crime of assault. *Bevel v. State*, 213 Miss. 208, 56 So. 2d 500 (1952).

18. Jury question.

In a kidnapping prosecution, a defendant who contended that he took no part in the commission of the crime and was guilty of nothing more than a failure to prevent another from kidnapping, beating and robbing the victim, but who admitted that he was present at all times, and who, at the time of his arrest, was in possession of articles taken from the victim, was not entitled to a peremptory instruction, the question of his guilt being for the jury. *Hall v. State*, 220 So. 2d 279 (Miss. 1969).

19. Evidence.

Evidence was sufficient to sustain conviction for attempted kidnapping where defendant had taken part in attempted kidnapping after failing to follow through with plan to rob grocery store, despite

defendant's contention that he took no part in plan or effort to rob or kidnap grocery store customer. *Jenkins v. State*, 507 So. 2d 89 (Miss. 1987).

Evidence that kidnapping defendant misled victim in asking victim to give defendant automobile ride to defendant's house and wound up on secluded country road, that defendant grabbed steering wheel and pulled automobile off road into secluded driveway barricaded by padlocked metal gate against victim's wishes, and that defendant struck victim on head and behind neck is sufficient for jury to find that victim was secretly confined against will, as required for conviction. *Haymond v. State*, 478 So. 2d 297 (Miss. 1985).

In a prosecution for kidnaping, the evidence was sufficient to support the verdict of guilty where the victim testified that

the defendant had come to her home and, having induced her to enter her car by false representation, had forced her to drive to an unknown destination by his threat that he had a gun. *Ulmer v. State*, 406 So. 2d 828 (Miss. 1981).

Undisputed showing that the defendant used some force and a great deal of persuasion and maneuvering to get a nine-year-old female child to go with him, and persisted in his efforts to the extent of taking the child about two blocks in one direction from the place from where she had wanted to go, and then, when she had got away from him, he pursued her until she arrived at the door of the place where her mother was, was sufficient to sustain the charge of attempted kidnapping. *McGuire v. State*, 231 Miss. 375, 95 So. 2d 537 (1957).

RESEARCH REFERENCES

ALR. Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 17 A.L.R.2d 1003.

Kidnapping by fraud or false pretenses. 95 A.L.R.2d 450.

Seizure or detention for purposes of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 A.L.R.3d 699.

Seizure of prison official by inmates as kidnapping. 59 A.L.R.3d 1306.

False imprisonment as included offense within charge of kidnapping. 68 A.L.R.3d 828.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim. 98 A.L.R.3d 733.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis. 20 A.L.R.4th 823.

Coercion, compulsion, or duress as defense to charge of kidnapping. 69 A.L.R.4th 1005.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 A.L.R.5th 283.

Presumption that kidnapped person has been transported in interstate or foreign commerce, under 18 USCS § 1201(b). 49 A.L.R. Fed. 936.

Am Jur. 1 Am. Jur. 2d, Abduction and Kidnapping §§ 59-61.

2 Am. Jur. Trials, Investigating Particular Crimes § 67 (kidnapping).

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS. 51 C.J.S., Kidnapping §§ 1-27.

Practice References. McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-54. Anti-Human Trafficking Act; short title.

Sections 97-3-54 through 97-3-54.4 may be known and cited as the Mississippi Anti-Human Trafficking Act.

SOURCES: Laws, 2006, ch. 583, § 2, eff from and after July 1, 2006.

§ 97-3-54.1. Anti-Human Trafficking Act; prohibited conduct; penalty.

(1)(a) A person who recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services, shall be guilty of the crime of human-trafficking.

(b) A person who knowingly subjects, or attempts to subject, another person to forced labor or services shall be guilty of the crime of procuring involuntary servitude.

(c) A person who knowingly subjects, or attempts to subject, or who recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, a minor, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of sexually oriented material, or causes or attempts to cause a minor to engage in commercial sexual activity, sexually explicit performance, or the production of sexually oriented material, shall be guilty of procuring sexual servitude of a minor and shall be punished by commitment to the custody of the Department of Corrections for not more than thirty (30) years.

(2) A person who is convicted of an offense set forth in subsection (1)(a) or (b) of this section, or who benefits, whether financially or by receiving anything of value, from participation in a venture that has engaged in an act described in this section, shall be committed to the custody of the Department of Corrections for not more than twenty (20) years.

SOURCES: Laws, 2006, ch. 583, § 3, eff from and after July 1, 2006.

§ 97-3-54.2. Anti-Human Trafficking Act; destruction, concealment, or confiscation of passport or other immigration document for purpose of preventing person's freedom of movement or ability to travel; penalties.

Anyone who knowingly destroys, conceals, removes, confiscates or possesses, or attempts to destroy, conceal, remove, confiscate or possess, any actual or purported passport or other immigration document, or any other actual or purported government identification document of any person to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor or services of that person, when the person is or has been a victim of a violation set out in Section 97-3-54.1, shall be punished by commitment to the custody of the Department of Corrections for not more than five (5) years.

SOURCES: Laws, 2006, ch. 583, § 4, eff from and after July 1, 2006.

§ 97-3-54.3. Anti-Human Trafficking Act; aiding, abetting, or conspiring to violate anti-human trafficking provisions.

A person who knowingly aids, abets or conspires with one or more persons to violate Sections 97-3-54 through 97-3-54.4 shall be considered a principal in the offense and shall be indicted and punished as such whether the principal has been previously convicted or not.

SOURCES: Laws, 2006, ch. 583, § 5, eff from and after July 1, 2006.

§ 97-3-54.4. Anti-Human Trafficking Act; definitions.

For the purposes of Sections 97-3-54 through 97-3-54.4, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Actor" means a person who violates any of the provisions of this act.

(b) "Blackmail" means obtaining property or things of value of another by threatening to (i) inflict bodily injury on anyone; (ii) commit any other criminal offense; or (iii) expose any secret tending to subject any person to hatred, contempt or ridicule.

(c) "Commercial sexual activity" means any sex act on account of which anything of value is given to, promised to, or received by any person.

(d) "Financial harm" includes, but is not limited to, extortion as defined by Section 97-3-82, Mississippi Code of 1972, or violation of the usury law as defined by Title 75, Chapter 17, Mississippi Code of 1972.

(e) "Forced labor or services" means labor or services that are performed or provided by another person and are obtained or maintained through an actor:

(i) Causing or threatening to cause serious harm to any person;

(ii) Physically restraining or threatening to physically restrain any person;

(iii) Abusing or threatening to abuse the law or legal process;

(iv) Knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;

(v) Using blackmail;

(vi) Causing or threatening to cause financial harm to any person; or

(vii) Using any scheme, plan or pattern intended to cause any person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

(f) "Labor" means work of economic or financial value.

(g) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the trafficked person to perform such labor or service.

(h) "Minor" means a person under the age of eighteen (18) years.

(i) "Obtain" means, in relation to labor or services, to secure performance thereof.

(j) "Services" means an ongoing relationship between a person and the

actor in which the person performs activities under the supervision of or for the benefit of the actor or a third party. Commercial sexual activity and sexually-explicit performances shall be considered services under Sections 2 through 6 of this act.

(k) "Sexually-explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(l) "Trafficked person" means a person subjected to the practices prohibited by this act and is a term used interchangeably with the terms "victim of trafficking" and "trafficking victim."

(m) "Venture" means any group of two (2) or more individuals associated in fact, whether or not a legal entity.

(n) "Sexually oriented material" shall have the meaning ascribed in Section 97-5-27, Mississippi Code of 1972.

SOURCES: Laws, 2006, ch. 583, § 6, eff from and after July 1, 2006.

§ 97-3-55. Libel; penalty.

Any person who shall be convicted of writing or publishing any libel, shall be fined in such sum or imprisoned in the county jail for such term as the court, in its discretion, may adjudge, having regard to the nature and enormity of the offense, or be punished by both such fine and imprisonment.

SOURCES: Codes, Hutchinson's 1848, ch. 65, art. 2 (61); 1857, ch 64, art. 199; 1871, § 2706; 1880, § 2195; 1892, § 1197; Laws, 1906, § 1275; Hemingway's 1917, § 1007; Laws, 1930, § 1036; Laws, 1942, § 2268.

Cross References — Constitutional provision that truth may be given in evidence, see Miss Const Art. 3, § 13.

Libel and slander, see § 95-1-1 et seq.

Posting or publishing another for not fighting a duel, see § 97-39-7.

Requisites of indictment in libel cases, see § 99-7-33.

JUDICIAL DECISIONS

1. In general.

Where the Mississippi criminal libel statute dealt merely with punishment and did not define the crime of libel, and where there had been no judicial definition of the crime since the United States Supreme Court declared that the First Amendment

is applicable to the states by virtue of the Fourteenth Amendment, the elements of the crime were so uncertain and indefinite, that it would not be enforced as a penal offense. *Boydston v. State*, 249 So. 2d 411 (Miss. 1971).

RESEARCH REFERENCES

ALR. Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Defamation: Publication of letter to editor in newspaper as actionable. 54 A.L.R.5th 443.

Am Jur. 50 Am. Jur. 2d, Libel and Slander §§ 520 et seq.

CJS. 53 C.J.S., Libel and Slander; Injurious Falsehood §§ 16 et seq.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-57. Libel; truth as defense.

In every criminal prosecution for libel it shall be lawful for the defendant, upon the trial, to give in evidence the truth of the matter written or published, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 2 (60); 1857, ch. 64, art. 200; 1871, § 2707; 1880, § 2916; 1892, § 1198; Laws, 1906, § 1276; Hemingway's 1917, § 1008; Laws, 1930, § 1037; Laws, 1942, § 2269.

Cross References — Constitutional provision that truth may be given in evidence, see Miss Const Art. 3, § 13.

Libel and slander, see § 95-1-1 et seq.

Posting or publishing another for not fighting a duel, see § 97-39-7.

Requisites of indictment in libel cases, see § 99-7-33.

JUDICIAL DECISIONS

1. In general.

False communication addressed to general public, imputing criminal offense or moral delinquency to a public officer in

discharge of his duty, not privileged though made in good faith and on probable cause; motive being immaterial. *Oakes v. State*, 98 Miss. 80, 54 So. 79 (1910).

RESEARCH REFERENCES

ALR. Joinder in defamation action, of denial and plea of truth of statement. 21 A.L.R.2d 813.

Validity of criminal defamation statutes. 68 A.L.R.4th 1014.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Defamation: Publication of letter to editor in newspaper as actionable. 54 A.L.R.5th 443.

Am Jur. 50 Am. Jur. 2d, Libel and Slander §§ 538 et seq.

CJS. 53 C.J.S., Libel and Slander: Injurious Falsehood §§ 16 et seq.

Law Reviews. Comment, *Ferguson v. Watkins: The Vortex Within Mississippi Defamation Law*. 55 Miss. L. J. 619, September, 1985.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-59. Mayhem.

Every person who, from premeditated design or with intent to kill or commit any felony, shall mutilate, disfigure, disable or destroy the tongue, eye, lip, nose, or any other limb or member of any person, shall be guilty of

mayhem, and, on conviction thereof, shall be punished by imprisonment in the penitentiary not more than seven years or in the county jail not less than six months.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (26); 1857, ch. 64, art. 203; 1871, § 2710; 1880, § 2920; 1892, § 1210; Laws, 1906, § 1288; Hemingway's 1917, § 1020; Laws, 1930, § 1051; Laws, 1942, § 2283.

Cross References — Assault and battery, see § 97-3-7.

JUDICIAL DECISIONS

1. In general.

In prosecution for aggravated assault, defendant is entitled to a lesser included offense jury instruction for mayhem as long as there is some proof that shows him to be innocent of aggravated assault, but at same time only guilty of mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Defendant was not entitled to instruction on mayhem, as lesser included offense of aggravated assault, since same proof that established aggravated assault also established mayhem. *Hoops v. State*, 681 So. 2d 521 (Miss. 1996).

Where the defendant was on trial charged with violation of this section

[Code 1942, § 2283], an instruction for the prosecution which used the words "deliberate design" rather than the statutory words, "premeditated design", did not constitute error for deliberate is a synonym for premeditated. *Emily v. State*, 191 So. 2d 925 (Miss. 1966).

Evidence justified the jury in finding that defendant's action in striking the victim in the face with a broken Coke bottle, cutting his nose and destroying one eye, was an act done from a premeditated design to mutilate and disfigure his victim. *Emily v. State*, 191 So. 2d 925 (Miss. 1966).

RESEARCH REFERENCES

ALR. Consent as defense to charge of mayhem. 86 A.L.R.2d 268.

Am Jur. 53 Am. Jur. 2d, Mayhem and Related Offenses §§ 1 et seq.

CJS. 56 C.J.S., Mayhem §§ 2 et seq.

§ 97-3-61. Poisoning with intent to kill or injure.

Every person who shall mingle any poison with any food, drink, or medicine with intent to kill or injure any human being, or who shall wilfully poison any well, spring, or reservoir of water, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (35); 1857, ch. 64, art. 214; 1871, § 2670; 1880, § 2937; 1892, § 1255; Laws, 1906, § 1331; Hemingway's 1917, § 1064; Laws, 1930, § 1095; Laws, 1942, § 2328.

Cross References — Poisoning person with intent to kill where death does not ensue, see § 97-3-63.

Poisoning animals, see § 97-41-17.

JUDICIAL DECISIONS

1. In general.
2. Indictment.

1. In general.

Under this section [Code 1942, § 2328] the corpus delicti is the mingling of the poison with the food, drink or medicine. *Stanley v. State*, 82 Miss. 498, 34 So. 360 (1903).

It is essential under this section [Code 1942, § 2328] to charge that the poison was mingled with the intent maliciously to kill. *Taylor v. State*, 74 Miss. 544, 21 So. 129 (1897).

2. Indictment.

Any duplicity in the indictment, as charging two offenses in the same count,

was cured by the judgment of conviction. *Randle v. State*, 105 Miss. 561, 62 So. 428 (1913).

Indictment charging mingling of carbolic acid with whiskey with intent to kill and injure a certain person, not demurrable as charging two distinct offenses. *State v. Clark*, 97 Miss. 806, 52 So. 691 (1910).

Unnecessary for indictment to charge to whom poison belonged or substance with which mixed, or that it was in possession of person for whom intended, or that such person was about or intended to drink same; corpus delicti consists of mingling poison with food, drink or medicine. *State v. Clark*, 97 Miss. 806, 52 So. 691 (1910).

RESEARCH REFERENCES

Am Jur. 40 *Am. Jur.* 2d, Homicide § 455.

30 *Am. Jur.* Proof of Facts 2d 1, Foreign Substance in Food or Beverage.

31 *Am. Jur.* Proof of Facts 2d 81, Food Poisoning.

2 *Am. Jur.* Trials, Investigating Particular Crimes §§ 54-56 (homicide by poisoning).

§ 97-3-63. Poisoning with intent to kill; where death does not ensue.

Every person who shall be convicted of having administered, or having caused or procured to be administered, any poison to any human being with intent to kill such human being, whereof death shall not ensue, shall be punished by imprisonment in the penitentiary for a term not less than ten years.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 3 (34); 1857, ch 64, art. 213, 1871; § 2669; 1880, § 2936; 1892, § 1254; *Laws*, 1906, § 1330; *Hemingway's* 1917, § 1063; *Laws*, 1930, § 1094; *Laws*, 1942, § 2327.

Cross References — Poisoning food or drink, generally, see § 97-3-61. Poisoning animals, see § 97-41-17.

JUDICIAL DECISIONS

1. In general.

Any duplicity in an indictment for violating this provision, as charging two offenses in the same count, is cured by a judgment of conviction. *Randle v. State*, 105 Miss. 561, 62 So. 428 (1913).

Under a former statute making actual

taking of the poison an element of the crime, word "taken" was held to mean any method by which the system is made to absorb poison designedly administered. *State v. Stuart*, 88 Miss. 406, 40 So. 1010 (1906).

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Homicide §§ 601 et seq.
CJS. 40 C.J.S., Homicide §§ 95, 98.
 2 Am. Jur. Trials, Investigating Particular Crimes §§ 54-56 (homicide by poisoning).

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

- (i) Is at least fourteen (14) but under sixteen (16) years of age;
- (ii) Is thirty-six (36) or more months younger than the person; and
- (iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

- (i) Is under the age of fourteen (14) years;
- (ii) Is twenty-four (24) or more months younger than the person; and
- (iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under paragraph (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under paragraph (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under paragraph (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4)(a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce

such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; Laws, 1906, § 1358; Hemingway's 1917, § 1092; Laws, 1930, § 1122; Laws, 1942, § 2358; Laws, 1908, ch. 171; Laws, 1974, ch. 576, § 8; Laws, 1977, ch. 458, § 7; Laws, 1985, ch. 389, § 3; Laws, 1993, ch. 497, § 1; Laws, 1998, ch. 549, § 2, eff from and after July 1, 1998.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error. The paragraph designation "(1)(c)" was changed to (2) and the remaining paragraphs were renumbered accordingly. In (3)(d) the word "paragraphs" was changed to "paragraph". The Joint Committee ratified the correction at its June 3, 2003 meeting, and the section has been reprinted in the supplement to reflect the corrected language.

Editor's Note — Laws, 1998, ch. 549, § 8, provides as follows:

"SECTION 8. The Department of Human Services is hereby directed to establish an informational campaign in order to disseminate to the public appropriate information concerning the statutory rape laws, subject to the approval of the office of the Attorney General as to the substantive content of the information to be disseminated."

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Effect of conviction of certain crimes as disqualification to hold office in labor union or to participate in labor management functions, see § 71-1-49.

Abduction of females, see § 97-3-1.

Murder in the commission of rape as constituting capital murder, see § 97-3-19.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Enticing children for prostitution or marriage, see § 97-5-5.

Seduction of female child, see § 97-29-55.

Violation of person of female child, see § 97-5-23.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Limitations of prosecutions generally, see § 99-1-5.

Requirement that an indictment for capital murder state specifically the section of the code defining the offense alleged to have been committed, see § 99-17-20.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

I. IN GENERAL.

1. In general.
2. Elements of offense.
3. Consent.
4. Constitutionality.
5. Indictment.
6. Sentence.
7. Plea of guilty.
8. Instructions.
9. Setting aside conviction.
- 9.5. Effective assistance of counsel.

II. EVIDENTIARY MATTERS.

10. In general.
11. Belongings of victim.
12. Chastity of victim.
13. Competency; child's testimony.
14. Consent of victim.
15. Victims statement to third party.
16. Photographs.
17. Confession of accused.
18. Conduct of accused; previous or criminal.
19. Sufficiency of evidence; generally.
20. —Corroborating evidence.
21. —Uncorroborating evidence.

III. UNDER FORMER § 97-5-21.

22. In general.
23. Indictment.
24. Evidence.

IV. UNDER FORMER § 97-3-67.

25. In general.
26. Evidence; generally.
27. —Chastity of victim.
28. Corroboration.

I. IN GENERAL.

1. In general.

Resistance is not required for rape; absence of resistance on account of fear caused by the assailant does not bar an attack from being rape. *Madere v. State*, 794 So. 2d 200 (Miss. 2001).

Age is critical element of crimes of capital and statutory rape; capital rape requires rape of a child under age 14 by one over age 18, while statutory rape requires carnal knowledge of unmarried person of previously chaste character younger than himself or herself and over 14 and under 18 years of age. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

While age serves as line of demarcation for purposes of potential penalty for capital rape, age is defining characteristic of statutory rape, be it forcible or not. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Capital rape statute has same purpose as does statutory rape statute, which is protection of children of a specified age; at heart of statutes is core concern that children should not be exploited for sexual purposes regardless of their "consent," because they simply cannot appreciate significance or consequences of their actions. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

In a prosecution for forcible rape of a female adult, the failure to administer to the jury the special oath in capital cases required by § 13-5-73 was not error where the jury received the oath of petit jurors prescribed by § 13-5-71 which is substantially equivalent to the special oath, the defendant refused any attempt by the trial judge to cure the omission, the defendant was not taxed by the jury with the maximum sentence of life imprisonment, and a special venire was neither requested nor empaneled in the trial of the case, but rather the jury was selected and accepted from the regular panel for the week. *Wilburn v. State*, 608 So. 2d 702 (Miss. 1992).

A conviction for rape under this section, once final, established the assailant's fault in tort in a civil action for assault and battery brought by the victim. *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990).

The venue of a kidnapping and rape trial was proper in the county in which the kidnapping and violence leading to the rape commenced, and in which the defense counsel admitted that the first contact between the defendant and the victim, which was determined by the jury to have been a kidnapping, took place. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

In subsection (2) of this section, reference to "the jury" is synonymous to "the trier of facts." Thus, where a defendant waived trial by jury and requested a bench trial with the trial judge sitting as jury and judge, the trial judge had the authority to sentence the defendant to life imprisonment, after sitting as a jury, since the judge was the "trier of facts" and substituted for the jury, which ordinarily is the "trier of facts" in a criminal case. *Evans v. State*, 547 So. 2d 38 (Miss. 1989).

Jurisdiction for prosecution of 15 year old for rape, offense potentially punishable by life sentence, is in circuit court, to exclusion of youth court, notwithstanding defendant's claim of interrogation in violation of Youth Court Act (§ 43-21-311). *Winters v. State*, 473 So. 2d 452 (Miss. 1985).

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. *McKorkle v. State*, 305 So. 2d 361 (Miss. 1974).

One whose confession and testimony indicate the commission of rape is properly denied a release on bond in habeas corpus proceedings. *Reed v. Gilfoy*, 246 Miss. 46, 148 So. 2d 714 (1963).

Where rape or attempted rape is charged to have been forcible and against

female's will and proof supports such charge, age of female need not be proved. *Tillman v. State*, 158 Miss. 802, 131 So. 265 (1930).

2. Elements of offense.

Evidence was legally insufficient to show the sexual intercourse element of statutory rape as it did not show, as required by statute, that defendant inserted defendant's male sexual organ into the victim's vagina, and, thus, defendant's conviction on two counts of statutory rape could not be upheld on appeal. *Pittman v. State*, 836 So. 2d 779 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952 (Miss. Ct. App. 2003).

"Mistake of age" is not defense to crime of capital rape. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Statutory rape is not lesser included offense of capital rape; capital rape requires rape of child under age of 14, but statutory rape requires that child be over 14 but under age of 18. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Age of accused is sine qua non of crime of capital rape which requires proof by state at trial. *Fisher v. State*, 690 So. 2d 268 (Miss. 1996).

The elements required to prove attempted capital rape are: (1) a design and endeavor to rape one less than 14 years old by one at least 18 years old, (2) an overt act toward the commission of rape, and (3) failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220 (Miss. 1995).

It is possible in some circumstances to commit forcible rape without committing child fondling, and thus child fondling under § 97-5-23 is not a necessarily included offense of forcible rape under subsection (2) of this section as it read prior to amendment in 1985. *Hailey v. State*, 537 So. 2d 411 (Miss. 1988).

A defendant's grabbing of the victim by the throat, threatening to beat her up if she did not remove her clothes, and announcing his intent to rape her, consti-

tuted an "overt act" for attempted rape. *Pruitt v. State*, 528 So. 2d 828 (Miss. 1988).

Failure of prosecution to introduce evidence of force does not render evidence insufficient to support rape conviction where defense offered is not consent on part of victim but rather alibi, alibi defense is discredited, and proof shows beyond reasonable doubt that victim surrendered because of fear arising out of reasonable apprehension of great bodily harm. *Stewart v. State*, 466 So. 2d 906 (Miss. 1985).

Lewd suggestion to victim coupled with physically grabbing victim and attempting to carry her away only to have her break free comes near enough to accomplishment of rape as to constitute crime of attempted rape. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. *McKorkle v. State*, 305 So. 2d 361 (Miss. 1974).

A necessary element of the crime of rape is that some penetration of the female's private parts by the sexual organ of the assailant must occur and this is true in every case except where the female is under twelve years of age and even then it must be shown that her private parts had been lacerated or torn in attempt to have carnal knowledge of her. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

Under this section [Code 1942, § 2358] the previous chaste character of a female is not an essential element of rape. *Thames v. State*, 221 Miss. 573, 73 So. 2d 134 (1954).

In prosecution for rape under this section [Code 1942, § 2358], act must be committed against victim's will; initial force is not enough, but resistance must continue to end. *Moss v. State*, 208 Miss. 531, 45 So. 2d 125 (1950).

Characterization in argument by state's attorney of defendant and his witness as "jackals" and "thugs" is not prejudicially erroneous in view of crime with which defendant was charged and admission on part of defendant and witness of commission of several grave felonies, including burglary. *Moss v. State*, 208 Miss. 531, 45 So. 2d 125 (1950).

3. Consent.

Where the victim is under the age of consent, it is not material whether the rape was accomplished by force or violence and against the will of the child; consent is not a defense to the charge. *Winston v. State*, 754 So. 2d 1154 (Miss. 1999).

Rape victim's testimony that defendant had a dark object in his hand, which she thought was a knife, and that defendant told her to be quiet or he would cut her throat could have supported jury finding that victim acted out of reasonable apprehension of great bodily harm, as required for jury instruction indicating that physical resistance on part of victim is unnecessary if victim acted out of reasonable apprehension of great bodily harm. *Hull v. State*, 687 So. 2d 708 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997).

There was no merit to defendant's unsupported arguments that lack of consent and use of force were not proven; suggestion that act was not rape where victim responded to defendant's actions while believing him to be her husband and that penetration occurred before she realized he was not was rejected. *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988).

Consent was not an issue where the male defendant, who was over 18 years of age, was charged with unlawful carnal knowledge of a female under the age of 12 years. *McBride v. State*, 492 So. 2d 581 (Miss. 1986).

It is immaterial whether the rape of an eight-year-old child was accomplished by force or violence, or against the will of the victim; for a child of such tender years is obviously under the age of consent. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

If woman, though she resists at first, eventually gives in and consents to intercourse, it is not rape, provided that the

consent be willing and free of the initial coercion. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

Absence of resistance on account of fear caused by assailant does not prevent attack being rape. *Milton v. State*, 142 Miss. 364, 107 So. 423 (1926).

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent unless she be overcome by drugs or other means. *Anderson v. State*, 82 Miss. 784, 35 So. 202 (1903), overruled on other grounds, *Lauderdale v. State*, 227 Miss. 113, 85 So. 2d 822 (1956).

4. Constitutionality.

Where defendant was tried in a second case for statutory rape, sexual battery, and fondling, double jeopardy was not violated; while the victims were the same, the factual bases supporting the charges in the current indictment were totally different from the factual bases undergirding the charges in the first case. *Moses v. State*, 885 So. 2d 730 (Miss. Ct. App. 2004).

People of ordinary intelligence have the ability to understand what behavior "forcible sexual intercourse" is designed to discourage; the word "forcible" is no more vague or overly broad than "forcibly ravish;" Miss. Code Ann. § 97-3-65(3)(a). *Madere v. State*, 794 So. 2d 200 (Miss. 2001).

A defendant's constitutional right to privacy was not violated by the State's taking the defendant to the health department for treatment of gonorrhea where the defendant was charged with capital rape of a child who was found to have gonorrhea, since the State's interest in operating a prison and providing for the health of inmates outweighed the privacy interests of the defendant. *Ormond v. State*, 599 So. 2d 951 (Miss. 1992).

A defendant's Sixth Amendment right to a public trial was not violated by the exclusion of the public from his rape trial during the victim's testimony where the trial judge held an evidentiary hearing and made findings sufficient to exclude members of the public during the victim's testimony, and where the court officials, the defendant, legal counsel and the jury

were never excluded from the courtroom. *Lee v. State*, 529 So. 2d 181 (Miss. 1988).

This section, which proscribes rape of a female, does not deny equal protection of the laws to males since it is the victim, not the accused, who must be a female under the wording of this statute; furthermore, by the very nature of the crime, it is the male who must make the criminal assault in order to sustain a conviction and there is no rational basis to attempt to apply this statute to any female accused. *Dixon v. State*, 519 So. 2d 1226 (Miss. 1988).

There was no merit to defendant's unsupported arguments that lack of consent and use of force were not proven; suggestion that act was not rape where victim responded to defendant's actions while believing him to be her husband and that penetration occurred before she realized he was not was rejected. *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988).

Rape statute (this section) does not, by providing 2 punishments for crime of rape depending upon age of victim, violate equal protection clause of Fourteenth Amendment of Constitution of United States. *Winters v. State*, 473 So. 2d 452 (Miss. 1985).

Sentencing provision of rape statute (this section) which subjects defendant who seeks jury trial to hazard of life imprisonment does not violate constitution. *Cunningham v. State*, 467 So. 2d 902 (Miss. 1985).

Criminal statute (this section) which establishes crime for rape of female but fails to make it crime to rape male does not violate equal protection clause. *Harper v. State*, 463 So. 2d 1036 (Miss. 1985).

Evidence was sufficient in a prosecution for carnal knowledge of a 6-year-old girl to sustain defendant's conviction, where, although there was no direct evidence of penetration, the defendant had been seen on top of the child in the very act of committing the rape, and the examining doctor's testimony showed penetration to the extent of causing traumatic injury to the child's major and minor labias; moreover, this section is not unconstitutional on the basis that it carries the death penalty, nor does it unconstitutionally discriminate against males. *Jackson v. State*, 452 So. 2d 438 (Miss. 1984).

This section, governing sentencing procedures in rape cases, does not violate due process or equal protection of the law, even though no provision is made for the jury to consider mitigating circumstances in fixing a defendant's sentence; the rule requiring a bifurcated trial is applicable only to cases involving capital offenses. *White v. State*, 375 So. 2d 220 (Miss. 1979).

Code 1942, § 2358, under which the defendant was sentenced for the crime of rape, was not unconstitutional as cruel and unusual in imposing a sentence of life imprisonment for the crime. *Wilson v. State*, 264 So. 2d 828 (Miss. 1972).

5. Indictment.

Defendant's contention that he was serving an illegal sentence was based on the fact that the caption of the rape indictment read, "Indictment for the offense of: RAPE Miss. Code Ann. § 97-3-65(2) (statutory rape)," and listed Miss. Code Ann. § 97-3-65(3)(a) (forcible rape), in the body of the indictment. However, so long as from a fair reading of the indictment, taken as a whole, the nature of the charge against the accused was clear, the indictment was legally sufficient; further, all non-jurisdictional defects in an indictment were waived where defendant entered a guilty plea. *Ward v. State*, — So. 2d —, App LEXIS 816 (Miss. Ct. App. Nov. 8, 2005).

Though the indictment failed to specify the subsection of Miss. Code Ann. § 97-3-65 under which that defendant was charged, the second count of the indictment described forcible rape, which at the time of defendant's crime was codified at Miss. Code Ann. § 97-3-65(2). (Now Miss. Code Ann. § 97-3-65 (3)(a)). Defendant's interpretation of the indictment, that it charged him with statutory rape under Miss. Code Ann. § 97-3-65(1)(a), was without merit. *Robinson v. State*, 920 So. 2d 1009 (Miss. Ct. App. 2003).

Indictment to which defendant pled properly identified the victim, a 15-year-old high school student, and did not need to include any mention of the chaste character of the victim; it also properly stated that the crime had occurred in the prosecuting county; thus, the indictment alleging statutory rape was proper. *McKenzie*

v. State, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

An indictment charging the defendant with rape under this section was proper, even though the indictment used the language "a female person under the age of 14," while the statute states, in pertinent part, "a child under the age of 14." The indictment's language was wholly included within the statutory language, since a female person under the age of 14 is a child under the age of 14; the indictment need not use the precise words of the statute. Furthermore, the defendant was not prejudiced in the preparation of his defense or exposed to double jeopardy by the indictment's language. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

Surplus language contained in an indictment for rape under subsection (1) of this section did not prejudice the defendant and was not improper where the indictment used the language "unlawfully, willfully and feloniously rape, ravish and carnally know," even though the statute uses the language "rape by carnally and unlawfully knowing." The term "unlawfully" appeared in both the indictment and the statute, the term "feloniously" means unlawfully with the intent to commit a felony-grade crime, "willfully" simply means voluntarily, and "ravish" means rape. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

An indictment charging 2 rapes and one attempted rape committed by the defendant upon the same victim at different times was proper. The charges were properly joined under one indictment since they were part of a common scheme or plan, pursuant to the language of § 99-7-2(1)(b), in that they were connected by the identity of the victim and by the identity of the kind of act committed by the defendant. Furthermore, all of the evidence proving each count was fully admissible to prove each of the other counts and, therefore, if the State had tried the defendant at 3 separate trials, testimony as to the 2 other acts of rape would have been admissible at each of the 3 trials. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

An indictment was sufficient to notify the defendant that he had been charged

with rape where it alleged that he made a lewd suggestion combined with a physical act (the placing of a towel over the victim's face), which was an overt act sufficient for the ultimate commission of a rape. *Alexander v. State*, 520 So. 2d 127 (Miss. 1988).

Trial court did not err in not granting defendant's motion for directed verdict where indictment did not contain specific date, but instead alleged that rape was committed on or about certain day, and jury instruction was similar; while notice of specific date is often essential to preparation of defense, especially where alibi is relied on, and it is even more important in jury instructions, there was no error where defendant had raised no credible claim of unfair surprise or prejudice, nor sought continuance or any other remedy. *Wilson v. State*, 515 So. 2d 1181 (Miss. 1987).

Under former provisions, when defendant was tried and convicted of rape, robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Defendant's claim that he was improperly prosecuted for attempted rape as defined by this section, when the indictment allegedly charged him with assault with intent to rape as defined by § 97-3-71, was properly denied, where the indictment accurately tracked this section in that it omitted any mention of "previous chaste character" and affirmatively asserted "carnally know," which was language not present in § 97-3-71, and where defendant waived his claim at trial by requesting which statute was applicable, and then failing to object to being tried under this section. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Indictment charging making of lewd suggestion by defendant to victim and violent making of attack or assault upon victim properly charges attempted rape under this section, rather than assault

with intent to rape under § 97-3-71, where indictment accurately tracks this section by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under this section and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

There is no legal impediment to the State's mounting of three separate prosecutions for forcible rape under this section, kidnapping, and armed robbery, even though the three offenses arise out of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pretrial and trial purposes, the trial court properly held that the defendant had consciously waived any objection he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724 (Miss. 1984).

The trial court properly overruled a defense motion to quash an indictment which had recited the language of the statute where the indictment was sufficient to inform the defendant of the charge against him. *Hickombottom v. State*, 409 So. 2d 1337 (Miss. 1982).

An indictment charging the defendant with one act of rape was not rendered invalid by the testimony of the victim at trial that she had been raped twice where the two acts of rape had occurred on the one occasion that the defendant had been in the victim's home, the time between the two acts had not been more than ten or fifteen minutes, and both acts had been so intermixed and so connected that they had formed an indivisible criminal transaction. *Smith v. State*, 405 So. 2d 95 (Miss. 1981).

The statutory requirement that a crime punishable by death be specifically cited in the indictment was substantially complied with in a rape prosecution, even though the indictment failed to include the words "as amended," after referring to the section and subsection of the rape statute. *Rhymes v. State*, 356 So. 2d 1165 (Miss. 1978).

Willfulness is not an essential element of the crime of rape of a female child under

the age of 12 years. *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977).

In prosecution for rape where the grand jury heard competent evidence, including the testimony of the prosecutrix, an indictment will not be quashed because a deputy sheriff testified as to evidence found in illegal search. *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6 (1952).

An indictment under this section [Code 1942, § 2328] is not void because it fails to charge that the rape was maliciously committed, since this section [Code 1942, § 2328] contains no such requirement. *Fry v. State*, 194 Miss. 603, 13 So. 2d 621 (1943).

Indictment held sufficient to charge statutory attempt to rape, constituting felony, not misdemeanor. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Indictment alleging attempt to commit rape forcibly and against will of injured female held to sufficiently charge offense. *Tillman v. State*, 158 Miss. 802, 131 So. 265 (1930).

6. Sentence.

Circuit court had the authority to impose a life sentence for defendant's conviction of capital rape because the legislature used words indicating judicial discretion would be the determination for crimes of statutory rape in Miss. Code Ann. § 97-3-65 (2)(c). *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

In a statutory rape case, defendant's Eighth Amendment rights were not violated by the imposition of a 40-year sentence for three convictions because the sentence imposed was within the range provided in Miss. Code Ann. § 97-3-65(2). *Price v. State*, 898 So. 2d 641 (Miss. 2005).

Miss. Code Ann. § 97-3-65(2)(c) establishes the sentencing range for a person 18 years or older who is convicted of statutory rape; statute provides a minimum penalty of 20 years imprisonment and a maximum penalty of life imprisonment. Hence, defendant's sentence of three concurrent 30-year prison terms was well within the sentencing range established by Miss. Code Ann. § 97-3-65(2)(c) after defendant was convicted of three counts of statutory rape of a 13-year-old girl. *Boggan v. State*, 894 So. 2d

581 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Although of the 50 states, only Louisiana requires a mandatory life sentence for capital sexual battery, many states impose a broad range of extensive punishment for sexual battery involving a child under a particular age; for example: (1) in Texas, the penalty ranges from five years to 99 years, Tex. Penal Code Ann. § 12.32(a), (2) in Mississippi, a sentence ranges from 20 years to life imprisonment, Miss. Code Ann. § 97-3-65(3)(c), and (3) in Rhode Island, a sentence ranges from 20 years to life imprisonment, R.I. Gen. Laws § 11-37-8.2. Accordingly, the treatment of the crime of capital sexual battery in other jurisdictions is not so out of line as to render the Florida legislature's selected punishment of mandatory life imprisonment without the possibility of parole unconstitutional. *Jones v. State*, 861 So. 2d 1261 (2003).

Although defendant alleged that defendant's sentence for statutory rape was tantamount to a life sentence because of defendant's age, the defendant's sentence was within the statutory guidelines and not as long as it could have been under the sentencing statute; thus, although defendant might be subject to what defendant perceived as a life sentence, the appellate court found that the sentence was appropriate. *McKenzie v. State*, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Sentence of 36 years for rape of a child under the age of 14 following remand from the appellate court for resentencing on defendant's original 50-year sentence after an amendment to Miss. Code Ann. § 97-3-65 reduced the maximum sentence from death or life imprisonment to 20 years to life was proper; defendant's argument that the sentence was the equivalent of life and was therefore not a lesser punishment within the meaning of Miss. Code Ann. § 99-13-33 was without merit. *Johnson v. State*, 824 So. 2d 638 (Miss. Ct. App. 2002).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, the defendant's sentence of life imprisonment was

vacated and the cause was remanded for resentencing where it appeared that the trial court sentenced the defendant to a life term because he mistakenly thought that such sentence was his only option. *Tompkins v. State*, 759 So. 2d 471 (Miss. Ct. App. 2000).

The court remanded a case to the lower court for imposition of a life sentence where the original lesser sentence ordered by the trial court was not authorized by the statute, notwithstanding that the defendant did not raise the illegality of his sentence on appeal. *Winston v. State*, 726 So. 2d 197 (Ct. App. 1998).

Capital rape statute which requires imposition of death sentence or life imprisonment did not violate separation of powers doctrine since power to determine appropriate punishment for criminal acts lies in legislative branch. *Fisher v. State*, 690 So. 2d 268 (Miss. 1996).

Sentence of life imprisonment for crime of capital rape was appropriate for defendant convicted of raping 6-year-old child, despite act that defendant had been offered 5-year sentence during plea negotiations prior to trial; court was not involved in plea negotiations, did not impose heavier sentence merely because defendant exercised his constitutional right to jury trial, and merely followed statutory sentencing dictates. *Johnson v. State*, 666 So. 2d 784 (Miss. 1995).

While § 97-3-53 places a limit of 30 years on the sentence which may be imposed by the court for kidnapping if the jury fails to find that a life sentence should be imposed, this section does not impose a limitation for the penalty for rape although it, also, allows the jury to fix a penalty at life imprisonment; if the jury does not so fix the penalty under this section, then it may be fixed for any term, less than life, as the court in its discretion may determine. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

On convictions for kidnapping and rape pursuant to § 97-3-53 and this section, where the jury was unable to agree on life imprisonment as the appropriate sentence, and the court was therefore required to impose some lesser sentence than life, each sentence was to be imposed

without respect to the other so that the total of the sentences imposed could amount to more than the actuarial life expectancy of the defendant, even though the crimes grew out of a series of violent acts by one individual toward another individual in an unbroken chain of events. If this matter were treated differently, circumstances might arise where it would be impossible for the State to impose any meaningful sentence where more than one crime was committed. *Erwin v. State*, 557 So. 2d 799 (Miss. 1990), but see *Strahan v. State*, 729 So. 2d 800 (Miss. 1998).

The maximum punishment upon conviction for rape under this section was life imprisonment where there was no proof that the defendant met any of the conditions set forth in § 99-19-101 for imposition of the death penalty. *Leatherwood v. State*, 548 So. 2d 389 (Miss. 1989).

Sentence of life imprisonment was required by § 99-19-81 because defendant had previously been convicted of 2 separate felonies arising out of separate incidents at different times and had been sentenced to separate terms of one year or more, and maximum term of imprisonment for the crime of rape was life imprisonment. *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

In sentencing defendant convicted of rape to term of imprisonment to run concurrently with separate judgment of imprisonment for another rape in another county, second sentencing court is not required to consider sentence previously imposed. *Harper v. State*, 463 So. 2d 1036 (Miss. 1985).

The legislature has prescribed that the sentence for rape is life imprisonment if the jury so agrees, and if the jury does not agree, then the court affixes the penalty at imprisonment in the state penitentiary for such term as the court in its discretion may determine, but less than life. *Warren v. State*, 456 So. 2d 735 (Miss. 1984).

A sentence of 40 years imposed by the trial court upon a 23-year-old defendant did not constitute a life sentence where, even if the defendant served the entire term, he would be released at approximately 63 years of age, well below his life expectancy. *Hickombottom v. State*, 409 So. 2d 1337 (Miss. 1982).

A defendant previously convicted of kidnapping was not subjected to double jeopardy at his subsequent trial for rape of his kidnap victim since he had committed two separate offenses when he had raped his kidnap victim. The trial court properly admitted evidence and exhibits of the crime of rape at the kidnaping trial since evidence of other crimes is admissible to prove motive and a connection between the act proposed to be proved and the crime charged. *Hughes v. State*, 401 So. 2d 1100 (Miss. 1981).

This section, governing sentencing procedures in rape cases, does not violate due process or equal protection of the law, even though no provision is made for the jury to consider mitigating circumstances in fixing a defendant's sentence; the rule requiring a bifurcated trial is applicable only to cases involving capital offenses. *White v. State*, 375 So. 2d 220 (Miss. 1979).

Under this section, the imposition of a life sentence is within the sole province of the jury, and the trial judge could not impose a life sentence on the defendant absent a jury recommendation. *Lee v. State*, 322 So. 2d 751 (Miss. 1975).

Defendant was not entitled to resentencing under the terms of this section as amended in 1974 where his conviction became final prior to the date on which the amendment became effective. *Davis v. State*, 308 So. 2d 87 (Miss. 1975).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

Code 1942, § 2358, under which the defendant was sentenced for the crime of rape, was not unconstitutional as cruel and unusual in imposing a sentence of life imprisonment for the crime. *Wilson v. State*, 264 So. 2d 828 (Miss. 1972).

7. Plea of guilty.

Where a twenty-one-year-old defendant entered a plea of guilty to charges of

statutory rape pursuant to Miss. Code Ann. § 97-3-65(1), the trial court correctly admonished defendant that his sentence would be not more than thirty years imprisonment. The appellate court rejected his claim that the plea was not voluntary. *Carpenter v. State*, 899 So. 2d 916 (Miss. Ct. App. 2005), cert. denied, 898 So. 2d 679 (Miss. 2005).

The new statutory rape law, Miss. Code Ann. § 97-3-65, went into effect before defendant's sexual encounter with the victim, a 15-year-old student, so the county had the authority to indict defendant and to accept defendant's guilty plea and the county did not have to allege that the victim was chaste. *McKenzie v. State*, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Defendant told the trial judge that defendant understood the charges and sentences available under the statutory rape law and that defendant pled guilty with full knowledge; thus, defendant's guilty plea was voluntarily, knowingly, and intelligently made. *McKenzie v. State*, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

While the plea agreement did not specifically state that it included loss of the right against self-incrimination, the equivalent clearly was stated in the plea agreement; defendant's guilty plea to statutory rape under Miss. Code Ann. § 97-3-65 was therefore made voluntarily, knowingly, and intelligently. *McKenzie v. State*, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

A defendant was erroneously sentenced to life imprisonment after entering a plea of guilty to forcible rape under subsection (2) of this section, since a defendant under this statute may not be sentenced to life imprisonment unless the jury fixes a penalty at life imprisonment. In cases where the jury does not fix the penalty at life imprisonment, the judge must sentence the defendant to a definite term reasonably expected to be less than life. *Luckett v. State*, 582 So. 2d 428 (Miss. 1991).

Assault with intent to rape under former § 2361 is sufficiently a lesser included constituent offense of forcible rape such that a plea-bargain-induced guilty

plea thereto under an indictment charging forcible rape will withstand subsequent post-conviction attack. *Grayer v. State*, 519 So. 2d 438 (Miss. 1988).

Trial court did not err in accepting accused's plea of guilty and fixing his punishment at life imprisonment without impaneling a jury, and no constitutional right of the accused was violated thereby. *Bullock v. Harpole*, 233 Miss. 486, 102 So. 2d 687 (1958).

In a prosecution for rape the trial court did not err in not allowing the defendant to change plea of not guilty entered prior to the trial to a plea of guilty in the presence of the jury in open court at the trial and there was no error committed by the court in submitting the case to the jury on its merits in order that the jury could intelligently determine what penalties should be inflicted. *Buchanan v. State*, 225 Miss. 399, 83 So. 2d 627 (1955).

8. Instructions.

Circuit had not erred in not giving defendant's proposed instructions on circumstantial evidence because the circuit court found the child victim's medical report constituted actual or direct evidence. Additionally, the child was clearly an eyewitness to the abuse committed upon her person. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

In a prosecution for statutory rape, the defendant was entitled to have the jury instructed with regard to the lesser related offense of lustful touching of a child where (1) the indictment charged that the defendant committed either statutory rape or the lesser crime of lustful touching of a child, and (2) there was a question of fact with regard to the issue of penetration. *Richardson v. State*, 767 So. 2d 195 (Miss. 2000).

Requested instruction that rape victim is under duty to use all reasonable physical resistance available under circumstances to prevent rape was not required, where court instructed jury as to amount of resistance victim needed to offer if she was not under threat of serious bodily injury; court instructed jury that victim must use "all reasonable physical resistance available to her under the circumstances then and there existing to prevent the sexual intercourse." *Hull v. State*, 687

So. 2d 708 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997).

Giving instruction on intoxication as defense to crime was proper, even though intoxication was not asserted as a defense, where defendant testified he was both drunk and high at time alleged offense occurred, where from that testimony jury could reasonably infer that defendant was not aware of his actions and did not have requisite intent to commit crime, and especially where jury was fully and fairly instructed by other instructions and, when read as a whole, instructions were proper as to state's burden of proof and elements of applicable crimes. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

A trial court committed reversible error in failing to adequately instruct the jury on the elements of attempted capital rape where the instructions did not mention the element of failure to complete the rape or prevention of completion. *Henderson v. State*, 660 So. 2d 220 (Miss. 1995).

In a rape prosecution arising from the rape of the defendant's 13-year-old daughter, "flight" instructions were properly given, in spite of the defendant's argument that he explained his flight by testifying that he was "shocked," "confused," and "frightened" after being confronted by his wife about his daughter's allegation, where the defendant's uncorroborated explanation was contradicted by the wife who testified that the defendant admitted to her via telephone that he had sex with the daughter. *Evans v. State*, 579 So. 2d 1246 (Miss. 1991).

In a prosecution for rape, the evidence was sufficient to support an instruction on the charge of aggravated assault where the victim testified that the defendant had repeatedly punched her in the face and head during his attack on her, she further testified that she had spent about 4 days in the hospital and that she was told to see a neurologist because of a damaged nerve in her head, the emergency room physician testified that the victim had suffered significant facial trauma and that both of her eyes were swollen shut, the victim had fresh blood in both nostrils and significant bruising and bleeding into the skin of her face, and photographs of the victim taken after the attack illustrated the nature of

her injuries. The evidence was also sufficient to support an instruction on the lesser included offense of simple assault where the defendant transported the victim to the hospital after the attack. *Taylor v. State*, 577 So. 2d 381 (Miss. 1991).

In a rape prosecution, the trial court did not err in refusing an instruction which stated that the State was required to present evidence "to produce a moral certainty of guilt"; the phrase "to a moral certainty" is confusing and misleading since the State's burden is to prove the defendant's guilt "beyond a reasonable doubt." *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

In deciding whether lesser included offense instructions are to be given, trial courts must be mindful of the disparity in maximum punishments. However, even where there is a great disparity in maximum punishments between the offenses, the trial judge cannot indiscriminately give a lesser included offense instruction, nor can the trial judge give such an instruction on the basis of pure speculation; there must be some evidence regarding the lesser included offense. Thus, a rape defendant was entitled to instructions on the lesser included offenses of simple and aggravated assault where the defendant's side of the story warranted the instructions, particularly since the maximum penalty for simple assault carries a 6-month jail term in the county jail and a \$500 fine and the maximum penalty for aggravated assault carries a 20-year prison term in the penitentiary, while, if convicted for rape, the defendant would be faced with the possibility of serving a prison term for the remainder of his life. *Boyd v. State*, 557 So. 2d 1178 (Miss. 1989).

Trial court did not err in not granting defendant's motion for directed verdict where indictment did not contain specific date, but instead alleged that rape was committed on or about certain day, and jury instruction was similar; while notice of specific date is often essential to preparation of defense, especially where alibi is relied on, and it is even more important in jury instructions, there was no error where defendant had raised no credible claim of unfair surprise or prejudice, nor

sought continuance or any other remedy. *Wilson v. State*, 515 So. 2d 1181 (Miss. 1987).

When an accused is charged with having carnal knowledge of a female under the age of 12 years, the State's proof need not show penetration, but only that the private parts of the female have been lacerated or torn in the attempt to have sexual intercourse with her. *Williams v. State*, 427 So. 2d 100 (Miss. 1983), but see *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989).

An instruction which told the jury that if the accused was not guilty of rape of girl under 12 years old, then the jury was under a duty to find him guilty of attempted rape, amounted to an impermissible peremptory instruction for the state. *Winters v. State*, 244 Miss. 704, 146 So. 2d 350 (1962).

The trial court properly refused to instruct the jury that in view of the seriousness of the charge against the accused it was required to scrutinize the testimony of the prosecutrix with due care and that if there was any doubt as to the truthfulness of her testimony, such doubts were to be resolved in favor of the accused. *Goode v. State*, 245 Miss. 391, 146 So. 2d 74 (1962).

The court did not err in charging that if the accused unlawfully and forcibly ravished the prosecuting witness without her consent, the jury might return a verdict finding the defendant guilty as charged, in which case it would be the duty of the court to sentence the accused to death in the gas chamber, or find the accused guilty as charged and fix his punishment at life imprisonment, or find the accused guilty as charged but disagree as to the punishment, in which case the court would sentence the accused to the state penitentiary for life. *Drake v. State*, 228 Miss. 589, 89 So. 2d 593 (1956).

Instruction in rape prosecution that when a female submits to sexual intercourse through fear of personal violence and to avoid infliction of great personal injury on herself, such carnal knowledge is rape correctly defines the law. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

Instruction that if jury believed beyond a reasonable doubt that defendant unlaw-

fully, forcibly, and feloniously assaulted prosecutrix, a female over age of 12 years, and put her in fear of great personal violence, and violently, forcibly and feloniously and against her will, ravaged and carnally knew her, at time and place and in manner and form as charged in indictment, it was jury's duty to find defendant guilty, does not refer the jury to the indictment to ascertain the elements of the crime as they sufficiently appear in instruction. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

Refusal of instruction that burden was on state to prove accused attempted rape as charged held not error because covered by instruction given at accused's request. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Instruction to convict of attempt to rape if jury believed from evidence beyond reasonable doubt defendant committed act specified in instruction, held not erroneous as confusing. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Instruction that a female child less than twelve years of age cannot consent to sexual intercourse, and if a man has intercourse with such child voluntarily so far as he is concerned then he would be guilty of rape, regardless of whether the female consented or not, is erroneous. *Simmons v. State*, 105 Miss. 48, 61 So. 826 (1913).

Instruction in prosecution for statutory rape, that the crime may be proved by circumstances, and it is not necessary to have an eye-witness to the deed, held erroneous. *Simmons v. State*, 105 Miss. 48, 61 So. 826 (1913).

9. Setting aside conviction.

Conviction of forcible rape was reversed where omnibus hearing was held day before trial instead of at least 3 days prior to trial as required by Rule 4.09[Repealed], Uniform Criminal Rules of Circuit Court Practice; state did not begin providing defense with witnesses' statements until omnibus hearing, despite filing of discovery motion by defendant pursuant to Rule 4.06[Repealed], Uniform Criminal Rules of Circuit Court Practice, several weeks before omnibus hearing; therefore, failure to grant defendant's request for continuance, coupled with violations of Rule

4.06 and 4.09, necessitated reversal of conviction. *Inman v. State*, 515 So. 2d 1150 (Miss. 1987).

Unfounded implication that defendant impregnated his 11 year old daughter required granting of request for mistrial; allowing defendant to show he was not responsible for pregnancy and resulting abortion was not sufficient to prevent granting mistrial. *Murriel v. State*, 515 So. 2d 952 (Miss. 1987).

Trial court did not err when it failed to grant mistrial based upon prosecutor's remarks during opening and closing arguments where: prosecutor's reference to defendant as "animalistic" was corrected when defendant's counsel objected and trial judge told jury to disregard remark; comment of prosecutor that conviction of defendant was only thing that would put victim's spirit to rest was not error because jury members were already aware of victim's death and that charge against defendant was rape, and there was nothing to suggest that such remark concerning victim's spiritual repose was itself grounds for reversal. *McFee v. State*, 511 So. 2d 130 (Miss. 1987).

State's revelation on its voir dire examination of the jury that the victim of forcible rape, accused's stepdaughter who was 13 years of age at the time, had subsequently undergone an abortion constituted prejudicial misconduct which could not be cured by admonition or instruction and necessitated a mistrial, and where a mistrial was not declared, the rape conviction was reversed. *Stokes v. State*, 484 So. 2d 1022 (Miss. 1986).

It is error to refuse continuance to rape defendant where appointed counsel for defendant is excused just prior to trial on basis of possible conflict of interest and newly appointed attorney informs judge of need for additional time to prepare; however refusal to grant continuance is not ground for setting aside conviction where defendant is not prejudiced by error in that every witness needed by defendant does in fact appear and testify, there is ample evidence on main issue in case, and defendant fails to show how continuance would have made difference in result. *Plummer v. State*, 472 So. 2d 358 (Miss. 1985).

In a prosecution for rape of a 12-year-old female which proceeded to trial as a rape not justifying the death penalty, and in which the jury found defendant guilty as charged, the only sentence under such verdict which could be imposed was a life sentence by the trial judge; therefore, the trial judge was not required to send the jury back to the jury room for the purpose of returning a verdict of life imprisonment, and he did not commit error in the procedure followed by him. *Williams v. State*, 427 So. 2d 100 (Miss. 1983), but see *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989).

A rape conviction would be reversed and a new trial ordered, where the trial judge's oral statement to the jury that it could include a recommendation of mercy as part of its verdict could have been interpreted as an indication by the trial judge that the jury's recommendation would have a bearing on the defendant's punishment, and where such statement may have caused two jurors to change their verdicts to guilty. *Martin v. State*, 415 So. 2d 706 (Miss. 1982).

New trial was required where the trial court refused to permit defense counsel to call prosecutrix as an adverse witness for purpose of laying predicate for introduction of impeachment testimony to the effect that on afternoon following the alleged commission of the offense, prosecutrix was laughing about the matter, and in his closing argument, district attorney had made statements, amounting to comment on the failure of the accused to testify. *Chatman v. State*, 244 Miss. 659, 145 So. 2d 707 (1962).

A judgment convicting a Negro of the rape of a white woman was required to be reversed where it was shown by witnesses that, to their knowledge, Negroes had never served on juries in the county where accused was tried, and although there were some Negro qualified electors in the county, and some names of Negroes had been placed in the jury box where they could be drawn as jurors, there were in the year in which the crime was committed and the defendant was tried and convicted, no names of Negroes in the jury box. *Gordon v. State*, 243 Miss. 750, 140 So. 2d 88 (1962).

While a conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, it should always be scrutinized with caution; and where there is much in the facts and circumstances in the evidence to discredit her testimony, another jury should be permitted to pass thereon. *Richardson v. State*, 196 Miss. 560, 17 So. 2d 799 (1944); *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948); *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6 (1952).

New trial granted, when testimony unreasonable and contradicted, and defendant may not have had fair trial. *Davis v. State*, 132 Miss. 448, 96 So. 307 (1923).

Where unreasonable story of prosecutrix is contradicted by credible witnesses, new trial should be granted. *Holifield v. State*, 132 Miss. 446, 96 So. 306 (1923).

Conviction must be reversed where against the weight of evidence. *Joslin v. State*, 129 Miss. 181, 91 So. 903 (1922).

9.5. Effective assistance of counsel.

Where defendant admitted that he committed the offense of statutory rape and entered a plea of guilty to the charge, the appellate court rejected his claim of ineffective assistance of counsel. There was no suggestion that defendant received inaccurate information on his parole eligibility in deciding to enter a plea of guilty; defendant also failed to prove that he was prejudiced by counsel's failure to investigate the facts of the case, or present any evidence in mitigation. *Carpenter v. State*, 899 So. 2d 916 (Miss. Ct. App. 2005), cert. denied, 898 So. 2d 679 (Miss. 2005).

Defendant failed to prove assistance of counsel was ineffective as (1) defendant did not show that defense attorney had a conflict of interest; (2) the State had ample proof without resorting to using defendant's statements had there been a trial, so that defense attorney did not need to file a motion to suppress defendant's statements; (3) defense attorney gave sound legal advice to defendant about pleading guilty; and (4) defendant was not coerced into pleading guilty. *McKenzie v. State*, 856 So. 2d 344 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

II. EVIDENTIARY MATTERS.

10. In general.

Circuit judge did not err in refusing to allow defendant's attorneys to question his former wife about the man to whom she was now married, because the circuit court found that that testimony had no relevance where defense counsel had made a number of ambiguous statements about the relevancy of the line of questioning to aid in the establishment that other men or youth could have caused the child victim's injuries. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

The decision to admit expert testimony describing the child's behavior as common with that of a sexually abused child was well within the trial judge's discretion, and there was no abuse of discretion where the expert testimony was offered as substantive evidence of abuse and was not describing a syndrome. *Crawford v. State*, 754 So. 2d 1211 (Miss. 2000).

It was not harmless error to exclude evidence reflecting on credibility of alleged rape victim, in prosecution for rape. *Skaggs v. State*, 676 So. 2d 897 (Miss. 1996).

Question to rape victim as to whether she had ever charged or made allegations against anyone regarding rape or sexual advances was improper and fell under evidentiary rule prohibiting introduction of evidence of victim's past sexual behavior unless question was whether victim

had made any false allegations of past sexual offense. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

Proposed testimony by third party that rape victim had made allegation of previous sexual offense was inadmissible as collateral evidence to impeach victim; defense was not allowed to prove that victim had made allegation that she had previously been victim of sexual offense based on prohibition against evidence of victim's past sexual behavior, and testimony was not that victim had made false allegation of previous sexual offense. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

In a rape prosecution, the trial court properly denied an instruction which stated that the defendant could not be convicted upon the uncorroborated testimony of the prosecutrix since it was an incorrect statement of the law in that it instructed the jury that corroboration of the victim's testimony was necessary. *Allman v. State*, 571 So. 2d 244 (Miss. 1990).

A practicing physician who was not qualified as a psychiatrist or a psychologist did not have the professional competence in the field of child sexual abuse to give an opinion that a child "had been sexually traumatized" where the physician had no specialized training in the field of child sexual abuse, and testified only that "I examine a good many young girls in my practice" and "I have had a tremendous amount of experience in child sexual abuse". Additionally, the prosecution made no effort to show that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinions that sexual abuse has occurred, with the required level of reliability. *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990).

It is doubtful that a trial court may admit expert opinion testimony that a child alleged to have been the victim of sexual abuse is telling the truth. *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990).

In rape prosecution, allegation in state's opening argument concerning defendant having oral sex with victim was not ground for mistrial, since testimony as to oral sex was part of the *res gestae*. *White v. State*, 498 So. 2d 368 (Miss. 1986).

Trial judge was not in manifest error in admitting defendant's statements in evidence at rape trial, where the overwhelming weight of the evidence on the record showed that the prosecution by clear and convincing evidence proved not only that defendant had received his Miranda warnings, but that he had waived his rights intelligently, knowingly, and voluntarily. *White v. State*, 495 So. 2d 1346 (Miss. 1986).

Testimony of witnesses at rape trial concerning defendant's statement indicating that he had had sex with victim was not precluded by hearsay rule, since the statement, which was made a very short time after the incident before defendant was arrested and while he was not in custody of police officers, amounted to a statement against interest. *McBride v. State*, 492 So. 2d 581 (Miss. 1986).

When rape prosecutrix states name of attacker and statement appears to be spontaneous and without indication of manufacture it should be received in evidence as exception to hearsay rule. *Cunningham v. State*, 467 So. 2d 902 (Miss. 1985).

Under this statute, which provides that any person under 18 years of age may not suffer the death penalty for rape of a female child under the age of 12 years, the trial court did not err in permitting introduction of biographical data obtained from defendant relating to his age; routine questions asked in booking a suspect, relating to his name, age, and place of residence, are not proscribed by Miranda. *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977).

In a trial for rape, it was not error to permit a doctor to testify as to injuries to the infant victim's sexual organs. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

Where only the victim testified as to the identity of the accused, there was no error in the admission of the evidence as to armed robbery which occurred at the same time when, and the same place where, the crime of rape was committed. Besides, the taking of a rifle and some money might well indicate that the accused's object in doing so was to effectuate his escape from detection of the crime of

rape. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

Where a highway patrolman, who had ample information that the crime of rape had been committed and knew that a warrant had been issued, after being stopped by a hitchhiker, whose description fitted the description of the rapist, arrested and searched the hitchhiker, the arrest, being lawful, the search incident thereto was likewise lawful, and the evidence obtained thereby was admissible. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209 (1956).

In a prosecution for rape introduction of evidence by the state that the prosecutrix was nervous, crying and upset about four hours after the commission of the offense, when she reached the home of her brother and was there observed by his family and the officers, was no error. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

In a prosecution of father for rape of his daughter it was an error to admit in evidence the testimony of a physician who testified as to what the mother had told him of the rape of her daughter. *Fairley v. State*, 225 Miss. 371, 83 So. 2d 278 (1955).

In prosecution for rape where the grand jury heard competent evidence, including the testimony of the prosecutrix, an indictment will not be quashed because the grand jury heard incompetent evidence. *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6 (1952).

Exclusion of admissions of female tending to account for physical condition was error and harmful. *Smith v. State*, 141 Miss. 630, 106 So. 817 (1926).

11. Belongings of victim.

At defendant's trial for attempted rape, admission, over defense's objections, of alleged victim's earring, and of testimony concerning earring, constituted reversible error where earring had not been made available to defense for inspection before trial under motion for discovery. *Thomas v. State*, 488 So. 2d 1343 (Miss. 1986).

Testimony of the victim, the fact that certain property feloniously taken from the victim's home was found in the accused's possession when he was arrested shortly after the crime was committed,

and other corroborating evidence, supported the conviction of rape. *Wilson v. State*, 243 Miss. 859, 140 So. 2d 275 (1962).

It was not error to admit in evidence the bloody clothing of the prosecutrix as part of the *res gestae* and also to corroborate the testimony of the prosecutrix. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

Admission of evidence that the accused had taken money and other articles, including a cigarette lighter, from his alleged rape victim was proper, where the taking of these articles occurred on the same occasion when the more serious offense was committed and was so connected as to constitute a continuous transaction, and for the additional reason that the cigarette lighter was of distinct value in establishing the identity of the assailant. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209 (1956).

12. Chastity of victim.

Rape shield law controls over any statutory evidence rules. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

Rape shield law does not apply to evidence pertaining to the sexual act upon which the rape charge is based. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

Rape shield law did not preclude introduction of conflicting testimony as to who actually committed the rape. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

For purposes of Rule 412(b)(2)(A), Miss. R. Ev., which limits what an accused may tell the jury concerning a rape victim's past sexual behavior, "past sexual behavior" refers to sexual behavior at any time in the past, i.e., prior to trial. The relevance of other sexual behavior of the victim which may explain the source of semen, pregnancy, disease or injury and thus exonerate the accused, as a matter of common sense, is not necessarily affected by whether it occurred before or after the event charged in the indictment. Conversely, the reasons why it would be unfair to delve into the victim's sexual experience prior to rape extend equally to post-rape sexual activity. *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990).

Where the prosecution proves the condition of a rape victim's vaginal opening to

induce belief that the condition is the result of an injury-producing and otherwise illegal act of sexual violence committed by the defendant, that injury-produced condition is an "injury" within the meaning of Rule 412(b)(2)(A), Miss. R. Ev. *Goodson v. State*, 566 So. 2d 1142 (Miss. 1990).

The trial court did not err in sustaining state's objection to a question asked, upon cross examination, of rape victim as to whether she and her fiancé, with whom she was with on the night the alleged rape occurred, did not have an affair and that this was the reason she had reported that she had been raped, where the question of the victim's consent was not in issue. *Shay v. State*, 229 Miss. 186, 90 So. 2d 209 (1956).

Evidence in a rape prosecution tending to show that cabin which prosecutrix was occupying was registered to a male companion under a fictitious name was inadmissible since impeachment of the character of the prosecutrix in respect to chastity must be confined to evidence of her general reputation, and she cannot be examined as to particular acts of intercourse with other men, or that fact otherwise proven. *Rogers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948).

In prosecution for attempt to rape, testimony respecting isolated act of sexual intercourse by prosecutrix held properly excluded as irrelevant. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Evidence that prosecutrix's general reputation for chastity was bad was admissible in rape case. *Wilkerson v. State*, 106 Miss. 633, 64 So. 420 (1914).

In a prosecution for rape on a female under twelve years of age, evidence of previous unchaste character is ordinarily immaterial. *Richardson v. State*, 100 Miss. 514, 56 So. 454 (1911).

13. Competency; child's testimony.

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming

physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence under Miss. R. Evid. 803(25), the "tender years exception," because it appeared that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. *Withers v. State*, 907 So. 2d 342 (Miss. 2005).

Trial court abused its discretion, in prosecution for capital rape, by excluding testimony of child witnesses on grounds that witnesses could not remember exact date of the incident; inability to remember date went to credibility, rather than competence. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

Trial court has discretion to exclude, as incompetent, testimony of child witness. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

Child had personal knowledge, directly from her sense of touch, that person in bed with rape victim had curly hair, and, therefore, child could testify to that fact; however, child could not speculate as to who the person with curly hair was. *Amacker v. State*, 676 So. 2d 909 (Miss. 1996).

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him

at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. *Powell v. State*, 566 So. 2d 1228 (Miss. 1990).

An 11-year-old rape victim's testimony that the defendant had forced her to have sex with him 2 to 3 times a week for a period of 6 months prior to the rape giving rise to the prosecution was admissible to show the defendant's lustful, lascivious disposition toward the victim. *White v. State*, 520 So. 2d 497 (Miss. 1988).

The testimony of a five-year-old prosecutrix was admissible where she demonstrated the capacity to observe, recollect and communicate events, to understand questions and to make intelligent answers with a consciousness of the duty to speak the truth. *Yarbrough v. State*, 202 Miss. 820, 32 So. 2d 436 (1947).

Complaint made by child less than twelve years of age to physicians five and seven days after outrage by her father is inadmissible. *Simmons v. State*, 105 Miss. 48, 61 So. 826 (1913).

14. Consent of victim.

The requirement that there must be both force and lack of consent no longer exists under Miss. Code Ann. § 97-3-65(3). *Madere v. State*, 794 So. 2d 200 (Miss. 2001).

Failure to apply proper legal standard to evidence on whether alleged rape victim consented was error; in ruling on admissibility of evidence of kissing between parties a month prior to incident, trial court did not consider exception to evidentiary rule excluding victim's sexual behavior for behavior that occurs with accused and is offered by accused on issue of whether victim consented to alleged sexual offense. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

Error in failure to apply proper legal standards in excluding evidence of prior kissing between parties in rape case was harmless; other evidence included that parties were previously acquainted, that defendant was high or intoxicated night of

incident, that during sexual encounter victim was injured, that victim ran away from scene in distraught, frantic manner in state of undress, that parties were kissing and fondling on night of incident, and defense failed to demonstrate significance and nature of previous kissing between parties that had been excluded. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

In prosecution for forcibly ravishing a girl over the age of 12 years against her will, where defendant testified that he and the girl engaged in acts of sexual intercourse shortly before date of alleged crime and planned the specific act charged, the testimony should have been admitted, since it was not only competent in defense, but it was very material and relevant as throwing light on the issue of whether or not the act was forcibly done or was with the consent of the alleged victim. *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634 (1953).

15. Victims statement to third party.

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Hearsay rule addressing statements made by child of tender years describing any act of sexual contact performed with or on child by another allows statements of causation and fault and has been expanded to include identity of perpetrator

in child abuse cases. *Young v. State*, 679 So. 2d 198 (Miss. 1996).

Admission, in rape prosecution, of anatomical drawing used by social worker during interview of child who was alleged victim, under tender years exception, was erroneous, as defendant objected to drawing as hearsay, trial court failed to hold hearing or make findings regarding trustworthiness of document, and state did not present any other basis for admitting document. *Young v. State*, 679 So. 2d 198 (Miss. 1996).

Error in admitting anatomical drawing used by social worker during interview of child who was alleged rape victim was harmless, notwithstanding defendant's hearsay objection and trial court's failure to make findings supporting admission of drawing, as drawing was cumulative of social worker's testimony that child identified defendant as perpetrator, which defendant did not object to, as well as testimony of police officer that he heard child identify defendant and child's own testimony that defendant was perpetrator. *Young v. State*, 679 So. 2d 198 (Miss. 1996).

In a sexual battery prosecution involving the defendant's sexual abuse of his stepdaughter, the trial court did not err in allowing the defendant's mental health therapist to testify about communications during the defendant's therapy sessions, where the defendant waived any and all rights under the psychotherapist-patient privilege by requesting the therapist to write a letter to the court informing the trial judge of his therapy sessions which treated his sexual behavior toward his stepdaughter; by making such a request, the defendant intended the communications to be disclosed to a third person, namely the court. *Everett v. State*, 572 So. 2d 838 (Miss. 1990).

To extent that admission of accusatory statement made by rape victim to third party shortly after alleged crime was committed is error, error is harmless and does not prejudice defendant where statement contains nothing which has not previously been testified to in competent testimony to which no objection has been made. *Barker v. State*, 463 So. 2d 1080 (Miss. 1985).

In a rape prosecution the state may show that the prosecutrix made complaint

as soon as a reasonable opportunity presented itself, and the statement of prosecutrix to her mother upon coming home and finding her daughter crying that "he hurted me" was properly admitted. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

Statement by prosecutrix to her mother upon being asked why she was crying that "he hurted me" did not specifically name or identify the defendant, but was admissible. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

In rape prosecution, evidence may be admitted that prosecutrix that she had been raped, including language indicating time and place of the occurrence, but testimony as to further details stated by her would be inadmissible hearsay. *Lauderdale v. State*, 227 Miss. 113, 85 So. 2d 822 (1956).

In a prosecution of a father for the rape of his daughter it was prejudicial error to permit a deputy sheriff to testify that the prosecutrix told him that her father had raped her. *Fairley v. State*, 225 Miss. 371, 83 So. 2d 278 (1955).

Testimony of the father of an eight year old girl as to the details of her alleged rape elicited from her by threats of whipping and by a method of cross-examination which destroyed the voluntary character of the information held to be erroneously admitted warranting a reversal of conviction. *Lewis v. State*, 183 Miss. 192, 184 So. 53 (1938).

Permitting witness to testify that soon after alleged attempted rape prosecutrix told witness that accused broke into her house held not reversible error. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Details told by prosecutrix to third person during unofficial investigation inadmissible. *Clark v. State*, 124 Miss. 841, 87 So. 286 (1921).

In a prosecution for rape, it was error to admit the testimony of the injured girl's mother that defendant was confronted with his victim, and that the girl charged the defendant with the crime, where witness also stated that the defendant promptly denounced the charge as false. *Garner v. State*, 120 Miss. 744, 83 So. 83 (1919).

Fatal error to permit witnesses to testify in detail as to what prosecutrix told

them, including what she stated about the locality where the offense occurred. *Frost v. State*, 100 Miss. 796, 57 So. 221 (1912).

In a prosecution for attempt to rape, it is error to permit a state's witness to detail particulars of the affair as narrated by prosecutrix shortly after assault. *Frost v. State*, 94 Miss. 104, 47 So. 898 (1909).

On prosecution for rape, it was error to admit what the assaulted girl said day after assault, as to who committed it, in absence of the accused. *Jeffries v. State*, 89 Miss. 643, 42 So. 801 (1907).

16. Photographs.

When a reasonably intelligent eyewitness has had a good opportunity to view the features of the perpetrator of a crime, the method the police use in having the witness identify the defendant recedes in importance in inverse ratio to the intelligence of the witness and opportunity to view the perpetrator. Thus, a rape defendant's argument that the victim's in-court identification resulted from an impermissibly suggestive photographic identification of the defendant, or from seeing him at the preliminary hearing, was without merit where the victim was a sensible child who had ample opportunity to view the rapist in the daylight, she gave a description of the defendant to a police officer, the accuracy of which was undisputed, and she identified the defendant's photograph without hesitation no more than 1 ½ hours after the crime. *Powell v. State*, 566 So. 2d 1228 (Miss. 1990).

In a rape prosecution arising from the defendant's frequent acts of sexual intercourse with his daughter from age 5 to 13, photographs of the victim in the nude which were taken by the defendant were admissible into evidence in order to establish the defendant's licentious disposition and lust for the victim. *Lovejoy v. State*, 555 So. 2d 57 (Miss. 1989).

Evidence of prior molestation of child was admissible because in context of sexual crimes, relaxation of rule that prosecution cannot offer evidence of criminal conduct not charged in indictment of which accused has not been convicted has long been recognized; substantially similar prior sexual acts with same person, that is, sexual acts of same general type as those charged in indictment, are as mat-

ter of common sense probative of issue being tried. *Wilson v. State*, 515 So. 2d 1181 (Miss. 1987).

Trial court did not abuse its discretion in allowing photographs that showed victim's injured face, head, and arm, but were not "gruesome" in nature, into evidence in rape trial. *Sims v. State*, 512 So. 2d 1256 (Miss. 1987).

Introduction of photographs showing victim's body was not improper where both photographs were sufficiently relevant and material to support their admission; photograph which showed torn pajama pants was evidence to support State's contention of non-consensual sexual intercourse; photograph which showed crime scene was admissible to support testimony of witnesses who described scene upon their respective arrivals. *McFee v. State*, 511 So. 2d 130 (Miss. 1987).

Photographs of rape victim's face are admissible to not only exemplify extent of force used in commission of crime but also to corroborate testimony of victim, notwithstanding gruesome appearance of victim in photograph and that photograph is cumulative of other evidence. *Luvane v. State*, 481 So. 2d 323 (Miss. 1985).

In a prosecution for rape, photographs, the accuracy of which had been established and which showed a 5-strand barbed wire fence through which the complaining witness admitted having gone with the defendant, voluntarily accompanying him to the secluded spot where the incident occurred, should have been admitted on the issue of consent, and their exclusion was prejudicial error where the fact of intercourse had been admitted. *Carr v. State*, 258 So. 2d 417 (Miss. 1972).

Identification of photographs depicting the scene of the crime by prosecutrix in rape prosecution did not violate the rule which prohibits the state from showing any statement made by her except the mere complaint that she had been violated. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622 (1943).

Identification by prosecutrix in rape prosecution of photographs depicting the scene of the crime was proper, where the basis for their admission was to establish venue, and the scene shown by the photo-

graphs was testified to by others present when the pictures were made. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622 (1943).

17. Confession of accused.

Defendant's statement of age made to detective was "admission" for purposes of capital rape prosecution. *Fisher v. State*, 690 So. 2d 268 (Miss. 1996).

A defendant accused of having carnal knowledge of his step-daughter was entitled to have the jury hear and consider evidence as to whether his wife had promised him that, if he signed a written confession, he would receive a light sentence, since such a promise was relevant in weighing the credibility of the confession. *Darghty v. State*, 530 So. 2d 27 (Miss. 1988).

Substantial evidence supported finding that defendant was competent at time of his confession and that it was freely, voluntarily, and knowingly given where police did not question defendant until some 24 hours after his arrest, because at time of arrest he appeared to be under influence of "something". *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

Objection to admission of a confession, held to be voluntary, on the ground that it showed that defendant had fondled the prosecutrix at times prior to the rape, which act was in itself a violation, was properly overruled, the rule for allowing evidence of other offenses in rape of one under age of consent being that evidence which shows or tends to show prior offenses of the same kind committed by defendant with the prosecuting witness is generally admissible. *Winston County Community Hosp. v. Hathorn*, 242 So. 2d 865 (Miss. 1970).

Where the accused's confession, giving in detail his movements, as well as the physical situation at his victim's home, and his struggle with her before accomplishing his purpose, corresponded with the true facts disclosed by other testimony, and all the witnesses to the confession, who were able to testify, testified that it was made without hope of reward or fear of punishment, the confession was properly admitted in evidence in a rape prosecution. *Drake v. State*, 228 Miss. 589, 89 So. 2d 593 (1956).

Incriminating statements made to officers held admissible where statements were voluntarily made without inducement or threat, notwithstanding prisoner was not warned that what he said might be used against him. *McGee v. State*, 40 So. 2d 160 (Miss. 1949), cert. denied, 338 U.S. 805, 70 S. Ct. 77, 94 L. Ed. 487 (1949), reh'g denied, 339 U.S. 958, 70 S. Ct. 977, 94 L. Ed. 1369 (1950); *McGee v. State*, 203 Miss. 609, 35 So. 2d 628 (1948), overruled on other grounds, *Haralson v. State*, 308 So. 2d 222 (Miss. 1975).

In a prosecution for statutory rape, court's failure to hold a preliminary hearing outside presence of jury on the question of admissibility of confession which defendant contended was not freely and voluntarily made, and admission of such confession over objection was held prejudicial error. *English v. State*, 206 Miss. 170, 39 So. 2d 876 (1949), overruled on other grounds, *Otis v. State*, 418 So. 2d 65 (Miss. 1982).

18. Conduct of accused; previous or criminal.

Defendant could not complain about prosecutrix being allowed to testify about other crimes committed by him where such testimony was invited or induced by defendant himself; on direct examination, prosecutrix related various incidents and happenings during course of night on which she was raped by defendant, including statement that on one occasion defendant had talked to her. While prosecutor had told her not to repeat what defendant had said, defendant's counsel asked what had been said, and her reply was that defendant had told her about other girls he had raped and about ones he was going to rape. *Singleton v. State*, 518 So. 2d 653 (Miss. 1988).

Evidence that defendant fled in automobile when sheriff's investigator attempted to stop him was admissible at rape trial to show guilty knowledge on part of defendant. *Mariche v. State*, 495 So. 2d 507 (Miss. 1986).

Evidence that rape defendant committed burglary in apartment complex, where victim lived, shortly prior to rape is inadmissible on issue of identification of rapist where rape victim and victim's roommate have definitely identified defendant. *Will-*

iams v. State, 463 So. 2d 1078 (Miss. 1985).

19. Sufficiency of evidence; generally.

Where a fifteen-year-old victim claimed that defendant had sexual relations with her and DNA testing showed that defendant was the father of her aborted child, the evidence was sufficient to support his conviction of statutory rape. *Carr v. State*, 911 So. 2d 589 (Miss. Ct. App. 2005).

Trial court had not erred in denying defendant's motion for a medical and forensic examination of the child victim because defendant failed to specifically show how that proposed examination would aid his defense. The authority he relied on addressed medical records and medical evidence already in existence and that was a fundamentally different issue from that of forcing a victim to submit to an examination. *Lee v. State*, — So. 2d —, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. Nov. 22, 2005).

Trial court had not abused its discretion in denying defendant's motion in limine and refusing to exclude photographs taken of defendant's genital area because the defense's cross-examination of the child victim had put her credibility into issue and that the photograph went to the victim's credibility as well as to the crime itself. The photograph corroborated the victim's testimony and showed that defendant had a scar on his abdomen and that he shaved his genital area. *Lee v. State*, — So. 2d —, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. Nov. 22, 2005).

Trial court had not abused its discretion in denying defendant's motion to suppress and refusing to exclude a vibrator and the thong from evidence as those items were utilized in defendant's enticement of the child victim, were part of the complete story of the crimes, and corroborated the victim's testimony. *Lee v. State*, — So. 2d —, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. Nov. 22, 2005).

There was sufficient evidence to convict defendant of capital rape and sexual assault where the State offered the testimony of a number of medical and counseling professionals indicating that the victim's statements were consistent with those of a sexual abuse victim. The victim named defendant as the perpetrator, and

the State offered physical evidence in the form of medical diagnoses and test results as well as many of the objects the victim stated defendant utilized in his abuse of her. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Where the victim testified that defendant forced her to perform oral sex on him and raped her, the evidence was sufficient to support defendant's conviction for sexual battery and rape. The victim gave a recorded statement to the police that night; the fact that the rape kit did not conclusively identify defendant as the source of semen retrieved from the victim did not detract from the validity of her testimony. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Where the child-victims testified as to several incidents of sexual abuse spanning the course of several years and police found items in defendant's home that the victims alleged were used during their sexual encounters, including a pornographic tape, condoms, and some lubricant, the evidence was sufficient to support defendant's conviction for five counts of statutory rape, one count of sexual battery, and three counts of fondling. *Moses v. State*, 885 So. 2d 730 (Miss. Ct. App. 2004).

Defendant was properly convicted of statutory rape for having sexual intercourse with a minor, his girlfriend's daughter. The State offered taped conversations between defendant and his girlfriend's children and the testimony of the victim as evidence to demonstrate that defendant had sexual contact with the victim. *Fisackerly v. State*, 880 So. 2d 368 (Miss. Ct. App. 2004).

Both girls testified as both victims and eyewitnesses to defendant's crimes of statutory rape and sexual battery; any issues of credibility or motive was for the jury to decide. Thus, the verdict was not contrary

to both the weight and the sufficiency of the the evidence, and defendant's convictions for statutory rape and sexual battery were affirmed. *Barrett v. State*, 886 So. 2d 22 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Where victim's mother stated that defendant, the mother's boyfriend, had sex with her 10-year-old daughter, the jury's guilty verdict of sexual battery and statutory rape was not against the overwhelming weight of the evidence, as the jury had heard the evidence and the testimony of the witnesses, including a social worker, a doctor who examined the victim and determined that she had been sexually abused, and a molecular biology and DNA expert who opined that the genetic profile of the sperm extracted from the victim's panties was consistent with the suspect being the major contributor. *Sanderson v. State*, 872 So. 2d 735 (Miss. Ct. App. 2004).

There was sufficient evidence to support defendant's rape conviction, and although the indictment did not make reference to the statute alleged to have criminalized defendant's activity, the court concluded that the State proceeded on the theory that defendant's conduct constituted a violation of Miss. Code Ann. § 97-3-65(4)(a); although defendant attempted to portray the incident as a consensual sexual encounter, the State presented evidence that defendant had held the victim around the neck and forced her onto the back seat of the vehicle before he raped her, there was no evidence that the victim failed to resist defendant by whatever means were available to her, and the victim's testimony was not so incredible or otherwise contradicted that it was rendered unworthy of belief. *Davis v. State*, 863 So. 2d 1000 (Miss. Ct. App. 2004).

Defendant had not been entitled to a directed verdict on a charge of forcible sexual intercourse, as the victim testified that defendant penetrated her, and defendant confessed to committing rape. *Bryant v. State*, 853 So. 2d 814 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Evidence was sufficient to convict defendant under Miss. Code Ann. § 97-3-65(3)(a), as the unsupported word of the

victim was sufficient to support a guilty verdict where the sex crime testimony was not discredited or contradicted by other credible evidence, especially as the conduct of the victim was consistent with the conduct of one who had been victimized by a sex crime. *Price v. State*, 847 So. 2d 290 (Miss. Ct. App. 2003).

Defendant rather repulsively argued on appeal that because the victim had not testified with clinical certainty about the extent to which defendant had penetrated the victim, the victim's evidence did not prove forcible sexual intercourse; however, when defendant's statement that defendant had raped the victim was taken together with the victim's testimony, the trial court below properly denied defendant's motion for a directed verdict. *Bryant v. State*, — So. 2d —, 2003 Miss. App. LEXIS 80 (Miss. Ct. App. Feb. 18, 2003).

Defendant's conviction for statutory rape was affirmed where the evidence in the record proved that defendant, who was 20 years old at the time, had engaged in sexual intercourse with the victim who was a 12-year-old girl; the age of the victim was adequately proven by testimony. *Wright v. State*, 856 So. 2d 341 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Testimony of the 15-year-old victim that she and defendant had an ongoing sexual relationship with the 38-year-old defendant, coupled with evidence that the victim had been sexually active and had been absent from school when the sexual contacts allegedly took place, was sufficient to support defendant's conviction for statutory rape, and the trial court did not err in denying defendant's motions for judgment n.o.v. or, in the alternative, a new trial. *Farrish v. State*, 840 So. 2d 820 (Miss. Ct. App. 2003).

Evidence was insufficient to show the sexual intercourse element of statutory rape, and, thus, defendant's convictions on two counts of the statutory rape of defendant's daughter could not be upheld on appeal as the evidence did not show there was an insertion of the male penis into the vagina of the female, as was required to show the sexual intercourse element. *Pittman v. State*, 836 So. 2d 779 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952 (Miss. Ct. App. 2003).

Evidence that defendant did not attempt to penetrate defendant's daughter meant that the State was not relieved of the requirement of proving penetration as statutory law did not require the State to prove penetration where it was shown that the genitals, anus, or perineum of a child under age 16-years-old was lacerated or torn in an attempt to have sexual intercourse with the child, and the evidence showed the child was under age 16, had lesions on the child's perineum, and an anal tear, but the lesions and the tear were not shown to have occurred during an attempt to have sexual intercourse, and, indeed, the daughter testified that defendant had not tried to penetrate her with defendant's male sex organ. *Pittman v. State*, 836 So. 2d 779 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952 (Miss. Ct. App. 2003).

Evidence was sufficient to prove statutory rape where (1) the defendant and the victim both testified that they engaged in sexual intercourse, though they disagreed as to the time and place, (2) the victim testified concerning her birth date and verified that she was 13 years old at the time of the intercourse with the defendant, (3) an investigator established that the defendant was 33 years old, and (4) the victim testified she was not married to the defendant. *Hayes v. State*, 803 So. 2d 473 (Miss. Ct. App. 2001).

Evidence was sufficient to support the defendant's conviction for capital rape. *Allen v. State*, 749 So. 2d 1152 (Miss. Ct. App. 1999).

Guilty verdict in rape prosecution was not against weight of evidence, notwithstanding either inflammatory nature of crime, poor quality of evidence, or defendant's assertions that evidence consisted primarily of child victim's statements and repetitions of those statements, that child at times mentioned name of another relative living in household, and that jury had difficulty with case. *Young v. State*, 679 So. 2d 198 (Miss. 1996).

Rape conviction was supported by complainant's testimony and identification of defendant as perpetrator, defendant's possession of long-barrel gun and silver flashlight which complainant described, fact that defendant was driving vehicle which

matched general description provided by complainant, and fact that defendant was found within hours of rape in same general vicinity as incident occurred. *Thomas v. McDonald*, 667 So. 2d 594 (Miss. 1995).

In a prosecution for rape of a child under the age of 14, proof of penetration is required absent evidence that the private parts of the child have been lacerated or torn, though actual medical evidence of penetration is not required; thus, in a prosecution for rape under this section, there was sufficient evidence of penetration, even though there was no medical testimony showing that the victim's private parts had been lacerated or torn, where the victim specifically testified that her private parts had been penetrated. *Wilson v. State*, 606 So. 2d 598 (Miss. 1992).

In a juvenile delinquency proceeding, evidence that the juvenile had a medium-sized pocketknife, forcibly took the victim behind a woodpile in the backyard, pushed her to the ground, and then voluntarily stopped the assault was insufficient to support a finding of guilty of attempted rape. *In re R.T.*, 520 So. 2d 136 (Miss. 1988).

The evidence was sufficient to sustain a conviction for rape where the victim testified as to the occurrence, tests indicated the presence of sperm in the victim, an acid phosphatase test was positive, and the physician testified that he observed evidence of recent injury to the victim's body on the evening the rape occurred. *Dixon v. State*, 519 So. 2d 1226 (Miss. 1988).

Jury verdict was not against overwhelming weight of evidence where defendant argued that it was virtually impossible for all things that victim and her husband testified about to have occurred in 5 minute interval that husband was away from home. Defendant also argued that children of victim were asleep in bedroom across hall yet never awakened while victim was allegedly screaming. Although evidence was conflicting and 5 minutes did seem to be rather short time for all that State alleged to have transpired, court would not disturb jury's finding on conflicting testimony where there was substantial evidence to support ver-

dict. *Pinson v. State*, 518 So. 2d 1220 (Miss. 1988).

Lower court did not err in overruling defendant's motion for directed verdict where state had put on ample evidence that there was conflict about defendant's whereabouts at time of rape, victim knew defendant and identified him as her rapist, giving detailed description of night in question, and her daughter's testimony substantiated her own. *Singleton v. State*, 518 So. 2d 653 (Miss. 1988).

Evidence was sufficient to sustain verdict of guilt on principal charge of rape where defendant confessed to crime. *Johnson v. State*, 511 So. 2d 1360 (Miss. 1987).

Defendant charged with rape was not entitled to a directed verdict on sanity issue, since the testimony of an officer, who had executed an affidavit stating that defendant was not of sound mind and memory, was insufficient as a matter of law to rebut presumption of sanity, and there was nothing in the record to show that, at the time of the crime, defendant was McNaughten insane. *Brown v. State*, 501 So. 2d 1131 (Miss. 1987).

Assignments of error by defendant who was convicted of raping female under 12 years of age that jury verdict was contrary to the weight of the evidence was without merit where the state's evidence was overwhelming as to defendant's guilt and the defendant's testimony was incredible. *McBride v. State*, 492 So. 2d 581 (Miss. 1986).

Trial court's guilty verdict was supported by the evidence, including accused's admission that he was in the victim's bedroom on the night of the crime and physical evidence placing the accused at the crime scene, and where, although accused denied committing the rape, there was no physical evidence of a second person being in the victim's home that night. *Braxton v. State*, 485 So. 2d 300 (Miss. 1986).

Circumstantial evidence strongly suggesting that murder victim was in truck with defendant on night victim was murdered, coupled with evidence that defendant had never known victim before and fact that she was found strangled to death several days later, and evidence showing that victim had sexual intercourse with

male on night in question is sufficient to establish to exclusion of every reasonable hypothesis consistent with innocence of defendant that victim was raped, that person who committed rape was defendant, that defendant acted with felonious intent, and that rape occurred in substantial temporal and factual relation to victim's murder at hands of defendant. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Undisputed evidence that defendant propositioned victim in lewd manner, exposed himself, seized victim and attempted to drag her away with him, and that lack of success in defendant's attempt to rape victim resulted from victim's resistance, not defendant's abandonment of crime, is sufficient to support conviction for attempted rape. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Defendant was properly convicted of raping a female under the age of 12 years, even though the state's evidence did not establish penetration, where the examining physician found a fresh laceration at the opening of the vagina. *Horton v. State*, 374 So. 2d 764 (Miss. 1979).

Where there was no material discrepancy in the version given by the victim on the witness stand at the trial, and that given in the confession of the accused, and the physical condition of the victim, as well as other testimony, explained the failure of the victim to make a specific accusation against the accused on the night of the attack, the state sufficiently proved the corpus delicti. *Cameron v. State*, 233 Miss. 404, 102 So. 2d 355 (1958).

It is not indispensable that the penetration be proved by the testimony of the prosecutrix, it may be established by circumstantial evidence. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

In a prosecution for rape the failure of defendant's fingerprints to conform to those prints which were taken from the window did not necessarily create a reasonable doubt as to the defendant's guilt. *Lang v. State*, 230 Miss. 147, 87 So. 2d 265 (1956), cert. denied, 352 U.S. 936, 77 S. Ct. 236, 1 L. Ed. 2d 167 (1956).

Direct evidence of the prosecutrix was sufficient to make a case for the jury; conviction of accused for rape committed upon girl 15 years of age affirmed. *Powell v. State*, 195 Miss. 161, 13 So. 2d 622 (1943).

Whether penetration was insufficient to constitute offense held for the jury. *Bardwell v. State*, 155 Miss. 711, 125 So. 85 (1929).

Conviction on impeached testimony of accomplice reversed. *Hunter v. State*, 137 Miss. 276, 102 So. 282 (1924).

20. —Corroborating evidence.

Defendant's convictions for attempted rape and statutory rape in violation of Miss. Code Ann. §§ 97-1-7 and 97-3-65(1)(b) were proper based on the victim's testimony and the corroboration of that testimony by defendant's wife, a physician and a psychologist. *Lee v. State*, 910 So. 2d 1123 (Miss. Ct. App. 2005).

Victim's testimony alone is sufficient to support a rape conviction, even though not corroborated, where it is consistent with the circumstances. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Verdict of jury was not contrary to overwhelming weight of evidence, although facts indicated that sperm found in prosecutrix' vagina were nonmotile and there were no bite marks found on defendant's body, despite allegation of prosecutrix that she had bitten him, where at trial doctor testified that sperm could lose motility at any period of time between ejaculation and 72 hours and defendant was not examined for bite marks until several days after incident; allegations of prosecutrix were corroborated by her physical and mental condition after incident, as well as fact that she immediately reported rape. *Inman v. State*, 515 So. 2d 1150 (Miss. 1987).

Jury's verdict convicting defendant of rape was supported by sufficient evidence where: 2 individuals were present in victim's home on morning of rape; pubic hair possessing same characteristics as defendant's was combed from victim's pubic hair, while no hairs that exhibited same characteristics as those of other person present in victim's home on morning of rape were found; along with proof that victim had been raped, this evidence was

sufficient to place jury's verdict beyond court's authority to disturb. *McFee v. State*, 511 So. 2d 130 (Miss. 1987).

Eyewitness testimony of police officer identifying rape defendant as person seen by officer at scene of crime, as well as other evidence placing defendant at scene, is sufficient to support conviction for rape. *Campbell v. State*, 480 So. 2d 1161 (Miss. 1985).

In a rape prosecution, evidence was sufficient to support conviction, notwithstanding that there was testimony that the victim had remained on friendly, even intimate, terms with the defendant following the rape, as the uncorroborated testimony of a victim that was consistent with the circumstances alone would be sufficient to justify conviction, where, in this case, the victim's testimony was corroborated and entirely consistent with the other evidence, and where the incident occurred in a sparsely populated rural community in which recurring contact, desired or not, with members of the community, including the defendant, was probably inevitable. *Goss v. State*, 465 So. 2d 1079 (Miss. 1985).

Testimony of rape victim which has been corroborated by and is entirely consistent with testimony offered by other state witnesses is sufficient basis upon which jury is free to reject defense claim of consent, notwithstanding testimony, including admission of victim, that victim remained on friendly, even intimate, terms with men involved in rape where incident occurred in sparsely populated rural community in which recurring contact, desired or not, with members of community is probably inevitable. *Goss v. State*, 465 So. 2d 1079 (Miss. 1985).

Testimony of rape victim which has been corroborated by physical facts and by testimony of examining physician and forensic serologist is sufficient to support rape conviction. *Barker v. State*, 463 So. 2d 1080 (Miss. 1985).

Testimony of rape victim identifying defendant as assailant, combined with testimony of defendant's former girl friend placing defendant at scene of crime at approximate time of assault and proof of defendant's lack of upper teeth, corroborating description of assailant given by

victim, is sufficient to sustain conviction. *Harper v. State*, 463 So. 2d 1036 (Miss. 1985).

In a prosecution for rape, the evidence was sufficient to support the conviction where the testimony of the victim that she had been forced to commit sexual intercourse with the defendant was corroborated by witnesses who knew the defendant and had seen him, as well as his truck, in the vicinity of the victim's home at the time of the crime. *Davis v. State*, 406 So. 2d 795 (Miss. 1981), appeal dismissed, cert. denied, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982).

Evidence of physician and another witness held sufficient to corroborate testimony of prosecutrix. *Bardwell v. State*, 155 Miss. 711, 125 So. 85 (1929).

Testimony of prosecutrix that she was raped while in a vacant house, corroborated by a person seeing accused on the gallery of such house who had examined her shortly thereafter when told what had taken place, and a physician had examined her shortly thereafter and found her lacerated and injured, was not uncorroborated testimony of the prosecutrix. *McArthur v. State*, 105 Miss. 398, 62 So. 417 (1913).

21. —Uncorroborating evidence.

Evidence was sufficient to sustain a statutory rape conviction where a victim testified that defendant, who was 28 years old, inserted his penis into her vagina several times while the victim was less than 14 years old. *Price v. State*, 898 So. 2d 641 (Miss. 2005).

Evidence was sufficient to convict defendant of sexual battery, statutory rape, and touching a child for lustful purposes where the totally uncorroborated testimony of the victims was sufficient to support a guilty verdict as that testimony was not discredited or contradicted by other evidence; it was the jury's duty to resolve conflicts in testimony. *Carle v. State*, 864 So. 2d 993 (Miss. Ct. App. 2004).

A conviction of rape may be upheld with the uncorroborated testimony of the victim. Thus, the identification testimony of a rape victim was sufficient to support a conviction despite the existence of strong alibi testimony where the victim's conduct was consistent with that of a person who

has been raped and some seminal fluid was found during an examination of the victim. *McKinney v. State*, 521 So. 2d 898 (Miss. 1988), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990).

In a prosecution under this statute [Code 1942, § 2358], the victim's testimony is sufficient although not corroborated, if it is consistent with the circumstances. *Lee v. State*, 242 Miss. 97, 134 So. 2d 145 (1961).

While a conviction for rape may rest on the uncorroborated testimony of the person alleged to have been raped, it should always be scrutinized with caution; and where there is much in the facts and circumstances in the evidence to discredit her testimony, another jury should be permitted to pass thereon. *Richardson v. State*, 196 Miss. 560, 17 So. 2d 799 (1944); *Rodgers v. State*, 204 Miss. 891, 36 So. 2d 155 (1948); *Johnson v. State*, 213 Miss. 808, 58 So. 2d 6 (1952).

Conviction of forcibly ravishing may be had on prosecutrix's uncorroborated testimony. *Sanders v. State*, 150 Miss. 296, 116 So. 433 (1928); *McLaurin v. State*, 129 Miss. 362, 92 So. 289 (1922); *Fairley v. State*, 152 Miss. 656, 120 So. 747 (1929).

Though the uncorroborated testimony of prosecutrix may be sufficient, it is not when there are numerous and serious contradictions therein. *Allen v. State*, 45 So. 833 (Miss. 1908); *Grogan v. State*, 151 Miss. 652, 118 So. 627 (1928).

Evidence in a prosecution for rape where the only witness connecting defendant with the crime was the prosecutrix herself, did not sustain a conviction. *Rawls v. State*, 105 Miss. 406, 62 So. 420 (1913).

III. UNDER FORMER § 97-5-21.

22. In general.

Forty-six year old male who engages in wholly consensual sexual intercourse with 13 year old female may not be convicted under child seduction statute (former § 97-5-21) where child has previously been intimate with at least 2 other men; nor may he be convicted under child fondling statute (§ 97-5-23) on basis of foreplay leading to intercourse. *McBrayer v. State*, 467 So. 2d 647 (Miss. 1985).

As to promise of marriage, evidence of previous chastity is necessary. *King v. State*, 121 Miss. 230, 83 So. 164 (1919).

Previous chaste character question for jury. *King v. State*, 121 Miss. 230, 83 So. 164 (1919).

Burden of proof is on the state. *King v. State*, 121 Miss. 230, 83 So. 164 (1919).

Intercourse with female already unchaste is not seduction. *Hatton v. State*, 92 Miss. 651, 46 So. 708 (1908).

23. Indictment.

Indictment was not defective for failure to use the words "then and there" before the expression "of previous chaste character." *Terry v. State*, 97 Miss. 472, 52 So. 483 (1910).

It is not necessary under this section [Code 1942, § 2054] to charge that the woman was unmarried, her marriage being a matter of defense. *Hoff v. State*, 83 Miss. 488, 35 So. 950 (1904).

Under this section [Code 1942, § 2054] an indictment pursuing its exact language is not subject to demurrer because it does not aver that the accused is a "man" and that the female is over the age of ten years. *Carlisle v. State*, 73 Miss. 387, 19 So. 207 (1896), overruled on other grounds, *Harrison v. State*, 534 So. 2d 175 (Miss. 1988).

24. Evidence.

Although defendant pled guilty, there was sufficient evidence in defendant's plea colloquy and the post-conviction hearing testimony that the State could have proved its charge of seduction against defendant under former § 97-5-21. *Carter v. State*, 775 So. 2d 91 (Miss. 1999).

Defendant's admissions held admissible to prove that seduction was result of promises made to prosecutrix, though insufficient alone to constitute corroboration. *Stone v. State*, 152 Miss. 274, 119 So. 198 (1928).

Testimony of prosecutrix must be corroborated in order to sustain conviction. *Terry v. State*, 97 Miss. 472, 52 So. 483 (1910).

IV. UNDER FORMER § 97-3-67.

25. In general.

"Mistake of age" is not defense to crime of statutory rape, but, rather, knowledge

or ignorance of age of child victim is irrelevant to offense of statutory rape. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Instruction on crime of statutory rape was not warranted in prosecution for rape of 13-year-old victim, as offense of statutory rape requires that victim be over 14 years of age but under age of 18. *Collins v. State*, 691 So. 2d 918 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997), cert. denied, 522 U.S. 877, 118 S. Ct. 198, 139 L. Ed. 2d 135 (1997).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).

Since this statute [Code 1942, § 2359] runs the gamut from a minor misdemeanor to a repulsive felony, the calling of a special term to try one person indicted on this charge only was such as to indicate to the jury that the court considered it a serious charge, and so deprived the defendant of a fair trial. *Coker v. State*, 200 Miss. 535, 27 So. 2d 898 (1946).

Marriage by husband who was not threatened with bodily harm if he did not marry wife, but who had married her to escape penalty for statutory rape, of which he was not guilty because wife was above age of consent, held not invalid because of coercion. *Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768 (1935).

Defendant was guilty of seduction, if female between twelve and eighteen consented to sexual intercourse as result of defendant's promise to give her money and clothes. *Stone v. Bang*, 153 Miss. 892, 122 So. 95 (1929).

Title of act fixing age of consent at 18 years held sufficient. *Hollins v. State*, 128 Miss. 119, 90 So. 630 (1922).

Fact that the girl, previous to the act of intercourse relied on for conviction, had copulated with accused is a defense, for she was not, at the time, chaste. *Rodgers v. State*, 111 Miss. 781, 72 So. 198 (1916).

26. Evidence; generally.

Where the testimony amply supported a jury verdict finding defendant guilty and there were no grounds for reversal, the conviction was affirmed. *Gautier v. State*, 233 Miss. 329, 101 So. 2d 648 (1958).

Corpus delicti of forcibly ravishing a female of about thirty years of age may be proved by the uncorroborated testimony of the prosecutrix. *Buchanan v. State*, 225 Miss. 399, 83 So. 2d 627 (1955).

In prosecution under this section [Code 1942, § 2359], trial court does not abuse its discretion in permitting prosecution to ask leading questions of victim, a sixteen-year-old girl who was reluctant to testify, where court has observed witness' demeanor on witness stand and considers leading questions reasonably necessary and where defendant has admitted to officials acts to which witness testifies and offers no evidence to contradict facts. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377 (1949).

Trial court does not commit reversible error in permitting case to be reopened after State and defendant had rested their case to allow state to prove fact that female victim in prosecution under this section [Code 1942, § 2359] is unmarried, failure to prove this fact previously being mere oversight. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377 (1949).

In prosecution for violating age of consent law, evidence of accused's guilt held for jury as against defense of alibi. *Johnson v. State*, 171 Miss. 321, 157 So. 896 (1934).

Evidence held sufficient to support conviction. *Gillis v. State*, 152 Miss. 551, 120 So. 455 (1929).

Evidence may be offered at any time within two years prior to indictment for statutory rape. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

Evidence of size and appearance of prosecutrix in given year admissible, as tending to show age when chastity violated. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

Prosecutrix testifying that accused violated her chastity may be impeached by showing contrary statements. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

27. —Chastity of victim.

Evidence of conversations with an absent witness offered to refute presumption of chaste character of prosecutrix under Code 1942, § 2360, was inadmissible whether viewed as hearsay statements of isolated facts or as attempt to prove character by reputation. *Harrison v. State*, 44 So. 2d 403 (Miss. 1950).

Statement by prisoner when being questioned about taking money from victim that "I didn't rob her but I did have sexual intercourse with her," was admissible in evidence against him in prosecution for rape under this section [Code 1942, § 2359], there being no suggestion in record that any threat or advantage of any kind was intimidated to induce statement, and jury being instructed to disregard statements concerning taking of money. *Summerville v. State*, 207 Miss. 54, 41 So. 2d 377 (1949).

Admission of evidence of intercourse subsequent to first, held error. *Arthur v. State*, 147 Miss. 136, 113 So. 199 (1927).

General reputation of prosecutrix for chastity prior to act of accused admissible in statutory rape. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

Error to admit acts of sexual intercourse subsequent to first act which completes offense of statutory rape; acts of sexual intercourse prior to act constituting statutory rape admissible. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

Prosecutrix's reputation for chastity or specific acts of unchastity after time proven on accused inadmissible. *Kolb v. State*, 129 Miss. 834, 93 So. 358 (1922).

28. Corroboration.

In a prosecution for rape the evidence failed to corroborate the prosecutrix' testimony, where such evidence was by the prosecutrix and her mother, was self-serving, admittedly hearsay, and was denied by the defendant. *Howard v. State*, 417 So. 2d 932 (Miss. 1982).

Although Mississippi has required by statute that the complaining witness' testimony be corroborated in prosecutions for

certain sexual offenses (e.g. Code 1942, §§ 2359, 2374), the state courts have specifically held that the requirement for corroboration is confined to those offenses wherein the statute expressly so provides, and no such corroboration is required in prosecution of defendant for disturbing the peace of the complaining witness, on allegations that the defendant had touched complainant's private parts. *Henry v. Williams*, 299 F. Supp. 36 (N.D. Miss. 1969).

While sufficient for conviction, uncorroborated testimony of the person alleged to have been raped should be scrutinized with caution. *Goode v. State*, 245 Miss. 391, 146 So. 2d 74 (1962).

Under this statute [Code 1942, § 2359] corroboration must be, not merely of incidental details, but of the commission of the prohibited act, and even though circumstances and admissions may be sufficient to this end, mere opportunity creating a possibility is not enough of itself. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151 (1947).

Findings of physician after personal examination of prosecutrix, that her condition could innocently have been caused, was insufficient to supply the corroborative proof required by the statute. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151 (1947).

Testimony of witness that at about the time and at the place where the alleged assault was committed, he saw a car, identified by other witnesses as being similar to the car of defendant, but that he saw therein only a man whom he could not identify seated behind the steering wheel, was insufficient to corroborate testimony of prosecutrix. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151 (1947).

Testimony of prosecutrix that on two prior occasions defendant had been guilty of related indecencies towards her does not of itself satisfy the requirement of corroboration. *Yancey v. State*, 202 Miss. 662, 32 So. 2d 151 (1947).

Corroboration is necessary in prosecution for attempt to violate age of consent statute. *Jones v. State*, 155 Miss. 335, 124 So. 368 (1929).

Corroboration means to strengthen, to support, or confirm testimony of injured

female in respect to main fact of corpus delicti. *Jones v. State*, 155 Miss. 335, 124 So. 368 (1929).

Defendant's admissions in prosecution

for attempt to violate age of consent statute held sufficient corroboration. *Jones v. State*, 155 Miss. 335, 124 So. 368 (1929).

ATTORNEY GENERAL OPINIONS

Penalty for crime or rape of child under fourteen, if committed by adult, is life imprisonment or death and jurisdiction is in circuit court. *Genin* Aug. 25, 1993, A.G. Op. #93-0611.

Circuit court, not youth court, has original jurisdiction over any violation of this section, notwithstanding that consent has been raised as defense. *Genin* Aug. 25, 1993, A.G. Op. #93-0611.

Section 47-7-33 does not empower circuit judges to suspend sentences pursuant to Section 97-3-65(2)(c) and Section 97-3-101(3) because the latter sections each provide that a life sentence is the maximum sentence that may be imposed. *Caranna*, May 5, 2000, A.G. Op. #2000-0239.

RESEARCH REFERENCES

ALR. Inclusion or exclusion of the day of birth in computing one's age. 5 A.L.R.2d 1143.

Admissibility in rape prosecution, of evidence that accused is married, has children, and the like. 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix. 62 A.L.R.2d 1083.

Intercourse under pretext of medical treatment as rape. 70 A.L.R.2d 824.

Intercourse accomplished under pretext of medical treatment as rape. 70 A.L.R.2d 824.

Incest as included within charge of rape. 76 A.L.R.2d 484.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 A.L.R.2d 1017.

Rape by fraud or impersonation. 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape. 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape. 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married. 32 A.L.R.3d 1030.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 A.L.R.3d 1434.

What constitutes penetration in prosecution for rape or statutory rape. 76 A.L.R.3d 163.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 A.L.R.3d 1228.

Propriety of, or prejudicial effect of omitting or giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity. 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only. 99 A.L.R.3d 129.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient. 99 A.L.R.3d 854.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 A.L.R.4th 330.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of

aggravated degree of rape, sodomy, or other sexual abuse. 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation. 42 A.L.R.4th 937.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment. 65 A.L.R.4th 1064.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape. 76 A.L.R.4th 1147.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 A.L.R.4th 685.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group. 18 A.L.R.5th 856.

Propriety of publishing identity of sexual assault victim. 40 A.L.R.5th 787.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Application of death penalty to nonhomicide cases. 62 A.L.R.5th 121.

Am Jur. 65 Am. Jur. 2d, Rape §§ 11 et seq.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 1.1 (complaint, petition, or declaration — false imprisonment imposed by private individual — sexual assault).

45 Am. Jur. Proof of Facts 2d 631, Age of Person.

8 Am. Jur. Proof of Facts 3d 749, Foundation for DNA Fingerprint Evidence.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

18 Am. Jur. Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

CJS. 75 C.J.S., Rape §§ 18, 21.

Law Reviews. DuBose, The Florida Star — "happy 200th" to the first amendment, but a setting sun for victims' privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

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Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-67. Repealed.

Repealed by Laws, 1998, ch. 549, § 6, eff from and after July 1, 1998.

[Codes, Hemingway's 1917, § 1093; 1930, § 1123; 1942, § 2359; Laws, 1914, ch. 171; 1962, ch. 320; 1980, ch. 390; 1985, ch. 389, § 4]

Editor's Note — Former § 97-3-67 related to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age. See now, §§ 97-3-65, 97-3-95 and 97-5-23.

For judicial decision notes under former § 97-3-67 relating to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age, see § 97-3-65.

§ 97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; “complaining witness” defined.

(1) In any prosecution for rape under Section 97-3-65, 97-3-67 or 97-3-71, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of said complaining witness, the following procedure shall be followed:

(a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a closed hearing in chambers, out of the presence of the jury, if any, and at such closed hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and otherwise admissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(2) As used in this section and Section 97-3-70, “complaining witness” means the alleged victim of the crime charged, the prosecution of which is subject to this section.

SOURCES: Laws, 1977, ch. 438, § 1, eff from and after July 1, 1977.

Editor’s Note — Section 97-3-67 referred to in (1) was repealed by Laws, 1998, ch. 549, § 6, eff from and after July 1, 1998. See now §§ 97-3-65, 97-3-95, and 97-5-23.

Section 97-3-70 referred to in (2) was repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

Cross References — Sexual battery, see §§ 97-3-95 through 97-3-103.

Evidentiary rule as to relevance of rape victim’s past behavior, see Rule 412, Mississippi Rules of Evidence.

JUDICIAL DECISIONS

1. In general.

Defendant’s motion for a new trial was properly denied where the evidence was sufficient to support a rape conviction

given the victim’s uncontradicted testimony; defendant’s act of opening the porch door was clearly sufficient to constitute a breaking, and entry through the

porch was required to gain entrance into the victim's home. *Davis v. State*, 910 So. 2d 1228 (Miss. Ct. App. 2005).

Indictment was sufficient to put defendant on notice that he was being charged with attempted rape, and the indictment specifically set forth the conduct which the State planned to use as evidence; defendant failed to complete the crime of rape because he was unable to get an erection, and consequently unable to penetrate the victim's vagina, such that the record supported a conviction of attempted rape. *Purnell v. State*, 878 So. 2d 124 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

State rape-shield statute, insofar as it authorized preclusion of evidence of past sexual conduct between victim and accused, did not per se violate Sixth Amendment where statute permits defendant to introduce evidence of own past sexual conduct with alleged victim upon timely filing written motion and offer of proof; it was error for state Court of Appeals of state to adopt "per se rule" that notice

requirement violates Sixth Amendment in all cases where requirement was used to preclude introduction of such evidence; it would be left to state courts on remand to address whether statute authorized preclusion of such evidence and whether preclusion violated Sixth Amendment on facts of case. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991), on remand, 193 Mich. App. 298, 484 N.W.2d 685 (1992).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).

RESEARCH REFERENCES

ALR. Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 A.L.R.3d 257.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 A.L.R.4th 283.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons. 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial

by showing that similar charges were made against other persons. 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts. 83 A.L.R.4th 685.

Am Jur. 65 Am. Jur. 2d, Rape §§ 66 et seq.

CJS. 75 C.J.S., Rape § 63.

Law Reviews. DuBose, The Florida Star—"happy 200th" to the first amendment, but a setting sun for victims' privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

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Practice References. Young, Trial Handbook for Mississippi Lawyers § 28:5.

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Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-69. Rape; "chaste character" presumed; uncorroborated testimony of victim insufficient.

In the trial of all cases under the last preceding section, it shall be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not; but no person shall be convicted upon the uncorroborated testimony of the injured female.

SOURCES: Codes, Hemingway's 1917, § 1094; Laws, 1930, § 1124; Laws, 1942, § 2360; Laws, 1914, ch. 171.

Cross References — Sexual battery, see §§ 97-3-95 through 97-3-103.

JUDICIAL DECISIONS

1. In general.
2. Chaste character of female.
3. Corroboration.

1. In general.

Defendant contended the jury's decision was based solely on conjecture and inference, and he maintained that he was not identified by the victim and that the evidence was circumstantial; however, the victim testified that defendant, her nephew, had raped her, her testimony was not impeached, deoxyribonucleic acid evidence connected semen evidence to defendant, and the evidence was sufficient to sustain his conviction. *Grant v. State*, 913 So. 2d 316 (Miss. Ct. App. 2005).

This section [Code 1942, § 2360] is limited in its application to cases of statutory rape and has no application to a robbery prosecution. *Sistrunk v. State*, 200 Miss. 437, 27 So. 2d 606 (1946).

2. Chaste character of female.

In prosecution for statutory rape under Code 1942, § 2359, evidence of conversations with an absent witness offered to refute presumption of chaste character of prosecutrix was inadmissible. *Harrison v. State*, 44 So. 2d 403 (Miss. 1950).

The testimony of two witnesses residing in the same locality as the prosecutrix as

to her unchaste reputation was not rebutted by the contrary testimony of two witnesses who, for some years, had lived more than eight miles away. *Barker v. State*, 200 Miss. 416, 27 So. 2d 555 (1946).

Under this section [Code 1942, § 2360] the female is presumed to have been of previous chaste character. *Smith v. State*, 188 Miss. 339, 194 So. 922 (1940).

Instruction that burden was on defendant, after chastity of prosecutrix attacked, to prove her unchaste held erroneous. *Johnson v. State*, 136 Miss. 775, 101 So. 685 (1924).

3. Corroboration.

The requirement that testimony of the outraged female be corroborated does not extend to prosecutions for an indecent assault on a female under 13. *Pittman v. State*, 236 Miss. 592, 111 So. 2d 415 (1959).

Uncorroborated testimony of prosecutrix sufficient for conviction under Ch. 171, Laws 1908-not under this section [Code 1942, § 2360]. *McLaurin v. State*, 129 Miss. 362, 92 So. 289 (1922).

In statutory rape prosecution, where prosecutrix's testimony is uncorroborated court should direct acquittal. *State v. Bradford*, 126 Miss. 868, 89 So. 767 (1921).

RESEARCH REFERENCES

ALR. Inclusion or exclusion of the day of birth in computing one's age. 5 A.L.R.2d 1143.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity. 35 A.L.R.3d 1452.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 A.L.R.3d 1434.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 A.L.R.4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 A.L.R.4th 1076.

Am Jur. 2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

18 Am. Jur. Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

CJS. 75 C.J.S., Rape § 14.

Law Reviews. DuBose, The Florida Star—"happy 200th" to the first amendment, but a setting sun for victims' privacy? 10 Miss. C. L. Rev. 193, A Spring, 1990.

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Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-70. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.
[En Laws, 1977, ch. 438, § 2]

Editor's Note — This section excluded from rape trials evidence pertaining to the victim's reputation or sexual conduct, with minor exceptions.

§ 97-3-71. Rape; assault with intent to ravish.

Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

SOURCES: Codes, 1906, § 1359; Hemingway's 1917, § 1096; Laws, 1930, § 1125; Laws, 1942, § 2361; Laws, 1962, ch. 321, eff from and after passage (approved March 8, 1962).

Cross References — Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Testing of persons convicted of rape for HIV and AIDS, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. —Corroboration.
5. Instructions.

1. In general.

Defendant's convictions of rape, Miss. Code Ann. § 97-3-71, and armed robbery, Miss. Code Ann. § 97-3-79, were affirmed; defendant's claims concerning the sufficiency and weight of the evidence were procedurally barred, as defendant failed to renew a motion for a directed verdict. *Collins v. State*, 858 So. 2d 217 (Miss. Ct. App. 2003).

Petitioner's sentence of five years probation was within the statutory limit of Miss. Code Ann. § 97-3-71; statutes governing parole contained no mandatory language and as such, prisoners had no constitutionally recognized liberty interest in parole. *Payton v. State*, 845 So. 2d 713 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003), cert. denied, 540 U.S. 1078, 124 S. Ct. 931, 157 L. Ed. 2d 751 (2003).

Imposition of civil damages on newspaper for publishing rape victim's name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).

Under this section [Code 1942, § 2361] the previous chaste character of a female is an essential element of crime. *Thames v. State*, 221 Miss. 573, 73 So. 2d 134 (1954).

Sentence under this section [Code 1942, § 2361] after indictment, trial and conviction, was not improper because of the mere probability that accused could have been prosecuted and sentenced under Code 1942, § 2011 for assault and battery with a deadly weapon with intent to rav-

ish, or under Code 1942, § 2017 for an attempt. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211 (1947), suggestion of error overruled, 201 Miss. 434, 30 So. 2d 74 (1947), rev'd on other grounds, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Court may call attention of jury to failure to assess punishment. *Thompson v. State*, 124 Miss. 463, 86 So. 871 (1921).

2. Indictment.

Indictment charging making of lewd suggestion by defendant to victim and violent making of attack or assault upon victim properly charges attempted rape under § 97-3-65, rather than assault with intent to rape under this section, where indictment accurately tracks § 97-3-65 by omitting mention of "previous chaste character" and affirmatively asserts "carnally know," and where, at trial, at specific request of defendant, defendant is informed that prosecution is under § 97-3-65 and defendant makes no objection to being tried under that statute. *Harden v. State*, 465 So. 2d 321 (Miss. 1985).

Where the evidence positively established the completed act of sexual intercourse, it was error to prosecute and convict the appellant of assault with intent to ravish. *Young v. State*, 317 So. 2d 402 (Miss. 1975).

Where an indictment charged the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, and was drawn under this section (Code 1930, § 1125), it was error for the trial court to treat the indictment as if drawn under Code 1930, § 793, the attempt statute. *John v. State*, 191 Miss. 152, 2 So. 2d 800 (1941).

The trial court is without power to impose a sentence of one year's imprisonment on a defendant convicted upon an indictment drawn under this section [Code 1930, § 1125] and charging the defendant with an assault with intent to ravish a female of previous chaste character, of the age of 14 years, unless such term of imprisonment was fixed by the jury trying the case. *John v. State*, 191 Miss. 152, 2 So. 2d 800 (1941).

Indictment held not to comply with provisions of statute. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

Chastity of female not element of offense and need not be alleged in prosecution for attempt to rape female of previous chaste character; separate offense from assault to rape female not of previous chaste character. *Hicks v. State*, 130 Miss. 411, 94 So. 218 (1922).

In assault with intent, state must allege and prove previous chaste character of female. *Wyche v. State*, 124 Miss. 736, 87 So. 286 (1921).

In order to convict, the indictment must allege the previous chastity of the female assaulted. *Frost v. State*, 94 Miss. 104, 47 So. 898 (1909).

An indictment pursuing the very language of Code 1906, § 1359 cannot be sustained as an indictment under Code 1892, § 967, relative to assault, including assault with intent to rape. *Barton v. State*, 94 Miss. 375, 47 So. 521 (1908).

Where an indictment was manifestly under Code 1906, § 1359, the verdict being merely guilty as charged, the sentence to five years' imprisonment was erroneous. *Barton v. State*, 94 Miss. 375, 47 So. 521 (1908).

3. Evidence.

Defendant contended the jury's decision was based solely on conjecture and inference, and he maintained that he was not identified by the victim and that the evidence was circumstantial; however, the victim testified that defendant, her nephew, had raped her, her testimony was not impeached, deoxyribonucleic acid evidence connected semen evidence to defendant, and the evidence was sufficient to sustain his conviction. *Grant v. State*, 913 So. 2d 316 (Miss. Ct. App. 2005).

Because the laboratory director testified to having trained the technician who performed the DNA testing, having examined the technician's proficiency, and having checked the protocols and checked and signed all DNA test results, the laboratory director's testimony as to the DNA test results was properly admitted; further, where the trial court found the laboratory followed the guidelines on the admissibility of DNA evidence as outlined in *Polk v. State*, there was no due process violation

simply because the laboratory had not gained national certification at the time of the first set of tests. *Morris v. State*, 887 So. 2d 804 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Sufficient evidence existed to support the charge of attempted rape as underlying the capital murder charge; the State's evidence concerning the underlying charge was not based on circumstantial evidence. *Powers v. State*, 883 So. 2d 20 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 1297, 161 L. Ed. 2d 121 (2005).

In a case where defendant threatened his estranged wife with a gun, forced her to have intercourse with him, and struck her, the evidence was sufficient to support defendant's rape and simple assault convictions based on the victim's testimony, as her testimony was not incredible on its face nor was it contradicted by other, more compelling, evidence. *Williams v. State*, 868 So. 2d 346 (Miss. Ct. App. 2003).

Defendant rather repulsively argued on appeal that because the victim had not testified with clinical certainty about the extent to which defendant had penetrated the victim, the victim's evidence did not prove forcible sexual intercourse; however, when defendant's statement that defendant had raped the victim was taken together with the victim's testimony, the trial court below properly denied defendant's motion for a directed verdict. *Bryant v. State*, — So. 2d —, 2003 Miss. App. LEXIS 80 (Miss. Ct. App. Feb. 18, 2003).

Evidence that assailant attempted to unbutton prosecutrix's blouse, but used no lewd or lascivious language, that defendant accused of being assailant is identified by prosecutrix only by voice, and that prosecutrix bit assailant on arm during assault but that police officer who arrested defendant on following day did not see any scars, bite marks, fresh scratches or bruises on defendant's arm is insufficient to support conviction of attempted rape. *Clemons v. State*, 470 So. 2d 653 (Miss. 1985).

Conviction under this section [Code 1942, § 2361] is warranted where testimony of prosecutrix was supported by defendant's oral confession to the sheriff and in substantial part by his own testimony. *Polk v. State*, 247 Miss. 734, 156 So. 2d 592 (1963).

In a prosecution under this section [Code 1942, § 2361] a burglarious breaking is evidence of some unlawful purpose, the nature of which may be established circumstantially. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211 (1947), suggestion of error overruled, 201 Miss. 434, 30 So. 2d 74 (1947), rev'd on other grounds, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

The trial court did not abuse its discretion in allowing the state, after both sides had rested in a prosecution under this section [Code 1942, § 2361], to introduce testimony it had overlooked, in the direct examination of the victim and her mother, to establish previous chastity, since ample opportunity for cross examination was allowed and such proof was an element of the accusation of which defendant had been duly informed. *Lee v. State*, 201 Miss. 423, 29 So. 2d 211 (1947), suggestion of error overruled, 201 Miss. 434, 30 So. 2d 74 (1947), rev'd on other grounds, 332 U.S. 742, 68 S. Ct. 300, 92 L. Ed. 330 (1948), conformed to, 203 Miss. 264, 34 So. 2d 736 (1948).

Evidence that defendant laid hands on shoulder and throat of female, and that he

turned her loose and ran when she continued to scream, held insufficient to sustain conviction for assault with intent to rape. *Pew v. State*, 172 Miss. 885, 161 So. 678 (1935).

Evidence sustaining conviction of assault with intent to ravish. *Thompson v. State*, 124 Miss. 463, 86 So. 871 (1921).

Where evidence did not show the use of such violence as might be necessary to overcome resistance to the attempt, accused could not be convicted of attempt to commit rape. *Austin v. State*, 48 So. 817 (Miss. 1909).

4. —Corroboration.

Corroboration of the testimony of the prosecutrix is unnecessary. *Gerrard v. State*, 34 So. 2d 195 (Miss. 1948).

Corroboration of prosecutrix held not required in prosecution for attempt to rape. *Barnes v. State*, 164 Miss. 126, 143 So. 475 (1932).

5. Instructions.

Instruction in a prosecution for assault with intent to rape, as to the nature of the force used, was erroneous. *Corley v. State*, 99 Miss. 896, 56 So. 179 (1911).

RESEARCH REFERENCES

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What constitutes penetration in prosecution for rape or statutory rape. 76 A.L.R.3d 163.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity. 90 A.L.R.3d 1300.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape. 76 A.L.R.4th 1147.

Am Jur. 65 Am. Jur. 2d, Rape §§ 15 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 37-39 (rape).

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§ 97-3-73. Robbery; definition.

Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (55); 1857, ch. 64, art. 220; 1871, § 2674; 1880, § 2944; 1892, § 1284; Laws, 1906, § 1361; Hemingway's 1917, § 1097; Laws, 1930, § 1126; Laws, 1942, § 2362.

Cross References — Ineligibility for parole of persons convicted of robbery or attempted robbery through display of a firearm, see § 47-7-3.

Penalty for robbery, see § 97-3-75.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Instructions.
5. Miscellaneous.
6. Sentence.

1. In general.

Three essential elements of robbery are as follows: (1) felonious intent, (2) force or putting in fear as a means of effectuating the intent, and (3) by that means taking and carrying away the property of another from his person or in his presence; in dealing with the second element, if putting in fear is relied upon, it must be the fear under duress of which the owner parts with possession. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

The statute is the same as the common-law definition of the offense. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Statute (Code 1942, § 2367), pertaining to robbery by use of a deadly weapon, is merely an extension of this section [Code 1942, § 2362], and the evil sought to be abated is the employment of such weapons as are generally considered to be deadly. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

The means used to effect a robbery is important only to the extent that it reasonably instills a disabling apprehension of great personal injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

It is not essential that the owner of the goods should have been put in fear. The statute is in the alternative "by violence to his person" or "by putting such person in fear." *McDaniel v. State*, 16 Miss. (8 S. & M.) 401 (1847); *Lovern v. State*, 30 So. 2d 511 (Miss. 1947).

2. Indictment.

Indictment properly charged defendant with an overt act toward the commission of strong-arm robbery where it stated that, in attempting to take an automobile and cash from the victim, defendant threatened to drag the victim from his car, physically assault him, and rob him, placing him in fear of some immediate injury to his person. *Gaston v. State*, 922 So. 2d 841 (Miss. Ct. App. 2006).

Indictment alleging robbery by fear does not vary fatally from proof offered at trial merely because proof can be interpreted as showing robbery by force as well as robbery by fear. *Ingram v. State*, 483 So. 2d 688 (Miss. 1986).

Indictment charging that money was forcibly snatched from person of another held sufficient to support conviction for grand larceny, so that defendant could not complain of variance on ground proof showed robbery while indictment charged grand larceny. *Dixon v. State*, 169 Miss. 876, 154 So. 290 (1934).

Allegation in indictment for robbery that money was feloniously taken, stolen,

and carried away by putting owner in fear held sufficient to charge intent to steal. *State v. Snowden*, 164 Miss. 613, 145 So. 622 (1933).

Indictment charging robbery "of about \$6.00 lawful and legal money and tender of the United States of America of the value unknown" held sufficient allegation of amount. *State v. Snowden*, 164 Miss. 613, 145 So. 622 (1933).

Allegations of indictment for robbery held sufficient, though not following statutory form. *State v. Snowden*, 164 Miss. 613, 145 So. 622 (1933).

Allegation that defendant did feloniously take, steal, and carry away property by putting owner in fear held to sufficiently allege intent. *Webster v. State*, 146 Miss. 682, 111 So. 749 (1927).

Where statute makes punishable the doing of several acts, doing all in one transaction violates the act but once; and indictment may allege defendant did all, employing the conjunction "and" where the statute has "or." *Brady v. State*, 128 Miss. 575, 91 So. 277 (1922).

Indictment for robbery held fatally defective for omission to allege immediate danger to person alleged to have been robbed. *Webb v. State*, 99 Miss. 545, 55 So. 356 (1911).

Indictment which fails to charge an intent to steal is defective. *Jones v. State*, 95 Miss. 121, 48 So. 407, 21 Am. Ann. Cas. 1137 (1909).

Indictment need not charge an assault in terms, where it charges taking of goods from person. *State v. Presley*, 91 Miss. 377, 44 So. 827 (1907).

In an indictment under this section [Code 1942, § 2362] seeking to charge a robbery by taking property from the person of another by putting him in fear, it is essential to charge either that the person said to have been robbed was put in fear of some immediate danger to his person or that the property was taken from his person. *Smith v. State*, 82 Miss. 793, 35 So. 178 (1903).

An indictment charging a taking from the person of another or in his presence against his will by violence is not bad for failing to include or by putting in fear of immediate bodily injury. *Cunningham v. State*, 28 So. 750 (Miss. 1900); *State v. Presley*, 91 Miss. 377, 44 So. 827 (1907).

3. Evidence.

Owner testified that he locked the door-knob and shut the door after allowing defendant to enter his mobile home, and both the owner and a victim testified that defendant declined to sit down and that she stood facing them with her back to the door; according to the victim, defendant had her hand on the doorknob before three masked men rushed through the door, and she never saw any of the masked men point a gun at defendant. Also, immediately after the men left, defendant refused to help the victim untie the owner; thus, the evidence was sufficient, and defendant's convictions for burglary of a dwelling, robbery, kidnapping, and auto theft were not against the weight of the evidence. *Brown v. State*, 926 So. 2d 283 (Miss. Ct. App. 2006).

Defendant's conviction for robbery in violation of Miss. Code Ann. § 97-3-73 was proper where the victim saw and felt defendant take her ring off of her finger. She was aware that he was taking her ring and she did not consent to the taking. *Cabrere v. State*, 920 So. 2d 1062 (Miss. Ct. App. 2006).

Evidence was sufficient to accept defendant's guilty plea to robbery because defendant handed the bank teller a note, and when she asked him what he wanted, he gave her a bag and told her to fill it with money. Although the teller was not injured, and the note said, "I'm a bum" as opposed to "I have a bomb," the evidence was clear that defendant was in possession of \$7,000 of the bank's money that he received after placing the bank teller in immediate fear of a bodily injury to herself. *Covington v. State*, 909 So. 2d 160 (Miss. Ct. App. 2005).

Where the store owner testified that defendant entered the grocery store wearing a red ski mask, jabbed a knife at the store owner, and took \$ 440 from the cash register, the evidence supported the verdict finding him guilty of robbery. The trial judge acted within his discretion by denying defendant's motion for a directed verdict. *Smith v. State*, 913 So. 2d 365 (Miss. Ct. App. 2005).

Record reflected that three individuals, the victim and two eyewitnesses, testified regarding defendant's participation in a

parking lot robbery. The victim and one of said witnesses positively identified defendant from a pretrial photo array and in court, while the third witness could only say that he believed defendant was the assailant; thus, where each witness was subjected to cross-examination by two separate defense counsels and gave similar accounts of the robbery, defendant's motion for a new trial or judgment notwithstanding the verdict, based on insufficient evidence, was properly denied. *Bynum v. State*, 929 So. 2d 324 (Miss. Ct. App. 2005).

State established a *prima facie* case that accomplice's knife was used during the course of the transaction; thus, there was sufficient evidence to convict defendant for robbery. *Sullivan v. State*, 883 So. 2d 142 (Miss. Ct. App. 2004).

Defendant's motion for a judgment notwithstanding the verdict was properly denied where the absence of physical evidence did not negate a conviction where there was testimonial evidence; the victim was able to easily identify defendant as the perpetrator, and although defendant testified on his own behalf and asserted that he had not committed the crime, juries in Mississippi were permitted to accept or reject testimony by a witness. *Williams v. State*, 879 So. 2d 1126 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of robbery as the victim was able to identify defendant, and testified how defendant had hit him in the face, forced him into a ditch, and made him give him his money. *Lee v. State*, 877 So. 2d 543 (Miss. Ct. App. 2004).

Defendant claimed that there was insufficient evidence that defendant participated in the robbery of the victim because defendant's co-indictee (who pled to manslaughter) actually took the wallet. However, the jury heard testimony that defendant stated to the co-indictee that, "I got him good, the blade went all the way through," and that defendant then searched through the victim's wallet which was later found in the possession of both men. Thus, a reasonable juror would have found defendant guilty and substantial evidence supported defendant's conviction for capital murder. *Stewart v.*

State, 881 So. 2d 919 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of robbery as defendant entered the victims' home, demanded money, and forcefully moved the 82-year-old husband around the home until he received it. *Mayo v. State*, 886 So. 2d 734 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

State proved that the victim identified defendant from a photo line-up and in the courtroom, and recognized him when he returned to the store on another occasion; the victim was in fear of immediate injury to her person and the trial transcript demonstrated that she testified that defendant had told her to open the cash register or he would kill her. *Armstead v. State*, 869 So. 2d 1052 (Miss. Ct. App. 2004).

Where codefendants testified that defendant shot the owner of the lounge and fled with billfolds taken from the owner and patrons, and the owner and the co-owner both identified defendant as the shooter, the evidence was sufficient to sustain defendant's convictions for armed robbery and aggravated assault, even though the money and the gun were not recovered and the bullet fragments were not retrieved from the ceiling and the victim's head. *Graham v. State*, 861 So. 2d 1053 (Miss. Ct. App. 2003).

Where defendant accused the victims of defrauding defendant's poker machines in defendant's bar, attacked one man with a bat, ordered the men to strip, and took the victim's money, defendant's argument that the trial court erred when it found that defendant's pointing the pistol at one victim's head as the victims departed the bar was a part of a single transaction or occurrence and was admissible to show intent, was rejected, as that evidence assisted in telling the story of the armed robbery. *Pierce v. State*, 860 So. 2d 855 (Miss. Ct. App. 2003).

Testimony presented by the two victims provided direct evidence of defendant's specific intent to rob the men alleged by defendant to be defrauding defendant's poker machines, as after attacking one victim with a ball bat, defendant made the victims disrobe and empty their pockets,

and then took the money that was in the men's pockets; no evidence was presented at the trial that the victims were the culprits in defrauding the poker machines on the night in question or the previous night, although one victim was found with a laminated money strip. *Pierce v. State*, 860 So. 2d 855 (Miss. Ct. App. 2003).

Sufficient evidence existed to convict the inmate of robbery where the State's evidence, in conjunction with the inmate's admission of guilt, supported the felonious taking of the victim's purse while putting her in fear for herself. *Clark v. State*, 854 So. 2d 1086 (Miss. Ct. App. 2003).

Evidence was sufficient to support defendant's conviction where the victim's testimony provided evidence of all of the essential elements of the crime and her testimony identifying defendant was unequivocal; the verdict was not so against the weight of the evidence as to lead the appellate court to the conclusion that the trial court abused its discretion. *Garner v. State*, 856 So. 2d 729 (Miss. Ct. App. 2003).

Record presented substantial evidence to support the verdict where testimony of the victim and corroborating testimony of the officers demonstrated that defendant acted violently towards the victim and stole his property. *Davis v. State*, 850 So. 2d 176 (Miss. Ct. App. 2003).

Evidence that defendant put the victim in fear was sufficient to convict defendant of robbery under Miss. Code Ann. § 97-3-73, as defendant, after raping the victim, told a third party to shoot the victim if she tried to stop defendant from stealing money from the victim's purse. *Williford v. State*, 820 So. 2d 13 (Miss. Ct. App. 2002).

Evidence supported a conviction for robbery where the victim was grocery shopping with her purse in the child seat of her grocery cart and while holding a string which was tied to her purse, when she was pushed from behind and her purse was stolen. *Fair v. State*, 789 So. 2d 818 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where the victim stated that her purse was taken against her will and also stated that she saw the thief approach her prior to the theft and that as he walked toward her, she became "un-

comfortable," "frightened," and "afraid." *McKee v. State*, 791 So. 2d 804 (Miss. 2001).

Evidence was sufficient to support a conviction for robbery where the victim testified that (1) the defendant, her former boyfriend, ran up to her from behind as she attempted to unlock the door to her apartment, (2) he then pushed her against the wall and grabbed her purse as she turned around and screamed, (3) she did not know if he was going to kill her as she stood pushed against the wall when he grabbed her purse, and (4) she did not give the purse to him, but that he took it. *Washington v. State*, 794 So. 2d 253 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where (1) the victim was able to positively identify the defendants as the men who robbed her, (2) a witness testified that one of the defendants used her telephone to order the pizza the victim was attempting to deliver at the time of the robbery, and (3) the victim was seen returning to her place of employment with a bruised face. *Williams v. State*, 772 So. 2d 1113 (Miss. Ct. App. 2000).

Evidence was insufficient to support a conviction for robbery where the indictment only charged a taking occurred by placing victim in fear of immediate injury to her person, not by violence, and there was no evidence to support the fear of injury theory. *Clayton v. State*, 759 So. 2d 1169 (Miss. 1999).

Evidence was sufficient to show violence where (1) the defendant reached into the elderly victim's pocket, extracted his wallet, and then later turned the pocket inside out and took the coins that were in the pocket, and (2) the defendant's actions caused the victim to fall to the floor. *Chaney v. State*, 739 So. 2d 416 (Miss. Ct. App. 1999).

The evidence was sufficient to support a conviction for simple robbery based either on actual force (grabbing, disarming, and pushing the victim) or by putting the victim in fear of the use of force (saying it was a holdup, demanding money, and jumping across the counter) or both. *Lowe v. State*, 736 So. 2d 404 (Miss. Ct. App. 1999).

Evidence was sufficient to show that the victim of a purse snatching experienced

fear where the record indicated (1) that the defendant grabbed the victim's purse, (2) that when he did so, she stated that she felt an immediate sensation similar to being struck by lightning, (3) that while not immediately aware of what was occurring, she also had a sense of apprehension, (4) that this apprehension marked the point at which the seed of fear was sown, and (5) that as the defendant continued to tug and pulled the purse away, the victim realized what was occurring at which point the seed of fear germinated and flowered. *Clayton v. State*, — So. 2d —, 1999 Miss. App. LEXIS 21 (Miss. Ct. App. Jan. 26, 1999).

Where a store clerk testified that she physically resisted the defendant's efforts to obtain possession of items of jewelry, but that he forced her hand open against her will, thus using physical force to overcome the clerk's efforts to retain control of the merchandise, a question of fact for the jury was raised: whether the defendant employed the necessary violence to the person of the clerk to constitute the crime of robbery. *Cobb v. State*, 734 So. 2d 182 (Miss. Ct. App. 1999).

The court rejected the defendant's contention that the almost instantaneous snatching of the victim's purse did not constitute the crime of robbery on the basis that there was no proof that he obtained the victim's purse through the use of either violence or by putting her in fear of immediate injury to her person since there was sufficient evidence of force where, as the victim got into her car, the defendant came up and positioned himself between the victim's body and the steering wheel of her automobile, thus effectively immobilizing her while he leaned over and grabbed her purse and the victim described that she felt "pressure on my chest." *Pickens v. State*, — So. 2d —, 1998 Miss. App. LEXIS 919 (Miss. Ct. App. Oct. 27, 1998).

In a capital murder prosecution, there was sufficient evidence to support the jury's verdict that the murder occurred during the course of an armed robbery, in spite of the defendant's argument that the alleged robbery was completed long before the victim was killed 60 miles away in another county, where the jury was in-

structed that it was necessary for them to find that the defendant had the intent to rob when the killing was done, the evidence offered at trial put the defendant in the same neighborhood as the victim on the date in question, there was evidence of violence in the victim's home, within a few hours the defendant was seen approximately 60 miles away in possession and control of the victim's car, and the victim's personal effects were found in the general vicinity of the car. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

Evidence of an alleged assault on a police officer which occurred during a chase across state lines subsequent to the robbery of a store, was admissible in the ensuing prosecution for robbery and conspiracy to commit robbery, even though the assault charge was dismissed for lack of jurisdiction, since the assault was so interrelated with the events at the store that it constituted a single occurrence. *Jones v. State*, 567 So. 2d 1189 (Miss. 1990).

Circumstantial evidence that defendant took several pieces of jewelry, personal property having some value, although modest, from murder victim combined with circumstantial evidence that defendant was person who committed killing, is sufficient to prove that taking of jewelry was by violence to victim or by putting victim in fear of immediate personal injury and is legally adequate to establish that defendant committed felony of robbery underlying capital murder conviction. *Fisher v. State*, 481 So. 2d 203 (Miss. 1985).

Evidence identifying defendant as being present on occasion of homicide in convenience store and that defendant was behind counter waiting on customers, that defendant had large amount of cash on him and that over \$300 was taken from store is sufficient to present to jury question of whether robbery and capital murder were committed and whether defendant was person who committed crime. *Johnson v. State*, 476 So. 2d 1195 (Miss. 1985).

In a capital murder trial, evidence was sufficient to support the conclusion that the murder had been committed during the course of a robbery, where the evi-

dence indicated that defendant had selected the victims and pointed them out to his codefendant, stating to him that they were going to rob the two men, where defendant and codefendant went with the victims to the victims' apartment after that intent had been made known, where the victims had been cold-bloodedly murdered for no demonstrable reason other than taking what they had, where the car of one of the victims had been taken away after he had told defendant, immediately prior to being stabbed, that his money was in the trunk of the car, and where, as soon as practical, the trunk had been searched by defendant, in that no other evidence would be needed for a jury to find that the cold-blooded murder was done to effect a robbery as defined by this section; moreover, in reviewing the sentence of death as required by § 99-19-105, the Supreme Court, would find unhesitatingly that the elements of passion, prejudice, or any other arbitrary factor did not exist in arriving at the jury verdict. *Dufour v. State*, 453 So. 2d 337 (Miss. 1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1231, 84 L. Ed. 2d 368 (1985), reh'g denied, 471 U.S. 1010, 105 S. Ct. 1880, 85 L. Ed. 2d 172 (1985), motion to vacate denied, 483 So. 2d 307 (Miss. 1985), cert. denied, 479 U.S. 891, 107 S. Ct. 292, 93 L. Ed. 2d 266 (1986).

In a capital murder prosecution, the jury properly found beyond a reasonable doubt that the alleged killing occurred while defendant was engaged in committing the crime of robbery where the jury was fully instructed that it was necessary for them to find that defendant had the intent to rob when the murder was committed and where, based on the defendant's action as well as the surrounding circumstances, the evidence was sufficient to show such intent. *Voyles v. State*, 362 So. 2d 1236 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2184, 60 L. Ed. 2d 1059 (1979).

In robbery prosecution, where testimony showed that defendant and companions acted in concert insofar as beating of victim was concerned, testimony of witness that defendant later told him that boy who was beaten had a dollar bill and a pocket knife, corroborated victim's testi-

mony, and together inferences jury was justified in drawing from other facts were sufficient to withstand defendant's request for peremptory instruction. *Hammons v. State*, 291 So. 2d 177 (Miss. 1974).

Evidence that late at night the participants turned aside from the highway to a secluded place on the pretense of wanting to see some person there when it was known (but not to the victim who was an entire stranger to that section) that the place was and had been for some time wholly uninhabited would, with all the other circumstances of the case, justify the conclusion that the participants had done so with the design to commit the robbery there, making each of them a principal. *United Press Ass'ns v. McComb Broadcasting Corp.*, 201 Miss. 68, 30 So. 2d 511 (1947).

Exclusion of evidence accounting for possession of money by accused prior to robbery held error. *Buford v. State*, 124 Miss. 418, 86 So. 860 (1921).

4. Instructions.

In defendant's capital murder case, court did not err in failing to instruct on lesser included offenses where the evidence presented did not support a reasonable jury finding defendant guilty of murder rather than capital murder. The evidence presented at trial, including defendant's own testimony, established that he took the victim's automobile, and the evidence also established that the victim was murdered. *Scott v. State*, 878 So. 2d 933 (Miss. 2004).

There was no factual basis to support an instruction that a robbery without a deadly weapon occurred; even if defendant was not the person who actually was holding the weapon, defendant participated in the robbery, and the trial court did not err in denying an instruction for simple robbery. *Harrington v. State*, 859 So. 2d 1054 (Miss. Ct. App. 2003).

Defendant's robbery conviction was proper where the jury should not have been instructed as to the lesser charge of petit larceny because there was simply no evidentiary foundation for the granting of a petit larceny instruction. *Silas v. State*, 847 So. 2d 899 (Miss. Ct. App. 2002).

The trial court did not err in refusing to instruct the jury with regard to petit larceny as a lesser included offense where the record contained no proof of the value of the purse stolen by the defendant or its contents. *McKee v. State*, 791 So. 2d 804 (Miss. 2001).

The jury was properly instructed regarding an intent to permanently deprive the victim of her property where the court instructed the jury that it was required to find that the defendant had feloniously taken the property of the victim. *Washington v. State*, 794 So. 2d 253 (Miss. Ct. App. 2001).

In prosecution for capital offense of murder during commission of robbery, jury instruction given regarding sequence of the robbery and murder did not sufficiently instruct jury on elements of underlying crime of robbery, for purposes of determining whether failure to specifically instruct jury on elements of robbery constituted reversible error. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

State had duty, in prosecution for capital offense of murder during commission of robbery, to ensure that jury was properly instructed on elements of underlying crime of robbery, and therefore failure to give such instruction constituted reversible error, even though defendant did not present acceptable robbery instruction. *Hunter v. State*, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

In the sentencing phase of a capital murder prosecution, the trial court did not err in stating that "robbery is a crime of violence" when instructing the jury regarding the aggravating circumstance of a previous conviction for an offense involving the use or threat of violence, even though the robbery previously committed by the defendant involved an attempt to snatch cash from a cash register in a store and the record did not indicate that the defendant had a weapon on that occasion, since the very act of reaching across a store counter in the presence of a clerk and seizing money from a cash register intimates a willingness to resort to violence, and this section-the statute under which the defendant pled guilty-defines

the crime of robbery as the act of taking another's personal property "by violence to his person or by putting such person in fear of some immediate injury to his person." *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994), post-conviction relief denied, 684 So. 2d 608 (Miss. 1996), reh'g denied (Miss. 1996), overruled on other grounds, *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999).

In a capital murder prosecution arising from the defendant's alleged killing of the victim while engaged in the commission of a robbery, the jury instructions defining the crimes of robbery and capital murder were adequate, even though neither instruction specifically mentioned the element of robbery known as "felonious intent," where the language "without authority of the law" was used in the instruction defining capital murder, so that robbery was defined correctly tracking the language of the statute when the 2 instructions were read together. *Mackbee v. State*, 575 So. 2d 16 (Miss. 1990).

An instruction in a robbery prosecution was defective because it did not specifically set out the cause and effect relationship between the taking of personal property and the putting in fear. *Jones v. State*, 567 So. 2d 1189 (Miss. 1990).

Trial court did not err in denying request for lesser included offense instructions on simple and aggravated assault where defendant was indicated for armed robbery, jury was instructed concerning lesser-included offenses of robbery and petit larceny, and no rational or reasonable juror could have convicted defendant of merely simple or aggravated assault. *Monroe v. State*, 515 So. 2d 860 (Miss. 1987).

In a prosecution for armed robbery pursuant to § 97-3-79, the trial court did not err in charging the jury that it could find defendant guilty if it concluded that he had "attempted" to take property from the victim where the statute also prohibited an attempt to commit the crime of robbery, unlike this section, relied upon by defendant, which does not include an attempt in the definition of robbery and was not the statute under which defendant was

charged. *Cooper v. State*, 386 So. 2d 1115 (Miss. 1980).

In a prosecution for robbery, it was not error for the trial court to refuse the defendant's requested instruction on the lesser included offense of assault and battery where the requested instruction ignored the charge of robbery and the evidence supporting that charge, and the evidence in the case was such that no fair-minded jury could have reached any other conclusion than that the defendant was guilty of robbery beyond a reasonable doubt. *Presley v. State*, 321 So. 2d 309 (Miss. 1975).

Evidence in detail as to defendant's attempt to escape from arresting officers after he was returned to scene of robbery, was proper, not to show that defendant was guilty of another offense, but as throwing light on question of his guilt of crime of robbery for which he was arrested, and where defendant requests it, court should instruct jury as to purpose for which such testimony is admitted. *McPherson v. State*, 208 Miss. 784, 45 So. 2d 589 (1950).

Failure of court to grant instruction directing jury to find defendant not guilty in robbery prosecution charging him with taking a pistol from victim by the exhibition of a deadly weapon, where evidence showed that he took pistol by physical force, did not constitute error where the evidence would justify defendant's conviction under this section [Code 1942, § 2362]. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441 (1948).

5. Miscellaneous.

Defendant's postconviction motion was properly denied as his plea to armed robbery was knowing and voluntary even though he did not initially admit that he had been armed; defendant was given a thorough explanation of the elements and State's recitation of proof, after which he entered his plea. *Hamlin v. State*, 853 So. 2d 841 (Miss. Ct. App. 2003).

There was nothing in the statute that suggested that the victim had to be aware that his or her personal property was being taken, and certainly a victim's lack of awareness due to the perpetrator's actions, such as defendant admittedly hitting the victim, did not take the victim's

actions outside of the robbery statute; rendering a person unconscious and then robbing him was also robbery within the statute. *Wheeler v. State*, 826 So. 2d 731 (Miss. 2002).

Robbery is not a component of murder and is, therefore, not a lesser included offense of murder. *Ballenger v. State*, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Robbery is per se crime of violence, for purposes of aggravating circumstances set forth under capital sentencing statute. *Cole v. State*, 666 So. 2d 767 (Miss. 1995).

Robbery is a crime of violence within the meaning of the habitual offender statute. *Magee v. State*, 542 So. 2d 228 (Miss. 1989).

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15 years in prison. *Griffin v. State*, 492 So. 2d 587 (Miss. 1986).

A sentence of seven years in a state penitentiary imposed on one convicted of robbery was not excessive. *Jones v. State*, 216 Miss. 186, 62 So. 2d 217 (1953).

In robbery prosecution under indictment charging accused as principal, accused may be convicted as accessory before fact under Code 1942, § 1995, providing that every person who shall be accessory to any felony, before fact, shall be deemed a principal and indicted and punished as such. *Goss v. State*, 205 Miss. 177, 38 So. 2d 700 (1949).

Statute dealing with robbery from person by deadly weapon and providing for possible death penalty did not repeal former statutes not mentioning deadly weapon and providing for imprisonment for term not over fifteen years, since later statute simply provided for greater punishment for commission of crime by use of deadly weapon. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

In robbery prosecution under indictment charging robbery with deadly weapon, accused could be found guilty of robbery without firearms under statute. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

Where proof was sufficient to support conviction for robbery, conviction for grand larceny which is necessary element of crime of robbery would bar future prosecution for robbery based on same facts. *Dixon v. State*, 169 Miss. 876, 154 So. 290 (1934).

Where two or more persons robbed at the same time, separate offenses, and acquittal in one case is not bar to a prosecution in another. *Johns v. State*, 130 Miss. 803, 95 So. 84 (1923).

6. Sentence.

Maximum penalty for the crime of robbery was fifteen years; therefore, since the trial court sentenced defendant to ten years, with five years suspended, the sentence imposed fell clearly within the statutory range. *Cameron v. State*, 919 So. 2d 1042 (Miss. Ct. App. 2005).

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital

offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). *Jones v. State*, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

There was no indication in the record that the trial judge enhanced the sentence of one defendant over the other, and the sentences were all well within the statutory limits for armed robbery, aggravated assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245 (Miss. 1999).

RESEARCH REFERENCES

ALR. Robbery or assault to commit robbery as affected by intent to collect or secure debt or claim. 46 A.L.R.2d 1227.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery. 58 A.L.R.2d 808.

Robbery by means of toy or simulated gun or pistol. 61 A.L.R.2d 996.

Stolen money or property as subject of larceny or robbery. 89 A.L.R.2d 1435.

Larceny: entrapment or consent. 10 A.L.R.3d 1121.

Purse snatching as robbery or theft. 42 A.L.R.3d 1381.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery of another person committed at the same time. 51 A.L.R.3d 693.

Retaking of money lost at gambling as robbery or larceny. 77 A.L.R.3d 1363.

Robbery by means of toy or simulated gun or pistol. 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape,

rather than in taking property, as element of robbery. 93 A.L.R.3d 643.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 A.L.R.4th 481.

"Intimidation" as element of bank robbery under 18 USCS § 2113(a). 63 A.L.R. Fed. 430; 163 A.L.R. Fed. 225.

Am Jur. 4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

5 Am. Jur. Proof of Facts 2d, Lack of Capacity to Form Specific Intent-Voluntary Intoxication, §§ 8 et seq. (proof of defendant's lack of capacity, due to intoxication, to form specific intent to commit robbery).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 11 (robbery scene).

CJS. 77 C.J.S., Robbery §§ 1 et seq.

Practice References. McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated
(Michie).

§ 97-3-75. Robbery; penalty.

Every person convicted of robbery shall be punished by imprisonment in the penitentiary for a term not more than fifteen years.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4 (57); 1857, ch. 64, art. 222; 1871, § 2676; 1880, § 2946; 1892, § 1286; Laws, 1906, § 1363; *Hemingway's* 1917, § 1099; Laws, 1930, § 1128; Laws, 1942, § 2364.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Limitations of prosecutions generally, see §§ 99-1-5.

JUDICIAL DECISIONS

1. In general.

Denial of the inmate's petition for post-conviction relief without a hearing was proper where, although the trial judge did not inform the inmate of the minimum sentence for robbery, the petition to enter a guilty plea that he signed clearly stated that the minimum sentence for robbery was zero years and the maximum sentence was 15 years. Thus, his argument that the trial judge failed to inform him of the minimum sentence was without merit. *Sanders v. State*, 900 So. 2d 1213 (Miss. Ct. App. 2005).

Where appellant's sentences for several counts of armed robbery did not exceed the sentence set forth in Miss. Code Ann. § 97-3-75, it was not disproportionate; moreover, appellant was not entitled to receive a sentence proportionate to that

imposed upon an accomplice. *Booker v. State*, 840 So. 2d 801 (Miss. Ct. App. 2003).

Although defendant received the maximum sentence on both counts of attempted robbery, there was no evidence that improper consideration infected the court's decision, or that the maximum sentences were given in retribution for defendant's physical outbursts at sentencing. *Bolton v. State*, 752 So. 2d 480 (Miss. Ct. App. 1999).

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15 years in prison. *Griffin v. State*, 492 So. 2d 587 (Miss. 1986).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Robbery § 76.
4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS. 77 C.J.S., Robbery, §§ 101 et seq.

Practice References. McCloskey and

Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-77. Robbery; threat to injure person or relative at another time.

Every person who shall feloniously take the personal property of another,

in his presence or from his person, which shall have been delivered or suffered to be taken through fear of some injury threatened to be inflicted at some different time to his person or property, or to the person of any member of his family or relative, which fear shall have been produced by the threats of the person so receiving or taking such property, shall be guilty of robbery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (56); 1857, ch. 64, art. 221; 1871, § 2675; 1880, § 2945; 1892, § 1285; Laws, 1906, § 1362; Hemingway's 1917, § 1098; Laws, 1930, § 1127; Laws, 1942, § 2363.

Cross References — Penalty for robbery, see § 97-3-75.

Robbery by threats demanding money or property, see § 97-3-81.

Threats, generally, see §§ 97-3-85, 97-3-87.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Robbery §§ 21, 23. Schoenberg, Criminal Law Deskbook (Matthew Bender).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery). Mississippi Criminal and Traffic Law Manual (Michie).

CJS. 77 C.J.S., Robbery §§ 18 et seq. Mississippi Penal Code Annotated

Practice References. McCloskey and (Michie).

§ 97-3-79. Robbery; use of deadly weapon.

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

SOURCES: Codes, 1942, § 2367; Laws, 1932, ch. 328; Laws, 1974, ch. 576, § 4, eff from and after passage (approved April 23, 1974).

Cross References — Ineligibility for parole of persons convicted of robbery or attempted robbery through display of a firearm, see § 47-7-3.

Murder committed in the course of robbery as constituting capital murder, see § 97-3-19.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. Validity.
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19. Bail.
20. Sentence.
21. Miscellaneous.
22. Double jeopardy.

1. Validity.

The circuit court had concurrent jurisdiction with the appellate court, for purposes of setting an appearance bond under Code § 99-35-115, over a defendant convicted of attempted armed robbery, even though defendant's appeal had already been perfected. *State v. Maples*, 445 So. 2d 540 (Miss. 1984).

The armed robbery statute is valid. *Scott v. State*, 218 Miss. 892, 56 So. 2d 839 (1952), cert. denied, 344 U.S. 805, 73 S. Ct. 38, 97 L. Ed. 627 (1952).

Statute making robbery or attempt at robbery with deadly weapon a capital offense under certain conditions held not invalid under constitution providing no law shall be revived or amended by reference to title only. *Hall v. State*, 166 Miss. 331, 148 So. 793 (1933).

2. Construction and application; generally.

There is no requirement that a victim actually see a deadly weapon in order to convict for attempted armed robbery under Miss. Code Ann. § 97-3-79; a victim is not required to have "definite knowledge" of a deadly weapon in the sense that the weapon must be seen through the victim's

own eyes. *Dambrell v. State*, 903 So. 2d 681 (Miss. 2005).

Court of appeals erred in reversing defendant's conviction for armed robbery where although the cashier did not actually see the butcher knife before defendant fled, clearly, defendant intended to rob the store, had a deadly weapon, threw down the towel and knife that was in his possession and was only thwarted in his attempt to rob the store. The cashier gained possession of the knife once defendant discarded it and thus, it was clear that defendant had a weapon on entering the store. *Dambrell v. State*, 903 So. 2d 681 (Miss. 2005).

Armed robbery endangers life, limb, and property as much as any non-capital offense, and carries one of most severe sentences applicable under criminal statutes, thus lends support to sentencing of convicted person to life without parole, under habitual offender statute, even where final conviction precipitating such sentence is for concededly lesser offense. *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992), cert. denied, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992).

A 7-year sentence for armed robbery committed with a knife in 1980 in violation of this section was not an unconstitutional application of an ex post facto law, even though § 47-7-3 denied eligibility for parole prior to 1982 only when a robbery was committed with the display of a firearm, where the sentencing order merely established that the defendant serve 7 years and made no mention of "mandatory" or "without parole." Additionally, the sentencing chapter and the parole chapter are separate and distinct; the granting of parole or denial of parole under § 47-7-3 is the exclusive responsibility of the state parole board, which is independent of the circuit court's sentencing authority. Thus, sentencing authority was provided for under this section, rather than § 47-7-3, and the defendant was not "sentenced" under the parole statute, which was later amended. *Mitchell v. State*, 561 So. 2d 1037 (Miss. 1990).

Armed robbery is a crime of violence, per se, for purposes of sentencing as an

habitual offender under § 99-19-83. King v. State, 527 So. 2d 641 (Miss. 1988).

Jury's verdict finding defendant guilty of armed robbery when it had been instructed to find him guilty or not guilty of attempted armed robbery did not require a new trial, since the omission of the word "attempted" from the verdict was an oversight which the court could correct in order to make the verdict confront to the clear and unequivocal jury intent. Singleton v. State, 495 So. 2d 14 (Miss. 1986).

Armed robbery is the felonious taking of the property of another against his or her will by violence or by putting such person in fear of immediate injury. Malone v. State, 486 So. 2d 360 (Miss. 1986).

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

Bank robbery is a crime under both laws of the United States and of the State of Mississippi, and a defendant's conviction under the laws of the United States will be no bar to his subsequent prosecution and conviction under the laws of Mississippi for the commission of the identical act for which he had previously been convicted in the federal courts. *Bankston v. State*, 236 So. 2d 757 (Miss. 1970).

The crime may be committed by taking money from a safe which the person robbed was compelled to open. *Passons v. State*, 239 Miss. 629, 124 So. 2d 847 (1960).

This section [Code 1942, § 2367] is merely an extension of statute (Code 1942, § 2362), defining robbery generally, and the evil sought to be abated is the employment of such weapons as are generally considered to be deadly. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

This enactment, supplemental to the old statute on robbery which it did not repeal, was the result of, and was designed to prevent, the systematic business

of robbery of banks, mercantile establishments, filling stations and the like, by persons armed with deadly weapons, making a business of banditry, who were so intently predetermined upon the accomplishment of that purpose they would kill in its execution and would also kill in making their escape. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585 (1941).

This statute [Code 1942, § 2367] was not only directed to the means employed, but requires that the particular intent must be one in which lucre or substantial gain in money or property is the dominant or primary purpose, and which is not to be supplied by that which happens as a mere incident to, or as a collateral development in, some other main and primary motive, and the accused must be the aggressor both as to the means and the stated intent. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585 (1941).

Statute dealing with robbery from person by deadly weapon and providing for possible death penalty did not repeal former statutes not mentioning deadly weapon and providing for imprisonment for term not over fifteen years, since later statute simply provided for greater punishment for commission of crime by use of deadly weapon. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

Laws 1932, ch. 328, was intended to and did compose a new and independent enactment, complete in itself, and required no reference or resort to any other statute to render it intelligible and to determine its meaning and the scope of its operation. *Hall v. State*, 166 Miss. 331, 148 So. 793 (1933).

3. —Elements of robbery.

Evidence was sufficient to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 where it was shown that he had felonious intent to commit robbery under Miss. Code Ann. § 97-3-79 in that he admitted that his plan was to kill the victim and take the victim's car to Chicago to get away, and he packed his belongings and left them outside the victim's house for easy access. *Walker v. State*, 913 So. 2d 198 (Miss. 2005), cert. denied, — U.S. —, 126 S. Ct. 743, 163 L. Ed. 2d 581 (2005).

In a criminal prosecution for attempted armed robbery, mere assumption that a

deadly weapon exists is not enough, the victim must have definitive knowledge that the deadly weapon does in fact exist to support a conviction under a standard of reasonable doubt. *Dambrell v. State*, 905 So. 2d 655 (Miss. Ct. App. 2004).

Armed robbery indictment contained the essential elements constituting the offense charged, as required under Miss. Unif. Cir. & County Ct. Prac. R. 7.06, even though the inmate never took and carried away the property of another, as required under Miss. Code Ann. § 97-3-79; the inmate could be convicted of armed robbery while attempting to complete the crime. *Putnam v. State*, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Defense counsel was not ineffective under Miss. Const. art. III, § 26 where the inmate was allegedly not informed, prior to the inmate's guilty plea, that the inmate's failure to take and carry away property prevented the inmate from satisfying the elements for armed robbery under Miss. Code Ann. § 97-3-79; the inmate did not have to take and carry away the personal property of another to satisfy the elements of armed robbery. *Putnam v. State*, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

The proof of the crime of armed robbery must necessarily include that the exhibition of the deadly weapon, causing violence or fear of immediate injury, was the means by which the personal property of another was taken. *Clark v. State*, 756 So. 2d 730 (Miss. 1999).

"Violence" requires some use of force, no matter how slight. *Shelton v. State*, 728 So. 2d 105 (Miss. Ct. App. 1998).

Wielding of "slapjack" and wrestling diamonds from victim falls within and establishes all of the elements of armed robbery. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

All that the state is required to prove under the provisions of Code 1942, § 2367 is that the accused took or attempted to take the personal property of the victim from his presence and against his will, by violence, or by putting him in fear of immediate injury to his person by exhibiting a deadly weapon. *Gisch v. State*, 259 So. 2d 118 (Miss. 1972).

To warrant conviction under this section [Code 1942, § 2367], it is not necessary to allege or prove that the pistol exhibited by the defendant was pointed at the victim. *Bond v. State*, 236 Miss. 538, 111 So. 2d 422 (1959).

In order to constitute a crime of robbery under this section [Code 1942, § 2367] the personal property of another must be taken from the person or from the presence of such other person either by violence or by putting such person in fear of immediate injury to his person by exhibition of a deadly weapon, and such act must be the means by which the personal property of another shall have been taken. *Register v. State*, 232 Miss. 128, 97 So. 2d 919 (1957).

Test of robbery under this section [Code 1942, § 2367] is whether or not any of the property named in indictment was taken by violence, force or fear. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

The means used to effect a robbery is important only to the extent that it reasonably instills a disabling apprehension of great personal injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

In robbery prosecution, taking of gloves from pocket of clothing worn by person robbed into possession of one of assailants held sufficient asportation. *Richardson v. State*, 168 Miss. 788, 151 So. 910 (1934), error overruled, 151 So. 558 (Miss. 1934).

4. —What constitutes robbery.

Because there were two victims to defendant's robbery, double jeopardy did not attach. *Towner v. State*, 812 So. 2d 1109 (Miss. Ct. App. 2002).

State met its burden of proving robbery under statute by showing that defendant, prior to break in of victim's home, had asked for gun and whether victim had money in her home, had awakened another person and persuaded him to go to victim's home and break in, had used physical force and fear to acquire property of victims, and, after entering home, had found pistol and used it to effectuate crime. *Reed v. State*, 506 So. 2d 277 (Miss. 1987).

The crime of armed robbery is committed by a motorist who, after having his

fuel tank filled at a service station, got away without paying by pointing a rifle at the attendant. *Hermann v. State*, 239 Miss. 523, 123 So. 2d 846 (1960).

Where the defendant, who was indicted under this section [Code 1942, § 2367], was shown to have left the house immediately following the violence against the prosecuting witness, and it would have been conjecture to assume that the defendant did not take the prosecuting witness's purse prior to the assault and battery upon her, defendant's conviction was reversed, since this section [Code 1942, § 2367] did not apply to the offense proved. *Register v. State*, 232 Miss. 128, 97 So. 2d 919 (1957).

This statute [Code 1942, § 2367] was not applicable to a situation where, as the outgrowth of the whipping of negro boy, defendants who had come to take the boy home, upon being accosted by a white man took from him a knife and struck him, and the victim later discovered that the sum of \$2 was missing from his person. *Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585 (1941).

Persons who shot man who opened door and then entered store and shot others and then left store held not guilty of robbery. *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933).

5. —What constitutes deadly weapon.

A metal pellet gun weighing 3 or 4 pounds was a "deadly weapon" within the meaning of this section, even though there was a piece missing from the weapon rendering it inoperative and it was not loaded at the time of the robbery, since it could have been used to club the victim and thereby inflict serious bodily injury. *Saucier v. State*, 562 So. 2d 1238 (Miss. 1990).

Jury may find blank starter pistol used during robbery to be deadly weapon. *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985).

Assessment of the death penalty was not justified where a dirk knife rather than a pistol was used in a robbery, there was no real likelihood of personal injury and none occurred, and the defendant participated in the robbery under the urging of an accomplice. *Augustine v. State*, 201 Miss. 277, 28 So. 2d 243 (1946).

A pistol is a "deadly weapon" within statutes denouncing the exhibition or carrying of such weapon, even without proof that the pistol is loaded or presently capable of committing a violent injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

6. —Property subject to robbery.

Contraband liquor may be the subject of robbery. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

In robbery prosecution, property taken need not have actual pecuniary value if it appears that it had some value to person robbed. *Richardson v. State*, 168 Miss. 788, 151 So. 910 (1934), error overruled, 151 So. 558 (Miss. 1934).

That gloves taken were preserved and carried in pocket of owner held sufficient, in robbery prosecution, to show that owner considered them of some value to himself. *Richardson v. State*, 168 Miss. 788, 151 So. 910 (1934), error overruled, 151 So. 558 (Miss. 1934).

7. Indictment.

Miss. Code Ann. § 97-3-79 punishes attempted armed robbery in the same way as armed robbery. Thus, it is irrelevant that an indictment only states that a defendant "attempts to take" because according to the statute, a person can be convicted of armed robbery while attempting to complete the act; the act of robbery is complete upon the attempt. *Calhoun v. State*, 881 So. 2d 308 (Miss. Ct. App. 2004).

Statement that defendant had used a handgun was an adequate substitute for the phrase "deadly weapon" in the indictment. *Parisie v. State*, 848 So. 2d 880 (Miss. Ct. App. 2002).

Indictment against defendant as drawn did not fail to charge offense against State of Mississippi where: (1) indictment for attempted armed robbery was not vague, because it practically mimicked statute in setting out offense; (2) issue of intent was question for jury, and state had not failed to prove overt act to support attempted armed robbery charge by failing to prove intent to steal, where issue of intent was matter of which witness jury believed; (3)

issue of whether attempt to steal was aborted by extraneous intervention or by defendant was question of which witness jury believed, where there was dispute as to whether or not police intervention frustrated attempt; and, (4) guilty verdict was not against overwhelming sufficiency and weight of evidence, because issues came down to which witness jury believed. *Burney v. State*, 515 So. 2d 1154 (Miss. 1987), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Under former provisions, when defendant was tried and convicted of rape, robbery, and kidnapping under improper multicount indictment charging separate offenses, conviction and sentence under kidnapping offense would be affirmed and remaining charges reversed where entire proof in record was relevant to and admissible under kidnapping charge. *Brock v. State*, 483 So. 2d 358 (Miss. 1986), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

There is no legal impediment to the State's mounting of three separate prosecutions for armed robbery under this section, kidnapping, and forcible rape, even though the three offenses arise of a common nucleus of operative fact; accordingly, where the defendant affirmatively requested that the proceeding against him on all three charges be consolidated for pre-trial and trial purposes, the trial court properly held that the defendant had consciously waived any objections he may have had to the multi-count indictment. *Ward v. State*, 461 So. 2d 724 (Miss. 1984).

An indictment that charged both attempted robbery and the completion of the offense was not fatally defective, since this section makes both an attempt to take and an actual taking of another's personal property against his will by violence or threat of violence the crime of robbery. *Harris v. State*, 445 So. 2d 1369 (Miss. 1984).

The words "unlawfully" and "feloniously" in an indictment are sufficient to make the necessary charge of "intent to steal." *McFadden v. State*, 408 So. 2d 476 (Miss. 1981).

An indictment charging the accused with robbery wherein it stated and charged the defendant with having taken

from the person "and" from the presence of the owner personal property obtained in the robbery, was not defective because of the use of the word "and" rather than the statutory "or" and also was not defective as charging two separate offenses. *Payne v. State*, 215 Miss. 390, 61 So. 2d 146 (1952).

Indictment charging robbery by assault by use of pistol with intent to take personal property of another included charge of assault. *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933).

Where a record indicated defendant was aware he was being prosecuted under statute making robbery, or attempt at robbery, capital offense under certain conditions, indictment, though awkwardly worded, was sufficient. *Hall v. State*, 166 Miss. 331, 148 So. 793 (1933).

8. Evidence; generally.

Trial court properly denied defendant's motions for judgment notwithstanding the verdict or, in the alternative, a new trial, where all of the evidence pointed to the fact that defendant committed the armed robbery; it was clear from the record and from defendant's statements that there was sufficient evidence for the jury to have convicted him and it was the job of the jury to determine which witnesses were credible and which were not. *Nason v. State*, 840 So. 2d 788 (Miss. Ct. App. 2003).

Application of the Biggers factors to defendant's case established that: (1) the victim of the armed robbery had ample opportunity to observe defendant; (2) while defendant was present in the store, there was nothing to distract the victim's attention from him; (3) the victim phoned a description of the robber to the police department immediately after the robbery; (4) the victim did not express any uncertainty about the identification of defendant; and (5) the time between the robbery and the identification was short; thus, there were sufficient indicia of reliability to allow the identification of defendant and defendant's convictions for armed robbery and possession of a firearm by a convicted felon were affirmed. *Ferguson v. State*, 856 So. 2d 334 (Miss. Ct. App. 2003).

In a prosecution for robbery, evidence that the defendant threatened to rape one of the victims and that he committed two acts of sexual battery upon her was admissible to show a continuing scheme to terrorize his victims, thereby ensuring their continued passivity and guarding against the possibility of resistance as his associates continued the process of looting a business. *Weathersby v. State*, 769 So. 2d 857 (Miss. Ct. App. 2000).

A defendant who was convicted of armed robbery was entitled to an evidentiary hearing pursuant to §§ 99-39-13 through 99-39-23 on the issue of whether he was afforded ineffective assistance of counsel during the plea process, where the defendant alleged that his attorney erroneously informed him that if he accepted the prosecution's plea bargain offer of 15 years imprisonment he would be eligible for parole after serving 3 years and 9 months of his sentence, and that he would not have accepted the prosecution's plea bargain offer had he known that he would be ineligible for parole for 10 years pursuant to § 47-7-3(1)(d), which provides that a person convicted of robbery and sentenced to more than 10 years imprisonment shall not be eligible for parole until after serving at least 10 years of the sentence. *Alexander v. State*, 605 So. 2d 1170 (Miss. 1992).

Notwithstanding that the state failed to prove that a deadly weapon was displayed at the time motel operator was sprayed with mace, defendant's conviction of an attempt to commit armed robbery of the motel operator was supported by evidence showing that defendant, along with others, planned the armed robbery, armed and transported themselves to the motel site, with the defendant and another hidden in the back seat of the automobile used in the commission of the crime, and by shooting at the motel operator to effectuate and escape. *Edwards v. State*, 500 So. 2d 967 (Miss. 1986).

A money box stolen from the store by armed robbers was admissible in evidence at their trial where, prior to admission, the prosecution elicited a creditable chain of custody through the testimony of the store clerk who was on duty on the night of the robbery, and defense counsel for

each of the robbers was afforded an opportunity to re-cross-examine the clerk following the introduction of the box. *Evans v. State*, 499 So. 2d 781 (Miss. 1986).

Admission into evidence at an armed robbery trial of hearsay statements of 2 detectives not for the purpose of showing the information upon which those detectives acted, but in an effort to prove the truth of the matter asserted in the statements, and to bolster the state's case, constituted reversible error. *Bridgeforth v. State*, 498 So. 2d 796 (Miss. 1986).

In a prosecution for armed robbery, evidence that the victim had been stabbed with a knife three times and shot through the chest during the course of the armed robbery was properly admitted, notwithstanding the contention that this was evidence of an entirely different crime from that for which defendant had been indicted, where the exhibition of a deadly weapon was a key element of the crime of armed robbery and a description of the crime could not be made adequately without describing the weapons used and what was done with those weapons. *Page v. State*, 369 So. 2d 757 (Miss. 1979).

Jury issue was presented as to whether or not defendant took pistol and police car from policemen for the purpose of permanently depriving the owners of their property or whether or not he took the property with no intention of permanently depriving the owners of its possession but merely for the purpose of resisting arrest. *Thomas v. State*, 278 So. 2d 469 (Miss. 1973).

The admission of the testimony of the victim of an alleged robbery that cash money and checks had been taken from him was not error, even though the police seized the funds at the time when they captured the defendant and subsequently returned the funds to the victim, and, similarly, the admission of the victim's testimony that the police subsequently returned the funds to him was not prejudicial. *Gisch v. State*, 259 So. 2d 118 (Miss. 1972).

In an armed robbery prosecution, where the defendant's only defense on the merits was his insanity at the time of the commission of the offense, the jury, in determining defendant's sanity at the time of

the crime, could consider the fact that defendant had testified in an intelligent and perceptive manner. *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355 (1960).

In a robbery prosecution against a daughter, who had testified that she had grabbed her mother's metal box containing money and a pistol and fled to prevent the mother from obtaining the pistol, evidence that on several occasions the mother had shot at members of the accused's family should have been permitted to go to the jury as tending to show the bias and prejudice of the mother, who was a prosecuting witness, even though it was not part of the *res gestae*. *Hardin v. State*, 232 Miss. 470, 99 So. 2d 600 (1958).

9. —Identification.

Defendant's argument on appeal was that there was no personal in-court identification of him as one of the men who participated in the robbery. However, the judge had recessed court for lunch and defendant failed to return to court on his bond, and upon a motion by the State, trial proceeded in his absence; because defendant chose not to return for his trial, he could not complain that he was not personally identified in court, where it was a consequence of his own voluntary act. *McCoy v. State*, 881 So. 2d 312 (Miss. Ct. App. 2004).

Defendant was properly convicted of armed robbery where a convenience store clerk identified defendant in a photographic array as the person who entered the store, pulled the store gun on the clerk, and demanded money from the register. *Scott v. State*, 877 So. 2d 549 (Miss. Ct. App. 2004).

State's identification of defendant consisted of the victim's eyewitness identification from a photo line-up and in-court identification, and a videotape of the robbery which showed the robber; moreover, the trial court instructed the jury to consider *Neil v. Biggers* to determine whether the identification made by the victim was credible and reliable, and the jury resolved the issue of credibility in favor of the State's witnesses. Thus, the evidence was sufficient to sustain defendant's convictions for robbery with the use of a deadly weapon, and aggravated assault. *Houston v. State*, 887 So. 2d 808 (Miss. Ct.

App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

A robbery victim's in-court identification of the defendant was not tainted by her extensive observation of the defendant at a pre-trial parole revocation hearing where the victim testified at the suppression hearing concerning her ample opportunity to observe the defendant at the time of the robbery. *Saucier v. State*, 562 So. 2d 1238 (Miss. 1990).

At trial of charge of armed robbery of bank, the asking of a question of a fingerprint expert as to whether in the expert's opinion the defendant had touched a petty cash slip left at the crime scene, while overly broad, was not irreversible error in view of the fact that the defendant was linked to the scene by his fingerprints on the door of the bank, and by the identification by 2 eyewitnesses. *Giles v. State*, 501 So. 2d 406 (Miss. 1987).

Even though it was possible that the jury would infer from a FBI fingerprint card that defendant had been involved in prior criminal activity, the admission into evidence of such a card at a trial of a charge of armed robbery of a bank was not error, where it was essential to the state's establishment of the identity of fingerprints on the bank door and the petty cash receipts slip found in the bank and, moreover, among the exceptions to the rule limiting admissibility of evidence of other crimes is when the evidence is used for identification. *Giles v. State*, 501 So. 2d 406 (Miss. 1987).

Sales clerk's in-court identification of armed robbery defendant was not tainted because prior to trial she had identified him from a photograph of a police lineup in which he was the only person wearing a fishing hat like the one worn by the jewelry store robber, where, on the day of the robbery, the sales clerk had furnished the police with a composite sketch of the robber, and in court she had repeated her identification of defendant with great conviction. *Foster v. State*, 493 So. 2d 1304 (Miss. 1986).

A photograph lineup, held some 6 months after the armed robbery, consisting of 5, 3 inch by 5 inch, photographs of various men, including the defendant who was in no way conspicuously singled out,

was not so unnecessarily suggestive as to taint positive in-court identification of defendant as the robber by the victim, who had also identified defendant at the photograph lineup. *Ex parte Baxley*, 496 So. 2d 688 (Ala. 1986).

In court identification of defendant as person who committed armed robbery in drugstore is not impermissibly tainted by prior showup at drugstore or by newspaper article in which defendant's photograph has appeared where, under totality of circumstances, there is no substantial likelihood that witnesses have misidentified defendant due to fact that witnesses had ample opportunity and reason to remember defendant's faith, witnesses description of robber to police conform generally with defendant's actual appearance, and witnesses positively identified defendant at lineup held one month after crime. *Lannom v. State*, 464 So. 2d 492 (Miss. 1985).

In a robbery prosecution, testimony of a deputy sheriff investigating the robbery that he took the prosecuting witness into a store and asked him if he saw the two men who had robbed him, whereupon the prosecuting witness pointed out the accused and another, was admissible for the purpose of showing that the accused was lawfully arrested upon a reasonable belief that he was the guilty person. *Reed v. State*, 232 Miss. 432, 99 So. 2d 455 (1958).

Letter from the Federal Bureau of Identification, offered by defendant, to the effect that no fingerprints lifted on robbed premises matched defendant's was properly excluded since it contained no certificate or copies of the fingerprints compared. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

Admission of evidence of prior extrajudicial identification of defendant as a participant in the robbery by prosecuting witness who also identified defendant at the trial could not be complained of, where evidence of the earlier identification out of court was admitted without objection. *Flegg v. State*, 202 Miss. 179, 30 So. 2d 615 (1947).

In prosecution for robbery with deadly weapon, where person robbed could not positively identify accused, evidence that witness reaching reported scene of rob-

bery few minutes later saw accused fifty yards away armed with rifle and that accused shot witness, held competent as showing identity of robber and accused's guilt of robbery, though it was evidence of a separate crime. *Brown v. State*, 171 Miss. 157, 157 So. 363 (1934).

10. —Prior to other offenses.

In a prosecution for armed robbery, evidence of the defendant's prior conviction of attempted strong-armed robbery was properly admitted into evidence where the defendant had testified that he would not hurt anyone in order to obtain money. When the defendant injected his "character for peaceableness or violence" into the trial, the prosecution was entitled to rebut his protestations that he was not prone to violence; the prosecution was properly allowed to challenge the truthfulness of the defendant's statement that he would not threaten anyone by showing that in the past he had done exactly what he said he would not do. *Rowe v. State*, 562 So. 2d 121 (Miss. 1990).

Even though it was possible that the jury would infer from a FBI fingerprint card that defendant had been involved in prior criminal activity, the admission into evidence of such a card at a trial of a charge of armed robbery of a bank was not error, where it was essential to the state's establishment of the identity of fingerprints on the bank door and the petty cash receipts slip found in the bank and, moreover, among the exceptions to the rule limiting admissibility of evidence of other crimes is when the evidence is used for identification. *Giles v. State*, 501 So. 2d 406 (Miss. 1987).

At an armed robbery trial, state's elicitation of testimony from the girl friend of defendant's accomplice which implicated defendant in the theft of cash, handguns and personal checks belonging to the witness's parents constituted a plain and reversible error, since the theft was wholly unrelated to the crime at issue, and prejudiced the minds of the jurors against the defendant. *Usry v. State*, 498 So. 2d 373 (Miss. 1986).

At armed robbery trial, where defense counsel, on cross-examination of state's witness, elicited information concerning stolen guns, thus inviting prosecutor to

follow-up on that line of questioning on re-direct, defendant was not in a position to complain that evidence of a crime or offense other than the one with which he was charged had erroneously been admitted into evidence. *Brown v. State*, 495 So. 2d 508 (Miss. 1986).

Defendant charged with armed robbery is denied fair trial by introduction of detail surrounding prior conviction and evidence of other crimes not resulting in convictions; error may be raised on appeal notwithstanding defendant's failure to object at time of trial where development of inadmissible detail is lengthy and repetitious. *Gallion v. State*, 469 So. 2d 1247 (Miss. 1985).

Where the prosecuting witness had denied that she had ever been convicted of any offenses other than driving without a driver's license and permitting gambling on premises occupied by her, the accused was entitled to show other convictions of the prosecuting witness by a deputy circuit clerk, whose office was a custodian of the docket of a man who was formerly a justice of the peace. *Hardin v. State*, 232 Miss. 470, 99 So. 2d 600 (1958).

In prosecution for robbery with deadly weapon, where person robbed could not positively identify accused, evidence that witness reaching reported scene of robbery few minutes later saw accused fifty yards away armed with rifle and that accused shot witness, held competent as showing identity of robber and accused's guilt of robbery, though it was evidence of a separate crime. *Brown v. State*, 171 Miss. 157, 157 So. 363 (1934).

In prosecution for robbery with deadly weapon, sheriff's testimony as to accused's flight and subsequent capture held admissible as against complaint that evidence was of flight from subsequent shooting of witness and not from robbery, where two crimes were so closely related in time that flight from one could not be shown without showing other unless evidence of second crime were excluded. *Brown v. State*, 171 Miss. 157, 157 So. 363 (1934).

11. —Confession of accused.

Post arrest confessions of 3 defendants charged with armed robbery were properly admitted into evidence via testimony of police officer where none of the confes-

sions implicated one of the codefendants. *Evans v. State*, 499 So. 2d 781 (Miss. 1986).

At the joint trial of 2 defendants charged with armed robbery, the admission of their confessions, found to have been otherwise admissible, in the state's case-in-chief, did not violate each defendant's right to confrontation of witnesses and was not improper, although both confessions incriminated each defendant and neither of them took the stand, where, upon the admission of the confessions; the trial judge instructed the jury that each confession could not be considered as evidence against the other defendant, that the confessions were almost identical in every detail, and that each defendant admitted his own guilt. *Seales v. State*, 495 So. 2d 475 (Miss. 1986).

Armed robbery defendant's confession was not inadmissible as product of illegal arrest where there was probable cause for the arrest. *Moore v. State*, 493 So. 2d 1295 (Miss. 1986).

12. Sufficiency of evidence; generally.

Where defendant and his accomplice entered a food market with a gun, ordered the employee to lay down, and took money out of the safe, ample evidence supported the verdict convicting defendant of conspiracy to commit armed robbery. The jury heard testimony that there were phone calls between defendant and his accomplice the day before and the day of the robbery. *Herring v. State*, — So. 2d —, 2006 Miss. App. LEXIS 82 (Miss. Ct. App. Jan. 31, 2006).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or new trial where the evidence was overwhelmingly in favor of the guilty verdict convicting defendant of armed robbery; defendant was positively identified by two eyewitnesses, concealed money was found in his bed, and his alibi witness was inconsistent. *Williams v. State*, 923 So. 2d 990 (Miss. 2006).

Prosecution presented sufficient evidence to support the conviction of defendant as the second gunman in a robbery, where an officer testified that he positively identified defendant as the man who was driving the get-away car, codefendant identified defendant as his

partner in the robbery at the time of his arrest, and defendant failed to produce any witnesses or paperwork to corroborate his alibi. *Willis v. State*, 911 So. 2d 947 (Miss. 2005).

There was ample evidence to support the jury's verdict convicting defendant of capital murder because (1) an accomplice testified that he and defendant attempted to rob the victims and thus proved the underlying felony of robbery, Miss. Code Ann. § 97-3-79; (2) three detectives testified that defendant confessed to shooting the deceased victim; and (3) defendant's letters to the accomplice apparently expressed defendant's concern in the accomplice's testimony against him. Thus, the trial court did not err in denying defendant's motion to dismiss and for a judgment of acquittal. *Moore v. State*, 914 So. 2d 185 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

There was sufficient evidence to convict defendant of capital murder under Miss. Code Ann. § 97-3-19 with armed robbery as the underlying felony under Miss. Code Ann. § 97-3-79 in that he confessed to and described the murder and the accounts matched the cashier's and other witnesses'. *Bush v. State*, 895 So. 2d 836 (Miss. 2005).

State presented testimony from witnesses who identified defendant as the person who committed both the crimes charged. The first victim testified that while working at the convenience store, an individual later identified as defendant, held a box cutter near her neck, and took money out of the cash register and in the burglary case, the victim testified that she was awakened by her cousins screaming and directly confronted defendant; defendant's motions for a directed verdict, judgment notwithstanding the verdict, and a new trial, were therefore properly denied. *Hill v. State*, 912 So. 2d 991 (Miss. Ct. App. 2004), cert. denied, 921 So. 2d 344 (Miss. 2005).

Defendant was properly convicted of armed robbery because even if defendant did not actually go into store and commit armed robbery, one could logically conclude that defendant actively participated in the armed robbery as a lookout or driver of the getaway car for brother.

Police also recovered a gun, cash, and food stamps located in a shoe box in defendant's girlfriend's apartment. *Smith v. State*, 904 So. 2d 1154 (Miss. Ct. App. 2004).

One man, who the victim identified as defendant, held a silver handgun to her head, and she testified that although he was wearing pantyhose over his face, she could see right through to his face. Upon initial police response, she gave detailed physical descriptions of all three men and of their car, and when police apprehended the men at a local gas station, the victim was taken to the gas station, she immediately identified defendant and the other two men, and officers found a silver gun on the front seat of the subject vehicle, and two other handguns in their car; the evidence was sufficient to support defendant's conviction for armed robbery. *McCoy v. State*, 881 So. 2d 312 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder with an underlying felony of armed robbery as defendant confessed to the murder after twice waiving his Miranda rights, defendant was seen leaving the murder scene, and the victim's blood was on defendant's clothing. Further, defendant's confession that he attacked the victim when she would not lend him money was sufficient to support a finding of armed robbery under Miss. Code Ann. § 97-3-79. *Carr v. State*, 880 So. 2d 1079 (Miss. Ct. App. 2004).

An abundance of evidence supported the charge of armed robbery by the exhibition of a deadly weapon, including defendant's confession to the trial court that he had possessed a handgun during the robbery, the victim's testimony at the plea hearing, and two other witnesses who were available to testify that defendant had admitted to robbing the store with a handgun. Therefore, defendant's guilty plea was valid notwithstanding defendant's post-sentencing denial of possession of a handgun, and defendant's assertion that defendant only simulated having a weapon. *Ray v. State*, 876 So. 2d 1032 (Miss. Ct. App. 2004).

Trial court properly convicted defendant of armed robbery where defendant

was identified on video brandishing a weapon in a store clerk's face and demanding money. This evidence was sufficient to prove all elements of the crime. *McDonald v. State*, 881 So. 2d 895 (Miss. Ct. App. 2004).

Evidence was sufficient to support defendant's armed robbery conviction, because the evidence fairly permitted an inference that defendant purposely took from the victim a cigarette pack believed to contain contraband crack cocaine rocks through the use of a deadly weapon in the form of a knife. *Woods v. State*, 883 So. 2d 583 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendants of robbery with a deadly weapon where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants and offered no reasonable explanation for their actions; the evidence in favor of defendants was not overwhelmingly contrary to the verdict. *Powell v. State*, 878 So. 2d 144 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Evidence that defendants broke into a hotel room, assaulted one of the occupants with a gun, but aborted their plans after encountering unexpected resistance, was sufficient to establish that they possessed the requisite intent to commit an armed robbery; a victim's watch was found on the floor, and the jury could have found that defendants removed the watch with the intent to take it. *Broomfield v. State*, 878 So. 2d 207 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendants' conviction of armed robbery was not against the overwhelming weight of the evidence as (1) they were identified as the men who broke into a hotel room, assaulted one of the occupants with a gun, but fled when they encountered resistance; (2) duct tape found in the hotel room matched a roll of duct tape found in defendants' vehicle; and (3) they presented no credible evidence tending to demonstrate their innocence nor a reasonable explanation for their actions. *Broomfield v. State*, 878 So. 2d 207 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant and the first co-defendant entered the car, the first co-defendant took

the victim's money at gunpoint which was divided equally, a second co-defendant then shot and killed the victim with the gun defendant had brought, and defendant and the first co-defendant testified that they had planned the robbery, thus, the evidence was sufficient to support defendant's convictions for conspiracy to commit robbery with a deadly weapon, robbery with a deadly weapon, and manslaughter. *Harrington v. State*, 859 So. 2d 1054 (Miss. Ct. App. 2003).

In defendant's armed robbery prosecution, the cashier not only felt the weapon at her side (a tool-like object), but also saw the weapon, and unlike in prior precedents where the victim did not see the object thought to be a deadly weapon, the evidence was sufficient to sustain defendant's conviction for armed robbery while displaying or using a deadly weapon. *Brown v. State*, 859 So. 2d 1039 (Miss. Ct. App. 2003).

Defendant's convictions of rape, Miss. Code Ann. § 97-3-71, and armed robbery, Miss. Code Ann. § 97-3-79, were affirmed; defendant's claims concerning the sufficiency and weight of the evidence were procedurally barred, as defendant failed to renew a motion for a directed verdict. *Collins v. State*, 858 So. 2d 217 (Miss. Ct. App. 2003).

Although a witness was unable to testify about the correct color of a get-away car, there was sufficient evidence to support convictions for armed robbery and conspiracy to commit armed robbery based on the identification of witnesses and the testimony of another perpetrator. *Quinn v. State*, 873 So. 2d 1033 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Circuit court correctly denied defendant's motions for a judgment notwithstanding the verdict and a new trial where the victim's statement, contradicting defendant's version of the facts, sustained the verdict; defendant's initial unrecorded statement was an admission of guilt and defendant had twice changed his story, such that the evidence was sufficient to convict defendant. *Moore v. State*, 858 So. 2d 190 (Miss. Ct. App. 2003).

Defendant's conviction for armed robbery was proper where the evidence was

sufficient because the store clerk described defendant and the female clothing that he was wearing and identified the clothing found by police as the same that the robber was wearing; the driver likewise described the clothing and the geographic location where defendant had thrown them from her vehicle and the driver also admitted driving defendant, in the woman's clothing, to the vicinity of the liquor store and a bottle of vodka of the same size and brand stolen from the store was found in the back seat of the driver's vehicle. *Peyton v. State*, 858 So. 2d 156 (Miss. Ct. App. 2003).

Defendants' convictions for armed robbery were proper where, at trial, the defense presented no credible evidence tending to demonstrate the innocence of defendants nor a reasonable explanation for their actions; further, the testimony concerning the manner in which defendants entered the room, their subsequent conduct, the fact that they fled and resisted arrest, and that a reasonably supported inference existed that there was an attempt to take one of the victim's watch all sustained a finding by a reasonable minded jury that defendants committed armed robbery. *Broomfield v. State*, — So. 2d —, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003).

There was sufficient evidence to sustain defendant's armed robbery conviction where the evidence showed that defendant admitted to being present at the scene and was positively identified by a victim during the investigation and at trial; therefore, a trial court did not err by denying defendant's motion for judgment notwithstanding the verdict. *Weaver v. State*, 852 So. 2d 82 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant of armed robbery pursuant to Miss. Code Ann. § 97-3-79, and the verdict was not against the manifest weight of the evidence; testimony of the codefendant and the driver of the getaway car established that defendant was a principal in both the planning and execution of the robbery, in which defendant and the codefendant stole the victim's jewelry at gunpoint. *Smith v. State*, 848 So. 2d 195 (Miss. Ct. App. 2003).

Because (1) two victims identified defendant as one of the robbers, (2) defen-

dant's former girlfriend testified that defendant told her of the plans to rob someone and later showed her some of the stolen items, (3) the police recovered some of the stolen items from the woods behind the girlfriend's house, and (4) defendant confessed to the crime, the evidence was sufficient to uphold defendant's conviction of armed robbery; thus, the trial court did not err in denying defendant's motion for a directed verdict, motion for judgment notwithstanding the verdict, and defendant's request for peremptory instructions. *Lott v. State*, 844 So. 2d 502 (Miss. Ct. App. 2003).

In reviewing the evidence presented to the jury, the appellate court found that the State presented evidence in accordance with Miss. Code Ann. § 97-3-79, which revealed that defendant intentionally exhibited a deadly weapon which placed the victim in fear of injury, and that defendant took funds from the store; thus, the trial court did not err in its denial of the motion for directed verdict and the appellate court did not find that the verdict was against the overwhelming weight of the evidence. *Ferguson v. State*, 856 So. 2d 334 (Miss. Ct. App. 2003).

Evidence that defendant shot the victim with a handgun while trying to take the victim's wallet but that defendant fled without taking anything was sufficient to support defendant's conviction for armed robbery because the attempt to take the wallet was sufficient by itself to support the charge; prior appellate ruling voiding defendant's attempt to plead guilty because of confusion over what crime was being charged did not preclude conviction on remand. *Stevens v. State*, 840 So. 2d 785 (Miss. Ct. App. 2003).

In a prosecution for attempted robbery, evidence that defendant attacked a man with a knife, was shot in the back by the man's brother, was found underneath a trailer with a bullet wound to the back, and that he twice confessed that this incident was part of an attempted robbery, was sufficient to justify denial of his motion for judgment notwithstanding the verdict. *Wimberly v. State*, 839 So. 2d 553 (Miss. Ct. App. 2002).

Evidence that defendant pointed a gun at two store clerks, demanded money, and

took money from the cash register drawer and the clerks' purses, was of sufficient weight and quality that a fair-minded jury could find defendant guilty on two counts of armed robbery despite defendant's arguments that the fact that defendant's fingerprints did not match any fingerprints found on items handled by the robber, that the victims stated that the robber had a scar under his eye while defendant did not have such a scar, that no weapon was recovered from defendant, and that neither victim testified that the robber had cursed at or touched them, fired any shots, or otherwise threatened the victims showed that the State had failed to carry its burden of proof. *Womack v. State*, 827 So. 2d 55 (Miss. Ct. App. 2002).

Evidence was sufficient to establish a causal connection between the victim's fear and his giving up his wallet where the victim testified that he parted with his wallet out of fear when the defendant pulled the hammer back on his gun. *Myles v. State*, 774 So. 2d 486 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault and capital murder, the evidence was sufficient to establish that the defendant attempted to commit the underlying felony of armed robbery where the defendant confessed that a coperpetrator stated that he intended to rob a store, and the defendant accepted a gun from the coperpetrator, masked his face, and walked into the store wielding the gun. *Spann v. State*, 771 So. 2d 883 (Miss. 2000).

Evidence was sufficient to support a conviction for a violation of the statute where (1) testimony at trial by the defendant's witness concerning her role in the crime contradicted her sworn testimony from her plea bargain hearing, (2) an officer testified that the defendant's testimony regarding his whereabouts at the time of the robbery contradicted a statement he gave shortly after his arrest, and (3) two witnesses picked the defendant out of a line-up. *Grihim v. State*, 760 So. 2d 865 (Miss. Ct. App. 2000).

Because defendant forced his way into the victims' home brandishing a knife, struck the husband with the knife, de-

manded money from the wife, who testified that she gave defendant a small amount of cash and wrote him a check for \$500 because she was afraid of him, there was sufficient evidence from which the jury could find that defendant committed armed robbery. *Thomas v. State*, 754 So. 2d 579 (Miss. Ct. App. 2000).

Though the defendant contended that he shot the victim in self-defense only, there existed substantial evidence upon which the jury could have found that he shot the victim in an effort to take his money; two different accounts of the incident were given by the defendant and the victim, but the jury was the sole judge of the weight and worth of their testimony. *Brown v. State*, 726 So. 2d 248 (Miss. Ct. App. 1998).

Defendant's confession, coupled with witness' verification of defendant's story, was sufficient to support convictions of murder and armed robbery when coupled with other trial testimony, even though witness had made deal with state for lesser sentence if he testified against defendant; jury was made aware of deal. *Morgan v. State*, 681 So. 2d 82 (Miss. 1996).

Evidence that alleged victim of armed robbery was in fear of immediate injury was sufficient to support defendant's conviction for armed robbery, despite contention he was involved in the crime, where conflicting testimony was offered as to victim's state of mind and jury had opportunity to assess credibility of victim, police officer and accomplices to crime, though one accomplice gave pretrial statement that an additional person known to another accomplice was to be included in split of money obtained in robbery. *Jones v. State*, 669 So. 2d 1383 (Miss. 1995).

The evidence was insufficient to support a conviction for armed robbery as an accessory before the fact where none of the witnesses who testified at trial saw the defendant prior to or during the armed robbery, the first time anyone saw the defendant was approximately 20 minutes after the commission of the armed robbery, and there was no evidence showing that the defendant was aware of his companions' activities prior to the actual commission of the armed robbery and no rea-

sonable inference from other evidence to show any such knowledge by the defendant. *Gangl v. State*, 612 So. 2d 333 (Miss. 1992).

Evidence was sufficient to support guilty verdict of jury for armed robbery where defendant had been with victim in victim's truck, and had been seen by numerous people; defendant had come into store and said he was going to "clip" the white man; defendant had come back to store alone in victim's truck; and defendant had been identified as person who drove victim's truck into service station in Memphis some 4 to 5 hours after incident and used victim's credit card to buy gas and food. *Ratliff v. State*, 515 So. 2d 877 (Miss. 1987).

Evidence sustained defendant's conviction for armed robbery of couple parked in automobile where defendant's fingerprints were found on automobile, hairs found on defendant's shirt came from male victim, defendants own witness exploded his explanation of why he possessed stocking and gloves similar to those used by the robber, and stories told by defendant's wife and brother-in-law to furnish him with an alibi were incredible. *Watkins v. State*, 500 So. 2d 462 (Miss. 1987).

Armed robbery defendant's conviction was supported by evidence which positively identified him as being in the store shortly before the robbery at an early morning hour, and further showed that he had been found on the ground behind the building into which the other robber had fled, that he had fled upon being discovered by a police officer, that he refused to halt when informed he was a robbery suspect, that he resisted the police officers attempt to take him into custody and that merchandise of the kind sold in the store was found at the place where the defendant had been found lying down. *McGilvery v. State*, 497 So. 2d 67 (Miss. 1986).

Notwithstanding inconsistencies in accomplice's testimony, jury verdict finding defendant guilty of armed robbery was supported by credible evidence, where one witness testified that he had left the car with a gun and returned with a cigar box containing money, and 2 other

witnesses gave identification testimony. *Arteigapiloto v. State*, 496 So. 2d 681 (Miss. 1986).

Although an accomplice had actually robbed the store at gunpoint, defendant's guilt as a principal in the commission of the crime was clearly established by evidence that he had planned the crime, had cased the store prior to the robbery, had furnished the gun, had furnished camouflaged hat and coat worn by the accomplice while robbing the store, had supplied and driven the get-away car, and had taken the money bag when the accomplice got back into the car after the robbery. *Walker v. State*, 493 So. 2d 1323 (Miss. 1986).

Evidence was sufficient to sustain conviction for armed robbery where defendant admitted that he was guilty of breaking and entering, stated that he had looked through a drawer for something to steal, and further stated that the whole time he was in the house he intended to steal, with other participants who were armed, and he had only changed his mind when he couldn't find anything to steal. *Kelly v. State*, 493 So. 2d 356 (Miss. 1986).

Jury verdict finding defendant guilty of armed robbery as an accessory before the fact was amply supported by testimony of state's principal witness, the person who actually assaulted and wrestled jewels from the victim, that defendant masterminded the crime, which testimony was corroborated by another witness, and by testimony of the defendant placing himself with the co-defendants before the fact and with the stolen jewels on the evening of the crime. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Testimony of eyewitnesses identifying defendants as persons who committed armed robbery, together with facts surrounding identification, are sufficient basis upon which jury may reject alibi testimony and convict defendants. *Belino v. State*, 465 So. 2d 1043 (Miss. 1985).

Identification of the accused by the robbery victim, together with corroborating evidence, was sufficient to sustain conviction under this section [Code 1942, § 2367]. *Smith v. State*, 242 Miss. 728, 137 So. 2d 172 (1962).

A charge that a stated amount of money was taken is supported by evidence that

the exact amount was not known, but was approximately that charged. *Passons v. State*, 239 Miss. 629, 124 So. 2d 847 (1960).

Evidence in robbery prosecution of resistance, outcry, complaint and immediate report by victim, is sufficient to warrant jury finding that the taking was against victim's will. *Littrell v. State*, 19 So. 2d 438 (Miss. 1944).

Where indictment charged taking of money from person and presence of certain parties, evidence that accused took money from presence of the named parties sustained conviction of robbery under statute defining robbery as feloniously taking from the person, or from the presence of another by violence. *Turner v. State*, 177 Miss. 272, 171 So. 21 (1936).

13. —Exhibition or use of weapon.

Defendant's conviction for armed robbery under Miss. Code Ann. § 97-3-79 (Rev. 2000) was affirmed as defendant held a hand behind his back when he first asked for the drugs and the victim later saw defendant's knife; thus, the evidence was sufficient to prove the robbery was procured through the exhibition of a deadly weapon. *Yucaitis v. State*, 909 So. 2d 166 (Miss. Ct. App. 2005).

Court properly denied defendant's motion for judgment notwithstanding the verdict after he was convicted of armed robbery because a store clerk identified defendant as one of her assailants. Clerk also testified as to the presence of a gun. *Young v. State*, 910 So. 2d 26 (Miss. Ct. App. 2005).

Where defendant entered a convenience store with a t-shirt partially covering his face and carrying a knife in his right hand, then stopped when he saw the store clerk on the phone, and fled, the evidence was sufficient to support his conviction for attempted armed robbery. The State failed to prove that the victim was placed in immediate fear by exhibition of a deadly weapon, an essential element of the crime of attempted armed robbery. *Dambrell v. State*, 905 So. 2d 655 (Miss. Ct. App. 2004).

In reviewing the evidence presented to the jury, the appellate court found that the State presented evidence in accordance with Miss. Code Ann. § 97-3-79, which

revealed that defendant intentionally exhibited a deadly weapon which placed the victim in fear of injury, and that defendant took funds from the store; thus, the trial court did not err in its denial of the motion for directed verdict and the appellate court did not find that the verdict was against the overwhelming weight of the evidence. *Ferguson v. State*, 856 So. 2d 334 (Miss. Ct. App. 2003).

Defendant's conviction for armed robbery was reversed, as the State presented no objective evidence that defendant possessed a gun at the time of the robbery; assumptions made by the robbery victims that defendant was hiding a gun under a paper bag were not enough to support the conviction. *Blue v. State*, 827 So. 2d 721 (Miss. Ct. App. 2002).

Teller saw a gun and the jury's guilty verdict could be based on the uncorroborated testimony of a single witness as a reasonable and fair-minded juror could have found the robbery was committed with the aid of a handgun and the evidence was sufficient to convict defendants of armed robbery. *Collins v. State*, 817 So. 2d 644 (Miss. Ct. App. 2002).

Evidence was insufficient to support a conviction under this section since no deadly weapon was exhibited or the use of a deadly weapon threatened by the defendant; the defendant approached the victim in a store to make a purchase, the defendant handed the victim a bill, the victim opened the register to make change in response to the purchase, and the defendant grabbed \$60.00 dollars and ran, and the only evidence presented by the state with regard to a weapon was that the victim saw part of a kitchen knife in the defendant's pocket. *Clark v. State*, 756 So. 2d 730 (Miss. 1999).

The evidence did not establish that the defendant exhibited a knife in the course of stealing cash from a store where the state's only proof of the use of a deadly weapon was the clerk's testimony that he noticed what he thought was the handle of a kitchen knife, which was only briefly visible, and the state did not contend that the defendant ever threatened the clerk or brandished the knife in any fashion. *Clark v. State*, 1999 Miss. LEXIS 161 (Miss. Apr. 22, 1999), subst. op., 756 So. 2d 730 (Miss. 1999).

Evidence was insufficient to show that the defendant stole a truck by exhibiting a deadly weapon where the victim testified that the defendant told him to get out of the truck, that the defendant poked something hard through his jacket pocket into his ribs, and that he assumed that the hard object, which he could not see, was a gun since no imprint of a gun was seen; the defendant did not say to anyone, before or after, that he had a gun, and he did not threaten to shoot anyone. *Gibby v. State*, 744 So. 2d 244 (Miss. 1999).

Evidence, along with reasonable inferences flowing therefrom, was sufficient to present jury question as to whether defendant exhibited deadly weapon in conjunction with robbery where defendant had under his shirt object which looked like gun and victim testified that she saw prints of gun. *Hughey v. State*, 512 So. 2d 4 (Miss. 1987).

Testimony from store manager that manager did not touch or restrain person stealing meat from leaving store and area of store by physical force because manager was afraid of pocket knife exhibited by person to manager, apparently for purpose of instilling fear to stop apprehension and pursuit, is sufficient to support conviction for armed robbery. *Presley v. State*, 474 So. 2d 612 (Miss. 1985).

Where evidence indicated that defendant addressed everyone in a church, demanding that personal valuables be brought down the aisle and placed in front of him, where he was waving and pointing a shotgun all around the church sanctorium, and where individual victims named in the indictment started to comply or intended to comply with the demand for their valuables, the trial court did not err in declining to grant a directed verdict as to five counts of attempted robbery in violation of this section. *Smith v. State*, 445 So. 2d 227 (Miss. 1984).

In a prosecution for attempted armed robbery under this section, evidence was sufficient to prove specific intent to rob, within the meaning of the statute, where the uncontradicted evidence indicated that defendant and a partner entered a bank, and defendant pointed a gun at an employee while his partner assaulted other employees, even though both fled

before any demand was made for money. *Perry v. State*, 435 So. 2d 680 (Miss. 1983).

Testimony establishing that defendant jerked bills out of victim's hand and at same time pulled pistol on him justified the jury in finding defendant guilty of armed robbery beyond reasonable doubt. *Sykes v. State*, 291 So. 2d 697 (Miss. 1974).

Defendant's threat that he would cut victim's heart out, coupled with the menacing gestures with a knife, was enough to instill a disabling apprehension of great personal injury, and defendant's threat that a buddy would be watching in the bank was sufficient to prevent victim from seeking help, and jury was justified in returning a verdict of guilty of armed robbery. *Anderson v. State*, 285 So. 2d 748 (Miss. 1973).

Proof of the threatening exhibition of a weapon which may be deadly if used is prima facie evidence that it can and will be so used. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Proof that defendant was armed with a drawn pistol and that victim was thereby compelled to submit to surrender of his goods is sufficient to sustain conviction under this section [Code 1942, § 2367], without direct proof that the pistol was loaded or that its use as a bludgeon was threatened or attempted. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

14. Instructions; generally.

There was no factual basis to support an instruction that a robbery without a deadly weapon occurred; even if defendant was not the person who actually was holding the weapon, defendant participated in the robbery, and the trial court did not err in denying an instruction for simple robbery. *Harrington v. State*, 859 So. 2d 1054 (Miss. Ct. App. 2003).

A trial court's failure to instruct the jurors in an armed robbery prosecution to view accomplices' testimony with caution and suspicion constituted reversible error where there was no physical evidence corroborating the accomplices' testimony, the armed robbery went unsolved for over 5 years, one of the accomplices who testified as a witness was granted absolute immunity in exchange for his testimony and also admitted to committing at least 25

felonies, and the other accomplice had entered a plea of not guilty to the charge of armed robbery, which he confessed to committing in his testimony, and had not yet gone to trial. An instruction given by the trial court directing the jury to consider accomplice testimony with "great care and caution" was insufficient since the difference between being told to exercise "great care" and to regard with "suspicion" is a difference of vast degree; in deleting the requirement to view accomplices' testimony with suspicion, the trial judge effectively diluted the instruction. *Wheeler v. State*, 560 So. 2d 171 (Miss. 1990).

An instruction that was tantamount to telling the jury that the defendant was present and participated in the robbery was erroneous, because it assumed as true a material fact which the jury alone could find, and the instruction, in its existing form, should not be given at a new trial. *Bridgeforth v. State*, 498 So. 2d 796 (Miss. 1986).

In a prosecution for being an accessory before the fact of armed robbery, use of terms usually associated with "conspiracy" in one of the state's instructions was not fatal, especially where any alleged deficiency in the matter of advising the jury of the concepts of aiding and abetting and specific intent was cured by 2 other instructions, as the reviewing court does not examine jury instructions in isolation but, rather, reads all instructions as a whole to determine whether the jury has been correctly instructed. *Malone v. State*, 486 So. 2d 360 (Miss. 1986).

Instruction to jury on issue of whether gun used in robbery is deadly weapon need not mention that gun is blank starter pistol; such mention would constitute impermissible comment by court on evidence. *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985).

Robbery defendant is not entitled to jury instruction to effect that eyewitness testimony should be viewed with caution. *Robinson v. State*, 473 So. 2d 957 (Miss. 1985).

In a prosecution for armed robbery pursuant to this section, the trial court did not err in charging the jury that it could find defendant guilty if it concluded that

he had "attempted" to take property from the victim where the statute also prohibited an attempt to commit the crime of robbery, unlike § 97-3-73, relied upon by defendant, which does not include an attempt in the definition of robbery and was not the statute under which defendant was charged. *Cooper v. State*, 386 So. 2d 1115 (Miss. 1980).

Although defendant's instruction was unartfully drawn, it should have been granted since there was no other instruction clearly showing the required element of asportation essential to prove the crime of robbery. *Thomas v. State*, 278 So. 2d 469 (Miss. 1973).

Where there was testimony showing that three persons including the accused, acted in concert in committing a robbery, each was responsible and accountable for the wrongful actions of the other two, including the use of a knife during the armed robbery by one of the codefendants, and the trial court was justified in refusing an unarmed robbery instruction requested by the defendant, who did not himself use a knife during the incident. *Ivey v. State*, 232 So. 2d 368 (Miss. 1970).

Instruction in prosecution for robbery with firearms which makes effort to define reasonable doubt is bad, but not harmful error when by other instructions defendant has obtained fair and full statement of law applicable to case. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

In robbery prosecution charging defendant with taking a pistol from the person of the prosecuting witness against her will, by putting her in fear of immediate injury to her person by the exhibition of a deadly weapon, trial court erred in not granting defendant's instruction that he could not be convicted of robbery by means of a deadly weapon, where evidence showed that he took pistol from victim by physical force. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441 (1948).

Failure of court to grant instruction directing jury to find defendant not guilty in robbery prosecution charging him with taking a pistol from victim by the exhibition of a deadly weapon, where evidence showed that he took pistol by physical

force, did not constitute error where the evidence would justify defendant's conviction under Code 1942, § 2362. *Newsome v. State*, 203 Miss. 449, 35 So. 2d 441 (1948).

While it is improper for the court to instruct the jury as to the court's sentence should the jury fail to assess the death penalty, it is not reversible error where it does not appear that but for such instruction the jury would not have fixed the penalty at death. *Boyd v. State*, 202 Miss. 509, 32 So. 2d 452 (1947).

Instruction authorizing jury to convict if accused used a pistol and a large dirk knife in perpetrating a robbery was not prejudicial where accused had confessed that he was armed with a pistol, notwithstanding state's attempt to introduce evidence that a specific pistol was used in the robbery was abandoned during the course of the trial. *White v. State*, 201 Miss. 556, 29 So. 2d 650 (1947).

Court's statement to jury, in prosecution for robbery with deadly weapon, to exclude testimony concerning guns which nobody can identify positively and to consider only testimony concerning dollar bills that have been identified positively as the property of the victim, was held not to be prejudicial error as constituting a commentary upon the weight of the evidence. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Instruction, in trial for robbery with firearms, to "find the defendant guilty as charged," unless jury fixed punishment at death, held proper. *Williamson v. State*, 167 Miss. 783, 149 So. 795 (1933).

15. —Intent.

Defendant specifically argued that the indictment made no mention of the intent required for the offense, as it failed to mention that robbery was a specific intent crime. However, use of the word "feloniously" in the indictment under which defendant was charged was sufficient to allege the necessary element of intent. *Calhoun v. State*, 881 So. 2d 308 (Miss. Ct. App. 2004).

In an armed robbery prosecution arising from the defendant's taking of guns from 2 law enforcement officers, the defendant was not entitled to a jury instruction on self-defense, even though the sum and

substance of the defendant's defense was that he took the guns with the purpose of disarming the officers in the midst of what had become a dangerous and heated confrontation in order to extricate himself from harm rather than with the intent to steal, where the jury received no fewer than 5 explanations that the "intent to steal" meant the intent to permanently deprive another of personal property, and therefore a self-defense instruction would have added nothing new to the defendant's theory of the case. *Williams v. State*, 590 So. 2d 1374 (Miss. 1991).

Armed robbery instruction need not state that taking of property was done with intent to steal, particularly where defendant does not request intent instruction and does not object to instruction actually given. *Lannom v. State*, 464 So. 2d 492 (Miss. 1985).

Where, after his efforts to return recently purchased shoes were unavailing, defendant drew a pistol and directed the store cashier to give him an amount equal to the purchase price, defendant's alleged good faith in taking the money did not entitle him to a peremptory instruction on the basis that he lacked felonious intent. *Wilson v. Wilson*, 317 So. 2d 425 (Miss. 1975).

Trial court was correct in refusing defendant's instruction to the effect that the particular intent of the defendant must be one in which substantial gain in money or property was the dominant or primary purpose; the word "substantial" has no place in an instruction on armed robbery, and was calculated to mislead jury. *Sykes v. State*, 291 So. 2d 697 (Miss. 1974).

16. —Lesser offenses.

Defendant in armed robbery case was not entitled to an instruction for the lesser offense of attempted larceny by trick even though he claimed that he was attempting to trick the drug dealer out of the money by delivering counterfeit cocaine. *Smothers v. State*, 761 So. 2d 887 (Miss. Ct. App. 2000).

Trial court did not err in denying request for lesser included offense instructions on simple and aggravated assault where defendant was indicated for armed robbery, jury was instructed concerning lesser-included offenses of robbery and

petite larceny, and no rational or reasonable juror could have convicted defendant of merely simple or aggravated assault. *Monroe v. State*, 515 So. 2d 860 (Miss. 1987).

Armed robbery defendant was properly denied a lesser included offense instruction, in view of his uncontradicted statement regarding his participation in the armed robbery which made him a principal regardless of whether or not he was actually holding a gun. *Moore v. State*, 493 So. 2d 1295 (Miss. 1986).

17. —Alibi defense.

Where the accused's defense to an armed robbery charge was an alibi, the court did not err in failing to give an instruction which would have placed upon the state the burden of proving that the alibi was untrue. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375 (1956).

Where the accused's alibi defense to an armed robbery charge was supported by strong testimony of apparently disinterested witnesses while the state's evidence that the accused was the perpetrator was weak, being the testimony of the victim, who, under the circumstances, had only a limited opportunity to observe at the time of the crime, the trial court committed reversible error in failing to instruct that if there was a probability of the accused's innocence, the jury should acquit him; such instruction should have been to the effect that the evidence in support of the alibi need only raise in the minds of the jury reasonable doubt as to the accused's presence at the time and the place of the crime. *Newton v. State*, 229 Miss. 267, 90 So. 2d 375 (1956).

Accused was entitled to a peremptory instruction where his alibi thoroughly impeached the state's evidence consisting solely of the uncorroborated testimony of an alleged accomplice, a habitual criminal who had not been sentenced although he had plead guilty of the robbery. *Pegram v. State*, 228 Miss. 860, 89 So. 2d 846 (1956).

18. Conviction of lesser offense.

Sequestration of the jury was not mandatory in a case where the defendant was indicted for armed robbery, was found guilty by the jury of robbery, as opposed to armed robbery, and was sentenced to 15

years in prison. *Griffin v. State*, 492 So. 2d 587 (Miss. 1986).

Under the provisions of Code 1942, § 2523, a defendant indicted for armed robbery may properly be tried and convicted for robbery. *Auman v. State*, 271 So. 2d 427 (Miss. 1973).

In prosecution under indictment charging robbery with deadly weapon accused could be found guilty of robbery without firearms under statute providing accused may be found guilty of lesser offense or other offense necessarily included in offense charged. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

In robbery prosecution under indictment charging robbery with deadly weapon, accused could be found guilty of robbery without firearms under statute. *Bogan v. State*, 176 Miss. 655, 170 So. 282 (1936).

19. Bail.

Both attempted armed robbery and armed robbery constitute the crime of "robbery" under this section, and, therefore, a defendant convicted of attempted armed robbery was not entitled to bail pending appeal as a matter of right, but rather, was subject to the discretion of the court as to bail after the conviction. *State v. Maples*, 445 So. 2d 540 (Miss. 1984).

In light of the legislative withdrawal of the death penalty from the robbery statute, denial of bail to a defendant charged with armed robbery was improper; denial is appropriate only for capital offenses, and "capital offenses" consist only of those for which the death penalty is permitted. *Ex parte Dennis*, 334 So. 2d 369 (Miss. 1976).

A defendant charged with armed robbery should be granted bail where the proof of his guilt was not evident or the presumption thereof great on the record. *Wooton v. Bethea*, 209 Miss. 374, 47 So. 2d 158 (1950).

20. Sentence.

Defendant's sentence for armed robbery was proper; 20 years in prison, with 12 years suspended, followed by five years of post-release supervision, was within the sentencing range. *Williams v. State*, 922 So. 2d 853 (Miss. Ct. App. 2006).

Because defendant did not address the third prong of the *Solem v. Helm*, 463 U.S. 277, inquiry, regarding sentences imposed in other jurisdictions, his claim that his 20 year sentence for robbery was excessive was barred *Willis v. State*, 911 So. 2d 947 (Miss. 2005).

Penalties set forth in the armed robbery statute, Miss. Code Ann. § 97-3-79, and the controlled substances statute, Miss. Code Ann. § 41-29-139, were clearly distinguishable where the specific requirement that a trial court's sentence be limited to a definite term, reasonably expected to be less than life, was applicable to an armed robbery conviction but did not apply to all crimes; therefore, the trial court did not have to consider defendant's life expectancy for the conviction of unlawful delivery of methamphetamine and unlawful possession of more than thirty grams of methamphetamine with intent to distribute. *Cannon v. State*, 919 So. 2d 913 (Miss. 2005).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery; the court interlineated the simple robbery petition indicating "armed" robbery and initialed the modification. Defendant was sentenced to a term of fifteen years with ten years to serve, five years suspended and post-release supervision of five years in the custody of the Mississippi Department of Correction. *Baldwin v. State*, 923 So. 2d 218 (Miss. Ct. App. 2005).

Defendant's robbery sentence was appropriate pursuant to Miss. Code Ann. § 97-3-79 because it was within the statutory limit. Further, it was not grossly disproportionate to the crime of which he was convicted. *White v. State*, 919 So. 2d 1029 (Miss. Ct. App. 2005).

Defendant contended that his sentence was excessive because his cohorts to the armed robbery were given lesser sentences, and the sentence that he received exceeded the punishment prescribed for the crime of accessory after the fact. However, his sentence was well within the statutory guidelines for the offense he pled guilty to (armed robbery), and it was not subject to review. *Sykes v. State*, 895 So. 2d 191 (Miss. Ct. App. 2005).

Defendant's 35-year sentence after he was convicted of armed robbery was proper under Miss. Code Ann. § 97-3-79 where the sentence was within the statutory guidelines and the trial court had not abused its discretion in considering pending charges during sentencing. *Banks v. State*, 912 So. 2d 1061 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 344 (Miss. 2005).

Upon appellant's plea of guilty to one count of armed robbery, the trial court did not err in sentencing him to fourteen years in the custody of the Mississippi Department of Corrections, with seven years suspended. The circuit court properly considered appellant's age, lack of criminal history, and similar cases. *Edmond v. State*, 906 So. 2d 798 (Miss. Ct. App. 2004).

Where appellant pled guilty to the armed robbery of a fast food restaurant, and his accomplice pled guilty to conspiracy to commit armed robbery for driving the "getaway car;" the trial court did not err in sentencing appellant to seven years while his accomplice only received an effective sentence of one year. The men performed different tasks in the crime. *Edmond v. State*, 906 So. 2d 798 (Miss. Ct. App. 2004).

Pursuant to Miss. Code Ann. § 97-3-79, a person found guilty of armed robbery had to be imprisoned for life in the state penitentiary if the penalty was so fixed by the jury. Defendant, however, was sentenced by the circuit judge after entering a plea of guilty, and Miss. Code Ann. § 97-3-79 did not provide for a maximum sentence of life for armed robbery when the sentence was imposed by a judge rather than a jury; thus, where defendant had no prior felonies, and contrary to the State's argument that defendant's sentence was illegal, the circuit judge had the statutory authority, pursuant to Miss. Code Ann. § 47-7-33, to suspend defendant's sentence (in the case at bar, 9 years of defendant's 10 year sentence was suspended, subject to a term of supervised probation), to the extent that the ends of justice and the best interest of the public, as well as defendant, would be served thereby. *State v. Hayes*, 887 So. 2d 184 (Miss. Ct. App. 2004).

Under Miss. Code Ann. § 97-3-79, the trial judge had the authority to impose any sentence but life imprisonment. Thus, defendant's sentence of 40 years was within the limits prescribed by statute and did not constitute cruel and inhuman treatment; further, the sentence was within the purview of the trial judge to impose, since he had adjudged defendant's remaining life expectancy to be 42 years. *Calhoun v. State*, 881 So. 2d 308 (Miss. Ct. App. 2004).

Where jury could not reach an agreement on a sentence for defendant whom they had found guilty of armed robbery, the trial judge did not demonstrate any bias by sentencing defendant to 25 years, as Miss. Code Ann. § 97-3-79 provided the judge could fix the sentence for any term not less than three years. *Jack v. State*, 878 So. 2d 1078 (Miss. Ct. App. 2004).

Inmate's sentence after pleading guilty to a charge of armed robbery was proper where the record constituted sufficient evidence to show that the inmate was properly advised as to the minimum and maximum sentence prior to entering his plea; further, three years was the minimum sentence for armed robbery and a person convicted of armed robbery could not receive a wholly suspended sentence as the inmate alleged that his attorney told him. *Mullins v. State*, 859 So. 2d 1082 (Miss. Ct. App. 2003).

Defendant's convictions for armed robbery and arson were proper but defendant's robbery sentence was reversed; the State agreed with defendant's contention that his life expectancy was not 39.6 years because the life expectancy for a 43-year-old black male was 30.6 years. *Payton v. State*, 897 So. 2d 921 (Miss. 2003).

Consecutive sentences of 30 and 45 years for armed carjacking and armed robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his co-defendants elected to do. *McCline v. State*, 856 So. 2d 556 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Evidence that defendant pointed a gun at two store clerks, demanded money, and

took money from the cash register drawer and the clerks' purses, supported imposition of consecutive sentences of 30 years and 10 years against a defendant convicted of two counts of armed robbery; sentences were within the maximum range set forth in Miss. Code Ann. § 79-3-79 [Repealed] and were neither cruel or unusual under either the Eighth Amendment to the Constitution of the United States or Miss. Const. art. 3, § 28 nor disproportionate to the offenses committed. *Womack v. State*, 827 So. 2d 55 (Miss. Ct. App. 2002).

There was no indication in the record that the trial judge enhanced the sentence of one defendant over the other, and the sentences were all well within the statutory limits for armed robbery, aggravated assault and accessory after the fact. *Birkley v. State*, 750 So. 2d 1245 (Miss. 1999).

The defendant's 25 year sentence fell within the guidelines of this section, was not excessive, and did not violate his Sixth and Fourteenth amendment rights, notwithstanding the defendant's assertion that he was merely an accessory after the fact; the trial judge found no reason to suspend any of the sentence and the defendant had a previous conviction for burglary of an occupied dwelling. *Lawson v. State*, 748 So. 2d 96 (Miss. 1999).

The sentence imposed by the trial judge was within the statutory limits of the statute and was not disturbed on appeal where the jury was unable to agree on the penalty of imprisonment for life and the trial court thus considered the actuarial tables and used his authority to sentence the defendant to serve 35 years in the state penitentiary, one year less than his life sentence. *Lenox v. State*, 727 So. 2d 753 (Miss. Ct. App. 1998).

The court rejected the contention that the defendant's 15 year sentence was an illegal life sentence because it was handed down by a judge, not a jury, and the judge had no knowledge of the defendant's HIV status or his life expectancy. *Lindsay v. State*, 720 So. 2d 182 (Miss. 1998).

Sentence for crime of armed robbery of 20 years with 11 years suspended was within guidelines of statute requiring sentence of any term not less than 3 years,

and was not subject to Supreme Court review, despite asserted presence of mitigating factors. *Jones v. State*, 669 So. 2d 1383 (Miss. 1995).

In a prosecution for armed robbery, it was not error for the trial judge to fail to accept the State's sentencing recommendation, even though the State agreed to make the recommendation in exchange for a guilty plea and the defendant's agreement to testify against his co-indictees, where the judge did not participate in the plea bargaining discussion between the defendant and the State, and the judge and the defense attorney informed the defendant that the State's sentence recommendation was not binding on the court. *Martin v. State*, 635 So. 2d 1352 (Miss. 1994).

The fact that a defendant pled guilty to armed robbery in exchange for a 7-year sentence did not broaden the circuit court's sentencing authority; it was still statutorily limited. *Mitchell v. State*, 561 So. 2d 1037 (Miss. 1990).

Judge acted within his discretion when he modified defendant's 25 year sentence to 3 years in prison followed by 5 years probation; contention was rejected that § 47-7-33 provided exclusive procedure in that suspension of sentence under its term could not be combined with requirement that any part of same sentence be served. *Marshall v. Cabana*, 835 F.2d 1101 (5th Cir. 1988).

Upon a prima facie showing of the existence of an advance plea agreement between the state and a codefendant who was state's principal witness, whereby in exchange for testifying for the state the codefendant would receive a lenient sentence for armed robbery, a defendant, who had been convicted for the same robbery as accessory before the fact, may be entitled to post-conviction relief where the agreement had not been disclosed prior to his trial, although the defense had made a general discovery request for exculpatory material, and the existence of any such agreement had been denied by the codefendant while testifying at the defendant's trial. Case would be remanded to circuit court for evidentiary hearing. *Malone v. State*, 486 So. 2d 367 (Miss. 1986).

Three years imprisonment is the most lenient lawful sentence for armed robbery.

Malone v. State, 486 So. 2d 367 (Miss. 1986).

Imposition of 40 years imprisonment under habitual offender statute (§ 99-19-81), which cannot be reduced or suspended and for which defendant cannot be eligible for probation or parole, upon conviction for armed robbery based on theft of meat during which defendant displayed pocket knife to avoid apprehension will be vacated, and additional sentence hearing and resentencing required, where adequate presentencing hearing was not held, even though trial judge afforded every opportunity to defendant and counsel to present mitigating evidence at that hearing. *Presley v. State*, 474 So. 2d 612 (Miss. 1985).

In a prosecution for armed robbery in which the jury failed to fix the penalty at life imprisonment, the trial court did not exceed its authority in imposing a sentence of 40 years where the defendant had an actuarial life expectancy of 40.51 years. *Ware v. State*, 410 So. 2d 1330 (Miss. 1982).

Where it appeared that the trial court, in sentencing a 16-year-old defendant convicted of armed robbery to a term of 14 years in state prison, had been under the misapprehension that this section and § 47-7-3, read together, mandated a sentence of at least 10 years in the state penitentiary, absent a jury verdict of life imprisonment, the case would be remanded to the court for a clarification of the sentencing since there was no way to ascertain whether the trial court had considered the statutory alternative for sentencing minor offenders under the provisions of § 43-21-159(3). *Bougon v. State*, 405 So. 2d 101 (Miss. 1981).

In a prosecution for armed robbery, a sentence of 12 years in prison, without eligibility of parole for 10 years, imposed upon a 14-year-old mentally retarded defendant did not constitute cruel and unusual punishment; however, the case would be remanded to the trial court for consideration of alternative sentencing under § 43-21-159 where the trial judge should have placed in the record the sources and facts of his sentence study and should have permitted the defendant's attorney to introduce evidence of

the presence of absence of facilities at the Mississippi State Penitentiary for the care of the defendant, and the availability of other institutions or facilities which could be utilized by the defendant. *May v. State*, 398 So. 2d 1331 (Miss. 1981).

The trial court in an armed robbery prosecution erred in sentencing defendant to a 75 year term of imprisonment where the jury did not fix the penalty at imprisonment for life; under this section, a trial court cannot impose a sentence of life when the jury has failed to do so. *Stewart v. State*, 372 So. 2d 257 (Miss. 1979).

The imposition of a life sentence is within the sole province of the jury, and it was thus error for the trial court to impose a life sentence on defendant, convicted of armed robbery, where the jury returned a verdict finding defendant "guilty as charged," but did not fix penalty as life imprisonment. *Parker v. State*, 367 So. 2d 456 (Miss. 1979).

Where the jury fails to fix the penalty at death, the sentence of the court is an exercise of discretion, and a sentence of life imprisonment is within his discretion. *Flegg v. State*, 202 Miss. 179, 30 So. 2d 615 (1947).

21. Miscellaneous.

Testimony of accomplice, which was partially corroborated by fellow inmate of defendant and by state's ballistics expert, presented question of fact to be determined by jury as to whether defendant was guilty of robbery and subsequent shooting of store clerk. *Brown v. State*, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Although a special venire could have been demanded in an armed robbery prosecution if the demand had been timely made, the trial court did not abuse its discretion in overruling the defendant's motion for a special venire where the motion was made just prior to the start of trial. *Williams v. State*, 590 So. 2d 1374 (Miss. 1991).

Initiation of criminal proceedings in justice court did not preclude circuit court in another county retaining jurisdiction and conducting case to conclusion after dismissal by justice court; courts in both counties had concurrent jurisdiction, since

portion of crimes occurred in each county. *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

The prosecution of a defendant for robbery with a deadly weapon after a prior conviction for kidnapping arising from the same incident was not barred by double jeopardy since the crimes of armed robbery and kidnapping required different elements of proof. *Brock v. State*, 530 So. 2d 146 (Miss. 1988).

Absent a recommendation of the jury for a life sentence, imposition of such sentence on the defendant convicted of armed robbery, and sentenced as an habitual criminal, was error. *Watkins v. State*, 500 So. 2d 462 (Miss. 1987).

Armed robbery conviction and sentence was affirmed on certificate of appeal, where the defendant, who had escaped from jail during pendency of the appeal, failed to file a transcript, and the return day had long since passed. *Nealy v. State*, 493 So. 2d 1294 (Miss. 1986).

Trial court committed reversible error by preventing armed robbery defendant, who contended another had committed the crime, from asking questions, in jury's presence, concerning such other person's description and characteristics, of a witness, an accused accessory, who, out of jury's presence, had refused, on self-incrimination grounds, to answer questions concerning the robbery, but had answered questions concerning the description of the other person. *Hall v. State*, 490 So. 2d 858 (Miss. 1986).

Trial court may refuse to grant motion for severance filed by defendant in prosecution for robbery with deadly weapon where there does not appear to be conflict of interest among codefendant and evidence introduced at trial does not go more to guilt of one defendant than to other. *Duckworth v. State*, 477 So. 2d 935 (Miss. 1985).

Comment by prosecuting attorney in argument that he will read defendant's confession "as this statement is the only way we hear from him" is harmless comment on failure of defendant to testify when there is no dispute about facts in connection with crime or who committed it. *Bramlett v. State*, 37 So. 2d 305 (Miss. 1948).

Refusal to grant mistrial in prosecution for robbery with a deadly weapon on ground that one of the arresting officers stated on direct examination that they already had defendant “under investigation before this,” whereupon prosecutor interposed question calling for repetition of such statement, did not constitute reversible error, where objection to prosecutor’s question was promptly sustained. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Where defendant, who was indicted on charge of robbery with a deadly weapon, before case was called for trial, filed motion for issuance of special venire facias, overruling of motion, if erroneous, was rendered harmless by subsequent reduction of grade of offense to one of mere felonious robbery, upon district attorney’s motion, and subsequent trial of defendant on that charge, since mere felonious robbery is not a capital offense. *Mosley v. State*, 174 So. 240 (Miss. 1937).

In robbery prosecution, defendants’ guilt of assault held for jury. *Anderson v. State*, 168 Miss. 424, 151 So. 558 (1934).

22. Double jeopardy.

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant’s double jeopardy rights were not violated through being convicted of both kidnapping and

armed robbery. *Moore v. State*, — So. 2d —, 2006 Miss. App. LEXIS 86 (Miss. Ct. App. Jan. 31, 2006).

Inmate’s convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. *Thomas v. State*, — So. 2d —, 2005 Miss. App. LEXIS 993 (Miss. Ct. App. Dec. 6, 2005).

Where defendant robbed the victim, a store clerk, at gunpoint, and pistol whipped the victim numerous times, the offenses of robbery with the use of a deadly weapon, and aggravated assault clearly required different elements of proof, and double jeopardy did not apply. *Houston v. State*, 887 So. 2d 808 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Conspiracy to commit armed robbery required only agreement among two or more people to commit the crime, while armed robbery, required the use of a deadly weapon which placed an individual in fear of immediate injury. Actual robbery required the establishment of several different facts than the agreement to commit the act; thus, the offenses were two separate crimes and defendant was not subjected to double jeopardy by convictions for both. *Stovall v. State*, 873 So. 2d 1056 (Miss. Ct. App. 2004).

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the carjacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. *McCline v. State*, 856 So. 2d 556 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

RESEARCH REFERENCES

ALR. Admissibility, in robbery prosecution, of evidence of other robberies. 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 A.L.R.2d 1396.

Robbery by means of toy or simulated gun or pistol. 61 A.L.R.2d 996.

Fact that gun was unloaded as affecting criminal responsibility. 79 A.L.R.2d 1412.

Robbery by means of toy or simulated gun or pistol. 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim. 88 A.L.R.3d 1309.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 124 A.L.R.5th 657.

Am Jur. 67 Am. Jur. 2d, Robbery §§ 4, 5.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 6 et seq. (proof of duress excusing commission of robbery and kidnapping).

CJS. 77 C.J.S., Robbery §§ 32, 33.

Law Reviews. 1978 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 59, March, 1979.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-81. Robbery; threatening letter demanding money, property.

Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being sent or delivered, shall part with the possession of any letter or writing with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark, or other designation, threatening therein to accuse any person of a crime or to do any injury to the person or property of any one, with a view or intent to extort or gain money or property of any description belonging to another, shall be guilty of an attempt to rob, and shall, on conviction be punished by imprisonment in the penitentiary not exceeding five years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4 (58); 1857, ch. 64, art. 223; 1871, § 2677; 1880, § 2947; 1892, § 1287; Laws, 1906, § 1364; Hemingway's 1917, § 1100; Laws, 1930, § 1129; Laws, 1942, § 2365.

Cross References — Robbery by threats to injure person or relatives at another time, see § 97-3-77.

Threatening letter or notice, see § 97-3-85.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

An action seeking to recover for the use of threats of criminal prosecution, in a letter, to enforce the payment of a purported civil debt, which the plaintiff charged was in violation of Code § 1942, § 2365, was barred by the statute of limitations applicable to an action for menace, the complaint having been filed more than a year after the letter was received. *Dennis v. Travelers Ins. Co.*, 234 So. 2d 624 (Miss. 1970).

Under statute making it an offense for one to knowingly part with possession of letter threatening to accuse any person of a crime or to do any injury to the person or property of anyone, with view or intent to extort or gain money or property, indict-

ment charging that defendant wrote instrument informing addressee to leave house and place money under front door-step, and not to return until certain time, and stating that addressee would be watched from time she left home until she returned, held defective, since it failed to charge that defendant parted with writing and writing did not contain threat. *Smith v. State*, 177 Miss. 731, 172 So. 132 (1937).

Creditor is entitled to demand payment of honest debts, and a threat to charge the debtor with an offense committed in connection with the debt or obligation is not within the statute. *State v. Ricks*, 108 Miss. 7, 66 So. 281, Am. Ann. Cas. 1917E,244 (1914).

RESEARCH REFERENCES

ALR. Criminal liability of corporation for extortion, false pretenses, or similar offenses. 49 A.L.R.3d 820.

What constitutes "property" obtained within extortion statute. 67 A.L.R.3d 1021.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

When is act of extortion performed "under color of official right" so as to be in violation of Hobbs Act (18 USCS § 1951). 74 A.L.R. Fed. 199.

Am Jur. 31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 21-62.

67 Am. Jur. 2d, Robbery §§ 22, 23.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 32-36 (robbery).

CJS. 77 C.J.S., Robbery § 24-28.

86 C.J.S., Threats and Unlawful Communications §§ 1 et seq.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-82. Extortion; definitions; offense and penalties.

(1) For the purposes of this section the following words and phrases shall have the meanings ascribed herein, unless the context clearly indicates otherwise:

(a) "Obtain" means: (i) in relation to property, to bring about a transfer or purported transfer of a legal interest in, or physical possession of, the property, whether to the obtainer or another; or (ii) in relation to labor or service, or any reward, favor, or advantage of any kind, to secure performance thereof; or attempt to do (i) or (ii).

(b) "Property" means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, choses-in-action, reputation of a person and other interests in or claims to

wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

(c) "Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

(d) "Public official" means any person elected or appointed to any office, position or employment whereby the person is paid a fee or salary by the State of Mississippi or any political subdivision thereof or any agency or subdivision of the government of the United States, regardless of the source or sources of the funds for the payment.

(2) A person is guilty of extortion if he purposely obtains or attempts to obtain property of another or any reward, favor, or advantage of any kind by threatening to inflict bodily injury on any person or by committing or threatening to commit any other criminal offense, violation of civil statute, or the public or private revelation of information not previously in the public domain for the purpose of humiliating or embarrassing the other person, without regard to whether the revelation otherwise constitutes a violation of a specific statute.

(3)(a) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion of property or things of value of another under the value of Five Hundred Dollars (\$500.00) shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not to exceed six (6) months.

(b) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion of property or things of value of another of the value of Five Hundred Dollars (\$500.00) or more shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed fifteen (15) years.

(c) Except as provided in paragraph (d) of this subsection, any person, whether a public official or not, who commits the offense of extortion in order to obtain any intangible reward, favor or advantage to which no monetary value is normally given shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed fifteen (15) years.

(d) Any public official acting in his official capacity or under color of his office who commits the offense of extortion in order to obtain any intangible reward, favor or advantage to which no monetary value is normally given, or who commits the offense of extortion of tangible property, regardless of the

value of the property, shall be guilty of a felony and, upon conviction thereof, shall be punished by commitment to the custody of the Department of Corrections for a term not less than two (2) nor more than twenty (20) years.

SOURCES: Laws, 1994, ch. 466, §§ 1, 2; Laws, 2001, ch. 384, § 1; Laws, 2005, ch. 538, § 2, eff from and after July 1, 2005.

Editor's Note — Laws, 1994, ch. 466, was classified as a single code section. The subsection designators originally appearing in ch. 466, § 2, were renumbered to conform to the classification of this section as a single code section.

Amendment Notes — The 2005 amendment inserted “or physical possession of” and “or any reward favor or advantage of any kind” in (1)(a); inserted “but not limited to” preceding “real estate” in (1)(b); added (1)(d); and rewrote (2) and (3).

RESEARCH REFERENCES

ALR. Injury to Reputation or Mental Well-Being as Within Penal Extortion Statutes Requiring Threat of “Injury to the Person.” 87 A.L.R.5th 715.

Am Jur. 31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 23-41.

CJS. 35 C.J.S., Extortion §§ 1 et seq.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-83. Robbery; bonds, bills, notes, etc., cotton receipts and railroad tickets.

Robbery of obligations or bonds, bill obligatory, bank bills or bills of exchange, promissory notes for the payment of any money or specific property, paper bills of credit, cotton receipts, railroad passenger tickets, certificates granted by or under authority of this state or the United States, or any state, territory, or district therein, or of any foreign country, shall be punished in the same manner, both as to the principal and accessory, as robbery of goods and chattels.

SOURCES: Codes, 1857, ch. 64, art. 224; 1871, § 2678; 1880, § 2948; 1892, § 1290; Laws, 1906, § 1365; Hemingway's 1917, § 1101; Laws, 1930, § 1130; Laws, 1942, § 2366.

Cross References — Penalty for robbery, see § 97-3-75.

Theft of bonds, notes, etc., see § 97-17-45.

Theft of railroad tickets, see § 97-25-11.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

First Amendment precluded imposition of liability on participants in economic boycott, even though some of them engaged in violence and threats contributed

to success of boycott, because boycott was otherwise nonviolent, politically motivated, and designed to force governmental and economic change and to effectuate rights guaranteed by Constitution itself;

however, First Amendment did not bar recovery from those who engaged in violence or threats of violence for losses proximately caused by their unlawful conduct.

NAACP v. Claiborne Hdwe. Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), reh'g denied, 459 U.S. 898, 103 S. Ct. 199, 74 L. Ed. 2d 160 (1982).

RESEARCH REFERENCES

CJS. 77 C.J.S., Robbery § 6.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-85. Threats and intimidation; by letter or notice.

If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or to intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.

SOURCES: Codes, 1892, § 1303; Laws, 1906, § 1377; Hemingway's 1917, § 1117; Laws, 1930, § 1147; Laws, 1942, § 2384.

Cross References — Robbery by threats demanding money or property, see § 97-3-81.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

JUDICIAL DECISIONS

1. In general.

Letter held not a "threatening letter."
State v. Jamison, 99 Miss. 248, 54 So. 843 (1911).

RESEARCH REFERENCES

ALR. Validity and construction of terroristic threat statutes. 45 A.L.R.4th 949.

Am Jur. 31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 23-26, 31, 33.

CJS. 86 C.J.S., Threats and Unlawful Communications §§ 1 et seq.

Practice References. McCloskey and

Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-87. Threats and intimidation; whitecapping.

Any person or persons who shall, by placards, or other writing, or verbally, attempt by threats, direct or implied, of injury to the person or property of another, to intimidate such other person into an abandonment or change of home or employment, shall, upon conviction, be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or

in the penitentiary not exceeding five years, as the court, in its discretion may determine.

SOURCES: Codes, 1906, § 1398; Hemingway's 1917, § 1141; Laws, 1930, § 1173; Laws, 1942, § 2416.

Cross References — Conspiracy to prevent persons from engaging in lawful work, see § 97-23-41.

Threats or coercion to prevent lawful conduct of business, see § 97-23-83.

RESEARCH REFERENCES

ALR. Danger to reputation as within penal extortion statute requiring threat of "injury to the person". 74 A.L.R.3d 1255.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 A.L.R.4th 1221.

Unemployment compensation: harassment or other mistreatment by co-worker as "good cause" justifying abandonment of employment. 40 A.L.R.4th 304.

State criminal prosecutions of union officer or member for specific physical threats to employer's property or person, in connection with labor dispute — modern cases. 43 A.L.R.4th 1141.

Punitive damages for interference with contract or business relationships. 44 A.L.R.4th 1078.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 A.L.R.4th 853.

Am Jur. 25 Am. Jur. 2d, Duress and Undue Influence §§ 18, 19, and 21-23.

45 Am. Jur. 2d, Interference § 46.

CJS. 86 C.J.S., Threats and Unlawful Communications § 15.

§ 97-3-89. Timber, trees and saw logs; tampering with to injure or harass the owner prohibited.

Any person who shall maliciously and knowingly drive, force, place, or otherwise insert, or cause to be driven, forced, placed or otherwise inserted any piece or kind of iron, steel, or metallic spike, nail, bar, rod, explosive, or other substance of any kind whatsoever into any kind of saw timber, trees, logs, or timber or logs, standing or fallen, which are not his own, and which are, or may be classed as commercial, or merchantable timber, logs or trees, from which lumber may be produced, with the intent and purpose of annoying, harassing, injuring or damaging the owner of same, in his person or property, or any other person, or for any other unauthorized purpose whatsoever, without the consent of the owner of such timber, logs, or trees, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail not less than three months nor more than six months, or by a fine not exceeding five hundred dollars, or both.

SOURCES: Codes, Hemingway's 1917, § 1120; Laws, 1930, § 1150; Laws, 1942, § 2387; Laws, 1914, ch. 143.

Cross References — Salvage, generally, see §§ 89-17-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 52 *Am. Jur.* 2d, Logs and Timber § 113.

§ 97-3-91. Timber, trees and saw logs; penalty for tampering when injury occurs.

When any person shall be physically injured in handling, sawing, squaring, or otherwise manufacturing such trees, logs, or timber into lumber, or other sawmill products, by reason of such metallic or explosive substances having been driven, inserted or placed in such timber, trees, or logs, the person so offending shall be guilty of a felony and on conviction shall be imprisoned in the penitentiary for a period of not more than ten years.

SOURCES: Codes, Hemingway's 1917, § 1121; Laws, 1930, § 1151; Laws, 1942, § 2388; Laws, 1914, ch. 143.

RESEARCH REFERENCES

Am Jur. 52 *Am. Jur.* 2d, Logs and Timber § 113.

§ 97-3-93. Timber, trees and saw logs; penalty for tampering when death results.

Whenever the death of any person shall be caused by reason of such metallic or explosive substances having been driven, placed or inserted in such merchantable timber as provided in Section 97-3-89, the person so offending shall be guilty of manslaughter, and upon conviction shall be punished as the law directs.

SOURCES: Codes, Hemingway's 1917, § 1122; Laws, 1930, § 1152; Laws, 1942, § 2389; Laws, 1914, ch. 143.

RESEARCH REFERENCES

Am Jur. 52 *Am. Jur.* 2d, Logs and Timber § 113.

§ 97-3-95. Sexual battery.

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

(c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or

(d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

SOURCES: Laws, 1980, ch. 450, § 1; Laws, 1983, ch. 429, § 3; Laws, 1985, ch. 389, § 6; Laws, 1993, ch. 512, § 2; Laws, 1998, ch. 549, § 3, eff from and after July 1, 1998.

Editor's Note — For judicial decision notes under former § 97-3-67 relating to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age and under former § 97-5-21 relating to the seduction of persons under eighteen, see § 97-3-65.

Amendment Notes — The 1998 amendment rewrote paragraph (c) and added paragraph (d) in subsection (1) and changed "of fourteen (14) but less than eighteen (18) years" to "under the age of eighteen (18) years" in subsection (2).

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Sexual battery of a vulnerable adult, see § 43-47-18.

Rape, see §§ 97-3-65 and 97-3-71.

Touching or handling a child for lustful purposes, see § 97-5-23.

Crime of condoning felonious child abuse, see § 97-5-40.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Time limitation for prosecuting an offense under this section, see § 99-1-5.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

JUDICIAL DECISIONS

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1. In general; construction.

Defendant's conviction and sentence for the sexual battery of a minor child in violation of Miss. Code Ann. §§ 97-3-95(1)(d) and 97-3-97(a) was proper where his motion to suppress was rightfully denied since intoxication did not automatically render his confession involuntary. He failed to show symptoms of being under the influence and the record indicated that he was given his Miranda warnings and asked questions. *Morris v. State*, 913 So. 2d 432 (Miss. Ct. App. 2005).

Defendant's conviction for capital murder was proper where the trial court did not abuse its discretion in denying defendant's motion for funds because his argument that DNA testing could have shown consent or lack of force was without merit. The evidence would not have been at all probative on the issue of consent, Miss. Code Ann. § 97-3-95(1)(a) *Brink v. State*, 888 So. 2d 437 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005).

Lack of consent is essential fact necessary to constitute crime of sexual battery. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

This section creates three separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." *Ryan v. State*, 525 So. 2d 799 (Miss. 1988).

Although, on its face, the definition of sexual penetration announced in § 97-3-97 encompasses any penetration, the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the product of clinical examination or domestic, parental functions. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

Attempted sexual battery is a criminal offense by virtue of Mississippi Code § 97-1-7. *Gill v. State*, 485 So. 2d 1047 (Miss. 1986).

2. Validity; constitutionality.

Miss. Code Ann. § 97-3-95 was held not to be unconstitutionally vague in a sexual battery case where the inmate admitted that he knew that raping an 11-year-old girl was wrong, but he did it anyway. *Calhoun v. State*, 849 So. 2d 892 (Miss. 2003).

This section is not unconstitutionally vague since, as applied to a male adult who allegedly stuck his finger into the vagina of a 10-year-old girl, the statute gives fair notice to a person of ordinary intelligence that the defendant's alleged conduct is forbidden, and there are no indications that the statute encourages

erratic arrest and convictions. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

The absence of explicit mens rea language in this section does not render the statute unconstitutional, since the legislature may define a crime which depends on no mental elements and consists only of forbidden acts or omissions. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

3. Applicability.

A teacher in a school that a child of the required age attends has a position of trust or authority over the child sufficient to fit within the meaning of the statute, and there is nothing in the statute that would limit the meaning to a student who is in a specific class of the teacher. *Carter v. State*, 775 So. 2d 91 (Miss. 1999).

Statute was not applied ex post facto to defendant where subsection (c), under which he was prosecuted, was added to statute to be effective from and after March 29, 1983, and incident giving rise to prosecution occurred in August, 1983. *Cantrell v. State*, 507 So. 2d 325 (Miss. 1987).

Where defendant's 19-year-old daughter testified at trial that she and defendant had engaged in acts of fellatio and cunnilingus, defendant was properly indicted under § 97-29-59, and not § 97-3-95 et seq., which were enacted subsequent to the violation for which he was convicted, in that § 97-3-103 expressly provides that the sexual battery statutes do not repeal, modify or amend any other criminal statute. *Contreras v. State*, 445 So. 2d 543 (Miss. 1984).

4. Elements.

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the victim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. *Friley v. State*, 879 So. 2d 1031 (Miss. 2004).

Court properly denied defendant's motion for postconviction relief after defen-

dant pled guilty to sexual battery; trial counsel did not provide erroneous advice in advising defendant that the 14-year-old victim's consent was not an issue for the jury to address. Under the plain language of Miss. Code Ann. § 97-3-95(1)(c), the State would not have had to address the issue of consent; State would have only had to show that the victim was between the ages of 14 and 16, that defendant was more than 36 months older than the victim, and that defendant had engaged in sexual penetration with the victim. *Bates v. State*, 879 So. 2d 519 (Miss. Ct. App. 2004).

State provided proof of sexual penetration of a child victim where the victim testified that she performed oral sex on defendant after defendant bought her some candy and defendant's niece testified that she saw the victim put defendant's penis in her mouth. *Williams v. State*, 859 So. 2d 1046 (Miss. Ct. App. 2003).

The requirement of evidence of libidinal gratification or sexual behavior relates only to subsection (1)(c) of this section, which deals with sexual penetration of a child, and does not relate to sexual penetration without consent under subsection (1)(a) of this section. *Puckett v. State*, 737 So. 2d 322 (Miss. 1999).

Lustful intent is not an element of sexual battery that needs to be proven under subsection (1)(c) of this section. *Watts v. State*, 733 So. 2d 214 (Miss. 1999).

Contact between person's mouth, lips, or tongue and genitals of person's body, whether by kissing, licking, or sucking, is "sexual penetration," regardless of gender of victim or perpetrator. *Hennington v. State*, 702 So. 2d 403 (Miss. 1997).

Force or reasonable apprehension of force are not necessary elements of the crime of sexual battery under this section. *Sanders v. State*, 586 So. 2d 792 (Miss. 1991).

The absence of explicit mens rea language in this section does not render the statute unconstitutional, since the legislature may define a crime which depends on no mental elements and consists only of forbidden acts or omissions. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

The testimony of the 10-year-old female sexual battery victim, and the admission

of the defendant of inserting his finger into the victim's vagina under circumstances suggesting a lustful or licentious state of mind, represents sufficient evidence of the defendant's intent to violate the statute. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

Conviction for sexual battery will be reversed on appeal where appellate court's study of record discloses no evidence of penetration as charged in indictment and required by this section. *Thompson v. State*, 468 So. 2d 852 (Miss. 1985).

5. Defenses.

Defendant was not prejudiced by the amendment of an indictment for Miss. Code Ann. § 97-3-95(1)(d) sexual battery that deleted the words "without her consent," because a child under the age of 14 had no legal ability to consent to such an act thus the language had no legal meaning as it was not an element of the crime and its removal had not deprived defendant of a valid defense. *Lee v. State*, — So. 2d —, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. Nov. 22, 2005).

Defendant's motion for a new trial after a conviction for sexual battery without consent was properly denied because the verdict was not against the great weight of the evidence; a victim's testimony was adequately corroborated by another person present in the room, and the question of whether the victim's inaction constituted consent (the minor victim was intoxicated and was afraid to object) was a question for the jury. *Seigfried v. State*, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

That 15-year-old victim's character was less than sterling was not a defense to sexual battery under Miss. Code Ann. § 97-3-95(1)(c), and was therefore neither relevant nor material. *Kearley v. State*, 843 So. 2d 66 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

The defense of mistake of age is not available to a charge of sexual battery. *Todd v. State*, 806 So. 2d 1086 (Miss. 2001).

Consent is a defense to a charge of sexual battery committed with a person 14 years of age and over. *Coates v. State*, 495 So. 2d 464 (Miss. 1986).

While consent is a defense to a charge of sexual battery committed with a person 14 years of age and over, jury had before it substantial credible evidence upon which to base its finding that the prosecutrix had been threatened and did not voluntarily consent. *Coates v. State*, 495 So. 2d 464 (Miss. 1986).

6. Indictment.

Although defendant argued that the indictment failed to expressly charge that he penetrated the victim with lustful intent, neither Miss. Code Ann. § 97-3-95 nor Miss. Code Ann. § 97-3-97(a) required proof of lustful intent; defendant's claim as to the sufficiency of the dates alleged in the indictment was waived for failure to demur the indictment in the court below. *Frei v. State*, — So. 2d —, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. Mar. 21, 2006).

Denial of the inmate's petition for post-conviction relief was proper where, although the indictment was defective for failing to allege the inmate's age, he suffered no prejudice from that defect. Clearly he was more than 24 months older than the victim of the sexual battery when the offenses were committed and he knew that he was 24 months older than she was when he read the indictment and entered his guilty plea. *Robinson v. State*, 904 So. 2d 203 (Miss. Ct. App. 2005).

Where consent was not an element of sexual battery of a girl under the age of 14 under Miss. Code Ann. § 97-3-95(1)(c), the indictment was not fatal for failing to state that the 11-year-old victim had not consented to the offense; thus, the indictment did not present grounds for postconviction relief. *Bryant v. State*, 879 So. 2d 530 (Miss. Ct. App. 2004).

An indictment for sexual battery was inadequate where there were no words relating to consent and no overt act was alleged indicating the manner in which the defendant attempted the crime. *Hawthorne v. State*, 751 So. 2d 1090 (Miss. Ct. App. 1999).

Whether fellatio by defendant was penetration of or with victim was irrelevant to sexual battery, and, thus, indictment could charge sexual penetration of male person under age of fourteen, even though statute prohibits sexual penetration with

victim. *Hennington v. State*, 702 So. 2d 403 (Miss. 1997).

Indictment for sexual battery was insufficient where it failed to notify defendant that he was being charged with sexually penetrating victim without victim's consent; indictment did not include without consent in its charge. *Peterson v. State*, 671 So. 2d 647 (Miss. 1996).

Amendment of indictment from sexual battery to attempted sexual battery during trial did not prejudice defendant; by virtue of attempt statute, defendant had notice that he could be convicted of attempt charge. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

Charges of 2 counts of sexual battery and one count of attempted sexual battery were properly combined in indictment, where transactions upon which offenses were based occurred over period of 5 months, and offenses were committed only against one child even when other children were present and available targets, which showed common plan. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

A trial court committed reversible error in allowing an indictment to be amended to charge the defendant with a violation of subsection (2) of this section for sexual battery of a female "over" the age of 14 years, instead of subsection (1) of this section for sexual battery of a female "under the age of 14 years, since the defendant's defense that the victim was not under 14 years of age but was 26 years old would have required the jury to return a verdict of acquittal; the amendment was "of substance" and was therefore beyond the power of the trial court to authorize. *Rhymes v. State*, 638 So. 2d 1270 (Miss. 1994).

Indictment tracking statutory language was sufficient to inform accused of charge against him, and no ambiguity existed where lone reference to defendant being beyond age 18 did not track statutory language. *Cantrell v. State*, 507 So. 2d 325 (Miss. 1987).

Where indictment charged defendant engaged in sexual battery on prosecutrix on or about or before a specified date, it was not reversible error for prosecution to prove, at trial, that defendant committed the act on the date specified in the indict-

ment, and to prove, over defense's objections, that similar acts had occurred on numerous occasions for several years prior thereto. *Coates v. State*, 495 So. 2d 464 (Miss. 1986).

Indictment which charges sexual penetration of identified victim on specified date in specified geographical location, including charge that acts were committed unlawfully, willfully and feloniously and typed label at top reading "SEXUAL BATTERY MCA 97-3-95(a)" is sufficient to charge accused with criminal offense of sexual battery. *Hines v. State*, 472 So. 2d 386 (Miss. 1985).

7. Evidence; generally; admissibility.

Where defendant was found guilty of the sexual battery of a child, the verdict was not against the weight of the evidence because the victim's testimony was corroborated by her knowledge of the pink vibrator, the thong underwear, and the appearance of defendant's genital area. His attempt to explain that knowledge simply created an issue of fact for the jury to resolve and the fact that the jury believed the victim gave defendant no basis for a valid complaint on appeal. *Lee v. State*, — So. 2d —, 2005 Miss. App. LEXIS 918 (Miss. Ct. App. Nov. 22, 2005).

Circuit judge did not err in refusing to allow defendant's attorneys to question his former wife about the man to whom she was now married, because the circuit court found that that testimony had no relevance where defense counsel had made a number of ambiguous statements about the relevancy of the line of questioning to aid in the establishment that other men or youth could have caused the child victim's injuries. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer

screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Victim's testimony alone is sufficient to support a rape conviction, even though not corroborated, where it is consistent with the circumstances. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Where defendant was charged with two counts of sexual battery and one count of conspiracy to batter, based on the victim's allegations that defendant and his accomplice held her down, beat her, and raped her, the trial court properly instructed the jury on aiding and abetting. Defendant was convicted based on evidence that he forced the victim to have sex with him. *Norris v. State*, 893 So. 2d 1071 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Evidence was sufficient to convict defendant based on the nine-year-old victim's statements describing the abuse and the corroborating testimony from the victim's doctor and school counselor. *Davis v. State*, 878 So. 2d 1020 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 880, 160 L. Ed. 2d 773 (2005).

Trial court had more than sufficient evidence before it, none of which was contradicted or even impeached during the hearing on a motion in limine regarding child victim's extrajudicial statements regarding the alleged sexual abuse, to conclude that the child's statements had sufficient indicia of reliability to overcome a hearsay objection and be admitted under Miss. R. Evid. 803(25), including the fact that the child related the events to a social worker without a great deal of prompting or prodding and told what happened in some detail in her own words, and the child was ten years old at the time. *Sharp v. State*, 862 So. 2d 576 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if "he was going to get him some sex," and when they arrived at a hotel room, defendant announced to other

men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987 (Miss. Ct. App. 2004).

Discrepancies in a child's prior statements regarding sexual abuse by defendant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making inquiry. *Sharp v. State*, 862 So. 2d 576 (Miss. Ct. App. 2004).

There certainly was evidence to support conviction on two counts of sexual battery, where the child victim was eight years old when the offenses occurred, stated that defendant had stuck his finger into her vagina and placed his penis in her mouth, and her testimony included a vivid description of the events that took place between them. *Peters v. State*, 864 So. 2d 983 (Miss. Ct. App. 2004).

Hearsay evidence, including statements made by the child victim were properly admitted where the trial court made extensive findings as to the factors necessary to ascertain the veracity of the child's testimony, the trial court did conduct a hearing outside the presence of the jury with regard to the victim and each witness that would be testifying under the exception, and made extensive findings of fact and conclusions of law. *Wright v. State*, 859 So. 2d 1028 (Miss. Ct. App. 2003).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed sexual battery, Miss. Code Ann. § 97-3-95(1)(c), because the first victim testified that (1) defendant engaged in sexual penetration with the first victim by inserting defendant's penis into the first victim's mouth; (2) defendant was 24 or more months older than the first victim; and (3) the first victim was under the age

of 14 years. *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. Jan. 28, 2003).

In a prosecution for sexual battery of a 10-year-old child in violation of this section, the trial court erred in allowing a bag of sexually explicit pictures found in the defendant's vehicle to be introduced into evidence, where the victim and 2 child witnesses testified that the defendant showed them pictures of nude people in a book, but they did not testify that they were shown the bag of pictures. The defendant was prejudiced by the admission of the bag of pictures to an extent that its admission constituted reversible error, since the jurors may have been offended by the explicit nudity shown in the pictures and by the graphic depictions of heterosexual and homosexual acts, and the jurors may have concluded that because the defendant collected these pictures, he did, in fact, sexually batter the victim. *Wade v. State*, 583 So. 2d 965 (Miss. 1991).

In a prosecution for sexual battery of a child, a child therapist's brief testimony, negating the defense position that the victim had confused the defendant with other abusers, did not rise to the level of bolstering and was not reversible error. *Hosford v. State*, 560 So. 2d 163 (Miss. 1990).

In a sexual battery prosecution which involved allegations of homosexual acts with a minor victim, letters written by the defendant which contained references to his homosexuality were relevant as tending to show that the defendant was a homosexual conjoined with the issue of whether he in fact engaged in the act with which he was charged. *Kolb v. State*, 542 So. 2d 265 (Miss. 1989), post-conviction relief denied, 568 So. 2d 288 (Miss. 1990).

In a prosecution for sexual battery, evidence that the defendant had gonorrhea and had infected the victim with gonorrhea was admissible. *Daniel v. State*, 536 So. 2d 1319 (Miss. 1988).

Trial court committed reversible error in admitting magazines other than one viewed by victim during alleged sexual battery, because other magazines were neither relevant to any issue in case nor part of *res gestae* of crime; they were simply found in desk drawer in shed

owned by defendant, and sole function of introduction was to inflame jurors. *Collins v. State*, 513 So. 2d 877 (Miss. 1987).

At trial of sexual battery charge, the exclusion from evidence of letters written by prosecutrix to defendant, predicated on defense's failure to disclose them in pre-trial discovery, did not deprive defendant of his constitutional right to confront witnesses, to a fair trial, and to due process of law, even though the excluded letters, which otherwise were competent evidence, on their face reflected a relationship between defendant and his stepdaughter (prosecutrix) substantially at odds with prosecution's theory that defendant had employed threats of violence or death to force his stepdaughter to engage in sexual acts with him, contained materials which impeached testimony of prosecutrix, and contradicted other more peripheral parts of prosecution's case. *Coates v. State*, 495 So. 2d 464 (Miss. 1986).

In an attempted sexual battery prosecution, where, in an attempt to show hostility on the part of prosecutrix-daughter towards defendant, the defense had questioned defendant's wife with regard to a conversation with her daughter 2 weeks before the incident, the prosecution was properly allowed to cross-examine the wife about the same conversation to bring out testimony that daughter had stated that defendant had raped her 4 times. *Gill v. State*, 485 So. 2d 1047 (Miss. 1986).

8. —Past sex crimes.

In a prosecution for sexual battery, the trial court should have granted the defendant's motion in limine to preclude admission, for impeachment use pursuant to Rule 609, Miss.R.Ev., of his prior conviction of touching a child for lustful purposes, even though a social worker testified that a general characteristic of pedophiles is an inability to be truthful, since admission of the prior conviction would have been manifestly prejudicial and mere reference to the conviction during the trial would have prejudiced the jury irreparably. *Hopkins v. State*, 639 So. 2d 1247 (Miss. 1993).

It was not error to permit testimony about sex assault on victim committed weekend prior to that on which crime

charged occurred because offense charge was sexual offense and evidence of past sexual crimes of accused is permitted in such cases. *Woodruff v. State*, 518 So. 2d 669 (Miss. 1988).

Evidence of other sexual crimes remote in time and with third parties was improperly admitted into evidence in sexual battery case, where defendant had not been convicted of any of those crimes and they were vaguely referenced to have taken place some time between 1979 and 1981, while alleged offense for which defendant was on trial occurred in 1983; in context of sexual crimes, however, it was recognized that relaxation of rule prohibiting evidence of other crimes would be granted, if prior evidence involved sexual acts of same general type and with same person, as those charged in indictment. *Elmore v. State*, 510 So. 2d 127 (Miss. 1987).

Where indictment charged defendant engaged in sexual battery on prosecutrix on or about or before a specified date, it was not reversible error for prosecution to prove, at trial, that defendant committed the act on the date specified in the indictment, and to prove, over defense's objections, that similar acts had occurred on numerous occasions for several years prior thereto. *Coates v. State*, 495 So. 2d 464 (Miss. 1986).

Evidence of prior sexual acts was admissible against defendant in a sexual battery prosecution under § 97-3-95, where each prior act of sexual penetration was performed with the same youthful victim, each incident occurred at the victim's home during a time in the day or night when her mother was at work, each of the incidents occurred within a two and a half month period, each involved actual penetration of the defendant's penis into the vaginal orifice of his daughter, each act of sexual penetration occurred without the consent of the victim, and the defendant, during three of the four prior acts of intercourse, achieved orgasm. *Hicks v. State*, 441 So. 2d 1359 (Miss. 1983).

9. —Sufficiency.

Defendant's conviction for sexual battery was upheld where the victim's testimony established that defendant forced her to have sex with him against her will.

Even assuming that the victim's uncorroborated testimony was insufficient, she testified that she reported the sexual battery to her boyfriend and grandmother almost immediately, and she went to the police station on the night of the incident. *Jones v. State*, — So. 2d —, 2006 Miss. App. LEXIS 243 (Miss. Ct. App. Apr. 4, 2006).

Fifteen-year-old victim testified that defendant kissed her neck, fondled her breasts, and put his fingers into her privates; that conduct clearly constituted sexual battery under the provisions of Miss. Code Ann. § 97-3-95(1)(c). Also, the corroborated testimony of the victim provided a sound basis for the jury's determination of guilt; thus, the evidence was sufficient to convict defendant of sexual battery. *Smith v. State*, 925 So. 2d 825 (Miss. 2006).

Evidence was sufficient to convict defendant of sexual battery, where the trial court found that defendant's statement was given voluntarily after being advised of his rights, and was not the result of threats, promises, coercion, or duress, and there was an abundance of evidence present to prove the corpus delicti; the victim's testimony, the testimony of the interviewers, as well as defendant's own confession, served as enough evidence for the jury to weigh in favor of defendant's conviction. *Frei v. State*, — So. 2d —, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. Mar. 21, 2006).

Defendant's conviction for sexual battery was proper where the jury verdict was not against the overwhelming weight of the evidence. Photographs at trial clearly showed the presence of the victim's injuries and various witnesses testified to seeing those injuries first-hand. *Houston v. State*, 911 So. 2d 1018 (Miss. Ct. App. 2005).

There was sufficient evidence to convict defendant of capital rape and sexual assault where the State offered the testimony of a number of medical and counseling professionals indicating that the victim's statements were consistent with those of a sexual abuse victim. The victim named defendant as the perpetrator, and the State offered physical evidence in the form of medical diagnoses and test results as well as many of the objects the victim

stated defendant utilized in his abuse of her. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Judge did not err in denying defendant's motion for a directed verdict where evidence was sufficient to support a conviction of sexual battery in violation of Miss. Code Ann. § 97-3-95, as the victim testified that defendant touched her in her private area and placed his penis in her mouth, and any issue of the victim's credibility as a witness was within the province of the jury. *Hensley v. State*, 912 So. 2d 1083 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of two counts of sexual battery where, even though the minor victims' testimony slightly differed regarding the events of the sexual abuse, the word of the victim of a sex crime, even if unsupported, was sufficient to support a guilty verdict when that testimony had not been discredited or contradicted by credible evidence; based on the evidence presented, the jury decided which testimony to accept and which to reject and returned a reasonable verdict. *Bradley v. State*, 921 So. 2d 385 (Miss. Ct. App. 2005).

Evidence was sufficient for a reasonable jury to find that defendant committed sexual battery where both the victim and the eyewitness testified that defendant played a pornographic video and that the victim subsequently performed oral sex on him at his request and the jury apparently accepted the victim's testimony over her great aunt's contradictory testimony. *Durdin v. State*, 924 So. 2d 562 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of three counts of sexual battery where the children's testimony was clear and consistent with the three counts charged against defendant, and the only evidence presented to contradict their testimony was defendant's testimony, for which he presented a general denial of the accusations; the testimony from the witnesses was consistent with the accounts provided by the children and the jury was the sole judge of witness credibility. *Torrey v. State*, 891 So. 2d 188 (Miss. 2004).

Where the victim testified that defendant forced her to perform oral sex on him and raped her, the evidence was sufficient

to support defendant's conviction for sexual battery and rape. The victim gave a recorded statement to the police that night; the fact that the rape kit did not conclusively identify defendant as the source of semen retrieved did not detract from the validity of her testimony. *Green v. State*, 887 So. 2d 840 (Miss. Ct. App. 2004).

Where the child-victim told her mother that defendant had sexually abused her and the medical evidence showed that she suffered a vaginal tear indicative of forced penetration by an adult male, the evidence was sufficient to convict defendant of sexual battery. *Perry v. State*, 904 So. 2d 1122 (Miss. Ct. App. 2004).

Where the child-victims testified as to several incidents of sexual abuse spanning the course of several years and police found items in defendant's home that the victims alleged were used during their sexual encounters, including a pornographic tape, condoms, and some lubricant, the evidence was sufficient to support defendant's conviction for five counts of statutory rape, one count of sexual battery, and three counts of fondling. *Moses v. State*, 885 So. 2d 730 (Miss. Ct. App. 2004).

Given the corroborated testimony of defendant's daughter and the results of the sexual abuse examination, there was more than sufficient evidence in the record to support the guilty verdict of sexual battery against defendant; therefore, the findings of the trial judge, sitting as the jury, were neither manifestly wrong nor clearly erroneous. *Wilson v. State*, 891 So. 2d 237 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

Both girls testified as victims and eyewitnesses to defendant's crimes of statutory rape and sexual battery; any issues of credibility or motive were for the jury to decide. Thus, the verdict was not contrary to either the weight or the sufficiency of the the evidence, and defendant's convictions for statutory rape and sexual battery were affirmed. *Barrett v. State*, 886 So. 2d 22 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Where victim's mother stated that defendant, the mother's boyfriend, had sex with her 10-year-old daughter, the jury's

guilty verdict of sexual battery and statutory rape was not against the overwhelming weight of the evidence, as the jury had heard the evidence and the testimony of the witnesses, including a social worker, a doctor who examined the victim and determined that she had been sexually abused, and a molecular biology and DNA expert who opined that the genetic profile of the sperm extracted from the victim's panties was consistent with the suspect being the major contributor. *Sanderson v. State*, 872 So. 2d 735 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of capital murder as the evidence showed the victim died of blunt force trauma and was sexually assaulted and defendant was the only adult in the home with the child when she died. *Gilmore v. State*, 872 So. 2d 744 (Miss. Ct. App. 2004).

Where a victim testified that defendant had committed an abduction, restrained the victim, and driven the victim to another location before performing various sexual acts while holding a weapon to the victim's head, there was sufficient evidence to sustain a conviction for sexual battery. *McCoy v. State*, 878 So. 2d 167 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Evidence was sufficient to convict defendant of sexual battery, statutory rape, and touching a child for lustful purposes where the totally uncorroborated testimony of the victims was sufficient to support a guilty verdict where that testimony was not discredited or contradicted by other evidence; it was the jury's duty to resolve conflicts in testimony. *Carle v. State*, 864 So. 2d 993 (Miss. Ct. App. 2004).

Child victim's testimony to sexual abuse was corroborated by the child's mother, the counselor from the department of human services, a law enforcement officer, and a doctor, the doctor testifying to better than a reasonable degree of medical certainty that the victim had been digitally penetrated, thus, there was sufficient evidence to support defendant's conviction for sexual battery. *Wright v. State*, 859 So. 2d 1028 (Miss. Ct. App. 2003).

Evidence was sufficient to convict defendant of sexual battery where the victim

testified clearly that defendant acted without her consent and that she struggled with him, scratching and hitting him in order to try to get him to stop; pictures of defendant with scratches on his face were introduced into evidence supporting the victim's testimony, and the jury was the judge of the weight and credibility of testimony and was free to accept or reject all or some of the testimony given by each witness. *Piercy v. State*, 850 So. 2d 219 (Miss. Ct. App. 2003).

Evidence was sufficient to prove beyond a reasonable doubt that defendant committed sexual battery, Miss. Code Ann. § 97-3-95(1)(c), because the first victim testified that (1) defendant engaged in sexual penetration with the first victim by inserting defendant's penis into the first victim's mouth; (2) defendant was 24 or more months older than the first victim; and (3) the first victim was under the age of 14 years. *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. Jan. 28, 2003).

Evidence was sufficient to convict defendant of sexual battery where the unsupported word of the victim was sufficient to support a guilty verdict and the testimony was not discredited or contradicted by other credible evidence, especially if the conduct of the victim was consistent with the conduct of one who had been victimized by a sex crime; the victim's testimony was not discredited or contradicted. *Byars v. State*, 835 So. 2d 965 (Miss. Ct. App. — January 28, 2003).

Evidence was sufficient where the 10-year-old victim gave a statement to the police, alleging that defendant had committed sexual acts on her; the child was not presumed to be dishonest; and the McClain standard was not met and reversal was thus not required. *Parker v. State*, 825 So. 2d 59 (Miss. Ct. App. 2002).

Sufficient evidence was presented to the jury by the State with regard to the element of lack of consent, and the jury was entitled to find the victim more credible than the defendant. *Winters v. State*, 814 So. 2d 184 (Miss. Ct. App. 2002).

Evidence was sufficient to establish attempted sexual battery where (1) the nine-year-old victim was in a check-out line at a store with his mother when the mother sent victim back to the appropri-

ate aisle to get a box of cereal, (2) once the victim got to that aisle, the defendant approached him and asked, using the vernacular, if he could engage in fellatio on the victim, (3) simultaneously with the verbal request, the defendant pointed to his own genitals, (4) the victim refused, and the encounter ended, and (5) the defendant never touched the victim or made any effort to restrain him. *Ishee v. State*, — So. 2d —, 2000 Miss. App. LEXIS 412 (Miss. Ct. App. Aug. 29, 2000).

Evidence was sufficient to support the conviction of the defendant for sexual battery of several young children, notwithstanding the absence of physical evidence, the fact that some of the children could not remember exact dates, and the assertion that the allegations of the children were suspect in light of their continued visits to his home after the alleged incidents of abuse. *Williams v. State*, 757 So. 2d 953 (Miss. 1999).

Evidence was sufficient to establish penetration and, therefore, to support a conviction for sexual battery, where the victim testified that the defendant partially penetrated her, and the arresting officer testified that the defendant admitted to him that he was trying to have sexual relations with the victim but that he did not rape her. *Hopson v. State*, 749 So. 2d 227 (Miss. Ct. App. 1999).

Evidence was sufficient to support a conviction under subsection (1)(c) of this section, notwithstanding that the case was a "he said, she said" case; the facts and inferences did not so point in favor of the defendant that a reasonable person could not have found him guilty beyond a reasonable doubt. *Vaughan v. State*, 759 So. 2d 1092 (Miss. 1999).

Evidence was sufficient to sustain the defendant's conviction where he admitted to sexual intercourse with the victim and claimed that the victim consented, but the victim asserted that she did not consent. *Waltman v. State*, 734 So. 2d 324 (Miss. Ct. App. 1999).

Conviction for sexual battery and attempted sexual battery was supported by victim's testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim's testimony that defendant had

threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

In an attempted sexual battery prosecution, testimony of victim, the defendant's daughter, concerning the attempt, which was partially corroborated by her brother, together with testimony of neighbor admissible under exception to hearsay rule, and testimony of defendant's wife on cross-examination, furnished ample competent evidence to support jury's guilty verdict. *Gill v. State*, 485 So. 2d 1047 (Miss. 1986).

In a prosecution for attempted sexual battery in violation of this section, evidence was insufficient to sustain a conviction under § 97-1-7, where the uncontradicted facts indicated that there was no penetration, as defined by § 97-3-97, the prosecution conceded that there was no attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim's admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So. 2d 1212 (Miss. 1983).

10. —Other; miscellaneous.

In a sexual battery of a child case, the State and the trial court complied with Miss. R. Evid. 702, in eliciting a psychotherapist's qualifications in open court; defendant was put on notice of her qualifications, credentials, and the nature of her testimony. Defendant had ample opportunity to challenge those qualifications but chose not to do so; thus, the trial court did not err in finding that the child was unavailable to testify under Miss. R. Evid. 804(a)(6) because there was substantial likelihood the victim's emotional or psychological health would be substantially impaired if he were required to testify in the physical presence of defendant. *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006).

In a prosecution for sexual battery of a three-year-old female child, the trial judge had discretion to either accept or reject offered evidence, and the trial judge was

within his rights to accept the testimony of the child as competent, but to later reject testimony from the child given in response to defense counsel's cross-examination where such testimony was found by the trial judge to be incompetent. *Renfrow v. State*, 863 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant's postconviction claim that counsel was ineffective in failing to challenge an unconstitutional indictment charging two counts of sexual battery on a child under the age of 14 years in violation of Miss. Code Ann. § 97-3-95(1) was without merit as defendant's claim was actually that the indictment did not allege the proper subsections of the statute, and that the statute as it read at the time of the alleged offenses did not contain the subsection divisions referred to by defendant. *Agee v. State*, 829 So. 2d 726 (Miss. Ct. App. 2002).

For statement made by child of tender years describing act of sexual contact performed with or on child by another to be admissible, reliability of statement must be judged independently of any corroborating evidence. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

A defendant's conviction of sexual battery would be reversed and remanded for a new trial where the prosecution failed to present evidence that the victim was under 14 years of age; the inference of the victim's age from the mere fact that she had teenage babysitters or from the jury's actual sight of the victim while she testified was insufficient to sustain a verdict that she was below the age of 14 beyond a reasonable doubt. *Washington v. State*, 645 So. 2d 915 (Miss. 1994).

In a prosecution for sexual battery of the defendant's 5-year-old daughter, the use of the defendant's guilty plea to simple assault on his daughter 2 years earlier was a proper use of a prior inconsistent statement to impeach the defendant's credibility as a witness under Rules 613 and 801(d)(2), Miss.R.Ev., where the defendant denied during direct examination that he had ever "abused" his daughter, thereby "opening the door" for impeachment; although the prior conviction for simple assault was admissible for the purpose of impeachment, the defendant

should not have been cross-examined about the details of the abuse leading to the conviction. *Quimby v. State*, 604 So. 2d 741 (Miss. 1992).

Under the excited utterance exception to the hearsay rule, the fact that questions are asked, while relevant to spontaneity, does not ipso facto demonstrate a lack of spontaneity in every case. Thus, a sexual battery victim's statements to a police officer and a crossing guard were admissible under the excited utterance exception where the only question asked of the victim was "what happened?" and the statements were made shortly after the incident when the victim was still extremely upset. *Sanders v. State*, 586 So. 2d 792 (Miss. 1991).

Since it is doubtful that a child sexual abuse syndrome or profile is generally accepted by the scientific community, courts should be reluctant to allow expert testimony that a child displays the so-called typical characteristics of other victims. However, the admission of such improper testimony in a prosecution for sexual battery of a child was harmless where the entire defense strategy was predicated on the assumption that the child had been sexually abused by persons other than the defendant, and was therefore confused regarding the identity of the abuser and the nature of displays of affection; since the defense admitted that the child was a sexual abuse victim, there was no reversible error in allowing the expert witness to give her opinion that the child exhibited the characteristics of a sex abuse victim. *Hosford v. State*, 560 So. 2d 163 (Miss. 1990).

Evidence of prior sexual assault upon victim, not committed by defendant, was not relevant, although defendant argued it established knowledge of this kind of abnormal behavior on victim's part thus enabling him to falsely accuse defendant and that it went to issue of consent. *Woodruff v. State*, 518 So. 2d 669 (Miss. 1988).

Instances of previous molestation of child victim by person other than accused may be relevant, but relevancy must be determined by trial judge in his discretion. *Woodruff v. State*, 518 So. 2d 669 (Miss. 1988).

Defense counsel may not elicit from 9 year old victim of sexual battery answer to

question of whether victim has ever seen act of sexual intercourse. *Hines v. State*, 472 So. 2d 386 (Miss. 1985).

Prosecutor in sexual battery prosecution may use leading questions in examination of 9 year old girl who is alleged victim of battery; however, where on cross-examination girl's responses become equivocal, court may not initiate series of questions without request from state or defendant which have effect of reconstituting witness and thereby lending court's approval to her testimony before jury. *Thompson v. State*, 468 So. 2d 852 (Miss. 1985).

11. Practice and procedure; jury instructions.

Circuit had not erred in not giving defendant's proposed instructions on circumstantial evidence because the circuit court found the child victim's medical report constituted actual or direct evidence. Additionally, the child was clearly an eyewitness to the abuse committed upon her person. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Trial judge mistakenly determined the crime of molestation under Miss. Code Ann. § 97-5-23 to be a lesser-included offense of sexual battery, Miss. Code Ann. § 97-3-95; molestation was recognized as a separate offense from sexual battery as defendants were frequently charged with both crimes simultaneously, such that to allow defendant to be convicted of a crime for which he was never charged would have created an injustice, as the legislature felt it necessary to construct two separate and distinct statutes regarding sexual battery and molestation. *Friley v. State*, 856 So. 2d 654 (Miss. Ct. App. 2003).

In a prosecution for sexual battery on his wife, the court was not obligated to give a sua sponte lesser offense instruction on simple assault. *Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000).

This section creates three separate classes of victims. Thus, in a prosecution for sexual battery of a child under the age of 14, the defendant was not entitled to an instruction containing the element "without her consent." *Ryan v. State*, 525 So. 2d 799 (Miss. 1988).

Supposed defect in instruction which limits crime charged from general "sexual penetration" of indictment to more specific "anal sexual penetration," yet still allows jury to return verdict of "guilty as charged" is technical point that should be tidied up but does not constitute ground for reversal of conviction where defense counsel makes no utterance remotely resembling objection when instruction is tendered. *Hines v. State*, 472 So. 2d 386 (Miss. 1985).

12. Sentence.

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

Sentence of 30 years in prison without probation or parole, maximum term of imprisonment prescribed for offense of sexual battery, did not violate either United States Constitution or Mississippi Constitution; under standards set forth in *Solem v. Helm* (1983) 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (superseded by statute as stated in *Re Petition of Lauer* (CA8) 788 F2d 135) sentence was not grossly disproportionate to crime of sexual battery where harshness of penalty was justified by gravity of offense, non-habit-

ual offenders convicted under this section could be sentenced to up to 30 years in prison, and sentence was not so dissimilar to sentences for same crime in other states as to make it a disproportionate penalty. *Davis v. State*, 510 So. 2d 794 (Miss. 1987).

13. Other, miscellaneous.

Where there was nothing in the record before the appellate court that would have permitted any meaningful analysis of what uncalled witnesses might have testified to, nor whether there might have been compelling reasons not to call them even if they were prepared to offer the testimony that defendant contended they would have in his brief, defendant's ineffective assistance of counsel claim had to be accomplished through the vehicle of a postconviction relief motion. *Sharp v. State*, 862 So. 2d 576 (Miss. Ct. App. 2004).

Where defendant was indicted for the crime of sexual battery, pursuant to Miss. Code Ann. § 97-3-95, but convicted of touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1), there was a common nucleus of operative facts and the record contained an evidentiary basis for the trial court to grant an instruction on the lesser offense of unlawful touching. Further, because defendant offered an instruction that would have allowed the jury to find defendant guilty of the lesser offense (as opposed to a "lesser-included offense"), the lack of an indictment on the lesser offense was waived, and the trial court did not commit plain error when it granted the lesser offense instruction. *Dupuis v. State*, — So. 2d —, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable

enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702 (Miss. 2003).

An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies in § 97-3-19 includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony. Thus, in a capital murder prosecution, involving the underlying felony of sexual battery, the fact that the actual moment of the victim's death preceded consummation of the underlying felony did not vitiate the capital charge. *Baker v. Baker*, 553 So. 2d 8 (Miss. 1989).

Proof was sufficient to establish burglary under former § 97-17-21 where evidence established that defendant was in vicinity of crime at time and on occasion of its commission; that shortly thereafter windowpane in door was found broken, which constituted evidence of forcible breaking and entering of occupied dwelling; and, that victim was found with bloody mouth, battered face, and unclothed lower half, which constituted evidence of intent to commit sexual battery upon mentally defective person under this section; when crime charged is burglary, prosecution need not prove sexual penetration of victim, but must merely prove that defendant broke and entered with intent to commit that crime. *Williams v. State*, 512 So. 2d 666 (Miss. 1987).

14. Lesser included offenses.

In a sexual battery case, a trial court did not err in failing to instruct the jury on simple assault which was not a lesser-included offense; the element "bodily injury" was missing from the sexual battery statute, Miss. Code Ann. § 97-3-95. *Seigfried v. State*, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

15. Double jeopardy.

Where defendant was tried in a second case for statutory rape, sexual battery, and fondling, double jeopardy was not violated; while the victims were the same, the factual bases supporting the charges

in the current indictment were totally different from the factual bases undergirding the charges in the first case.

Moses v. State, 885 So. 2d 730 (Miss. Ct. App. 2004).

ATTORNEY GENERAL OPINIONS

The list of persons in a "position of trust" provided by subsection (2) of this section is not an exclusive list and a per-

son in a "position of trust" could include a law enforcement officer. Huffman, July 7, 2004, A.G. Op. 04-0254.

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 A.L.R.3d 1227.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child. 54 A.L.R.4th 112.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Defense of mistake of fact as to victim's consent in rape prosecution. 102 A.L.R.5th 447.

Am Jur. 65 Am. Jur. 2d, Rape §§ 3, 7-14, 20-26, 29.

70 Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses); Forms 195.1, 196.1 (complaint, petition or decla-

ration, sexual molestation of minor daughter during daughter's childhood, against father); Form 195.2 (Complaint, petition, or declaration — Sexual assault and battery — Against mental incompetent, county, and county mental health agency).

CJS. 6A C.J.S. Assault and Battery §§ 70-74.

75 C.J.S., Rape §§ 20-35.

81 C.J.S., Sodomy §§ 1 et seq.

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§ 97-3-97. Sexual battery; definitions.

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

(b) A "mentally defective person" is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.

(c) A “mentally incapacitated person” is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.

(d) A “physically helpless person” is one who is unconscious or one who for any other reason is physically incapable of communicating an unwillingness to engage in an act.

SOURCES: Laws, 1980, ch. 450, § 2, eff from and after July 1, 1980.

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

Sexual penetration of incarcerated offenders by law enforcement officers or employees, see § 97-3-104.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

JUDICIAL DECISIONS

1. In general.
2. Sexual penetration.
3. Indictment.
4. Jury Instructions.

1. In general.

Defendant’s conviction and sentence for the sexual battery of a minor child in violation of Miss. Code Ann. §§ 97-3-95(1)(d) and 97-3-97(a) was proper where his motion to suppress was rightfully denied since intoxication did not automatically render his confession involuntary. He failed to show symptoms of being under the influence and the record indicated that he was given his Miranda warnings and asked questions. *Morris v. State*, 913 So. 2d 432 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of attempted sexual battery of a female minor where the victim testified that defendant asked her to get into a car with him and to lie down in the back of the car, and asked her if “he was going to get him some sex,” and when they arrived at a hotel room, defendant announced to other men there that the victim was there to have sex with them. *Quarles v. State*, 863 So. 2d 987 (Miss. Ct. App. 2004).

Whether fellatio by defendant was penetration of or with victim was irrelevant to sexual battery, and, thus, indictment could charge sexual penetration of male person under age of fourteen, even though statute prohibits sexual penetration with

victim. *Hennington v. State*, 702 So. 2d 403 (Miss. 1997).

Contact between person’s mouth, lips, or tongue and genitals of person’s body, whether by kissing, licking, or sucking, is “sexual penetration,” regardless of gender of victim or perpetrator. *Hennington v. State*, 702 So. 2d 403 (Miss. 1997).

Conviction for sexual battery and attempted sexual battery was supported by victim’s testimony that described anal and digital penetration, attempted anal penetration, and attempted cunnilingus, victim’s testimony that defendant had threatened to harm other members of her family if she told anyone about the abuse, corroboration by other witnesses, and evidence that immediately after alleged abuse, victim had been treated for gonorrhea and chlamydia. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

Indictment tracking statutory language was sufficient to inform accused of charge against him, and no ambiguity existed where lone reference to defendant being beyond age 18 did not track statutory language. *Cantrell v. State*, 507 So. 2d 325 (Miss. 1987).

Although, on its face, the definition of sexual penetration announced in this section encompasses any penetration, the parameters of the definition of sexual penetration are logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the

product of clinical examination or domestic, parental functions. *Roberson v. State*, 501 So. 2d 398 (Miss. 1987).

In a prosecution for attempted sexual battery in violation of § 97-3-95, evidence was insufficient to sustain a conviction under § 97-1-7, where the uncontradicted facts indicated that there was no penetration, as defined by this section, the prosecution conceded that there was no attempt to penetrate, the defendant had every opportunity to penetrate if he had wished to do so, and his failure was not the product of his victim's admittedly ineffective resistance or the intervention of extraneous causes. *West v. State*, 437 So. 2d 1212 (Miss. 1983).

2. Sexual penetration.

Evidence was legally sufficient to show defendant committed a sexual battery upon defendant's daughter as the only contested element of sexual battery was whether there was digital penetration of the vagina and the daughter testified that defendant had put his finger in her vagina and only stopped because defendant's wife had pulled up. *Pittman v. State*, 836 So. 2d 779 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952 (Miss. Ct. App. 2003).

Cunnilingus is considered to be penetration for the purpose of determining whether or not a sexual battery occurred. *Brady v. State*, 722 So. 2d 151 (Ct. App. 1998).

3. Indictment.

Although defendant argued that the indictment failed to expressly charge that he penetrated the victim with lustful intent, neither Miss. Code Ann. § 97-3-95 nor Miss. Code Ann. § 97-3-97(a) required

proof of lustful intent; defendant's claim as to the sufficiency of the dates alleged in the indictment was waived for failure to demur the indictment in the court below. *Frei v. State*, — So. 2d —, 2006 Miss. App. LEXIS 196 (Miss. Ct. App. Mar. 21, 2006).

An indictment improperly omitted the essential element that the crime was without the victim's consent where the indictment asserted only that the defendant attempted to engage in sexual penetration of a female person in violation of § 97-3-95(1)(a). *Hawthorne v. State*, 751 So. 2d 1090 (Miss. Ct. App. 1998).

4. Jury Instructions.

Defendant claimed that giving the supplemental instruction was an abuse of discretion because the instruction gave undue prominence to evidence concerning penetration without re-instructing the jury as to the other elements needed to establish the offense of rape and that, when plainly read, the supplemental instruction stated that the offense was established by penetration alone. While it certainly would have been better procedure to have reminded the jury that penetration was only one element of the offense and that all of the instructions, including the supplemental one, should have been considered, there was no reversible error; in that respect, the trial court did unmistakably tie the supplemental instruction to the other elements of rape listed in the original instruction and the supplemental instruction was not meant to encompass the entire offense of rape but was merely an explanation and clarification of one of the elements listed in the original jury instructions. *Williams v. State*, 928 So. 2d 867 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Sufficiency of allegations or evidence of serious bodily injury to support charge of

aggravated degree of rape, sodomy, or other sexual abuse. 25 A.L.R.4th 1213.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Am Jur. 65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

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Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-99. Sexual battery; defense.

A person is not guilty of any offense under Sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.

SOURCES: Laws, 1980, ch. 450, § 3; Laws, 1993, ch. 469, § 1, eff from and after passage (approved March 27, 1993).

Cross References — Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Rape, see §§ 97-3-65 through 97-3-71.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

JUDICIAL DECISIONS

1. In general.

2. Illustrative cases.

1. In general.

A defendant was not immune from prosecution under this section for a sexual battery on his wife committed by another person, even though he may have been immune from prosecution had he alone committed the battery; this section did not give the defendant immunity since the sexual battery was committed by someone else and the defendant had aided and

abetted its commission. *Davis v. State*, 611 So. 2d 906 (Miss. 1992).

2. Illustrative cases.

The marital exception did not exculpate the defendant from liability for sexual battery on his wife where he rendered her unconscious by lacing her food with drugs, physically undressed her, and then sexually penetrated her since all of those actions required some amount of force. *Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Criminal responsibility of husband for rape, or assault to commit rape on wife. 84 A.L.R.2d 1017.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 24 A.L.R.4th 105.

Prosecution of female as principal for rape. 67 A.L.R.4th 1127.

Am Jur. 65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS. 6A C.J.S., Assault and Battery §§ 75, 84-88.

75 C.J.S., Rape §§ 30-43.

Law Reviews. Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

Practice References. Anthony Moros-

co, The Prosecution and Defense of Sex Crimes (Matthew Bender).

Paul DerOhannessian II, Sexual Assault Trials, Second Edition (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-101. Sexual battery; penalty.

(1) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(a), (b), or (2) shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years, and for a second or subsequent such offense shall be imprisoned in the penitentiary for not more than forty (40) years.

(2)(a) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is at least eighteen (18) but under twenty-one (21) years of age shall be imprisoned for not more than five (5) years in the State Penitentiary or fined not more than Five Thousand Dollars (\$5,000.00), or both;

(b) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is twenty-one (21) years of age or older shall be imprisoned not more than thirty (30) years in the State Penitentiary or fined not more than Ten Thousand Dollars (\$10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense.

(3) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(d) who is eighteen (18) years of age or older shall be imprisoned for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(4) Every person who shall be convicted of sexual battery who is thirteen (13) years of age or older but under eighteen (18) years of age shall be sentenced to such imprisonment, fine or other sentence as the court, in its discretion, may determine.

SOURCES: Laws, 1980, ch 450, § 4; Laws, 1993, ch. 512, § 3; Laws, 1995, ch. 596, § 15; Laws, 1998, ch. 549, § 4; Laws, 1999, ch. 560, § 2, eff from and after passage (approved Apr. 21, 1999.)

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

JUDICIAL DECISIONS

1. In general.
2. Sentence ranges.
3. Plea bargain.

1. In general.

The trial court sentenced the defendant within the limits of this section and did not abuse its discretion where the defendant was convicted of six counts of sexual battery and the trial court sentenced him to a term of 30 years on each count, with two of the sentences running consecutively and four running concurrently, making the term that he would have to serve 60 years. *Williams v. State*, 757 So. 2d 953 (Miss. 1999).

Fondling is not a lesser included offense of sexual battery. *Brady v. State*, 722 So. 2d 151 (Ct. App. 1998).

Trial court acted within its discretion by imposing 2 consecutive 20-year sentences for 2 sexual battery convictions and concurrent 20-year sentence for attempted sexual battery conviction. *Eakes v. State*, 665 So. 2d 852 (Miss. 1995).

A sentence of 30 years in the state penitentiary was not disproportionate to the crime of sexual battery since 30 years' imprisonment is the maximum sentence which may be imposed upon a person convicted of sexual battery pursuant to § 97-3-101. *Smith v. State*, 569 So. 2d 1203 (Miss. 1990).

2. Sentence ranges.

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that

verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006).

Appellate court concluded that defendant entered a guilty plea to the charge of sexual battery of a fourteen-year-old, and he received a thirty-year sentence; the term of incarceration was within the statutory guidelines, and defendant failed to present concrete facts to support his allegation that the sentence was unjust. *Bates v. State*, 914 So. 2d 297 (Miss. Ct. App. 2005).

Where defendant pleaded guilty to sexual battery of a girl under the age of 14 under Miss. Code Ann. § 97-3-95(1)(c), the fact that the inmate was not advised of a statutory minimum did not present grounds for postconviction relief, as under Miss. Code Ann. § 97-3-101, there was no statutory minimum sentence. *Bryant v. State*, 879 So. 2d 530 (Miss. Ct. App. 2004).

3. Plea bargain.

Where appellant was charged with sexual battery, his defense attorney was not ineffective for allowing him to plead guilty of aggravated assault. Aggravated assault is a lesser crime than sexual battery and carries a lower maximum sentence. *Pearson v. State*, 906 So. 2d 788 (Miss. Ct. App. 2004).

ATTORNEY GENERAL OPINIONS

Section 47-7-33 does not empower circuit judges to suspend sentences pursuant to Section 97-3-65(2)(c) and Section 97-3-101(3) because the latter sections each

provide that a life sentence is the maximum sentence that may be imposed. *Caranna*, May 5, 2000, A.G. Op. #2000-0239.

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Am Jur. 65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS. 6A C.J.S., Assault and Battery §§ 75, 85-88.

75 C.J.S., Rape §§ 30-43.

Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-103. Sexual battery; relationship with other criminal statutes.

Sections 97-3-95 through 97-3-103 shall not be held to repeal, modify or amend any other criminal statute of this state.

SOURCES: Laws, 1980, ch. 450, § 5, eff from and after July 1, 1980.

Cross References — Rape, see §§ 97-3-65 and 97-3-71.

JUDICIAL DECISIONS

1. In general.

Where defendant's 19-year-old daughter testified at trial that she and defendant had engaged in acts of fellatio and cunnilingus, defendant was properly indicted under § 97-29-59, and not § 97-3-95 et seq., which were enacted subse-

quent to the violation for which he was convicted, in that this section expressly provides that the sexual battery statutes do not repeal, modify or amend any other criminal statute. *Contreras v. State*, 445 So. 2d 543 (Miss. 1984).

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

What constitutes offense of "sexual battery". 87 A.L.R.3d 1250.

Am Jur. 65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

CJS. 6A C.J.S., Assault and Battery §§ 75, 85-88.

75 C.J.S., Rape §§ 30-43.

Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-3-104. Crime of sexual activity between law enforcement or correctional personnel and prisoners; sanctions.

It is unlawful for any jailer, guard, employee of the Department of

Corrections, sheriff, constable, marshal or other officer to engage in any sexual penetration, as defined in Section 97-3-97, or have carnal knowledge of any offender, with the offender's consent, who is incarcerated at any jail or any state, county or private correctional facility or who is serving on probation, parole, earned-release supervision, post-release supervision, earned probation or any other form of correctional supervision. Any person who violates this section is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both.

SOURCES: Laws, 1998, ch. 470, § 1; Laws, 2004, ch. 589, § 1; Laws, 2005, ch. 518, § 1, eff from and after July 1, 2005.

Amendment Notes — The 2004 amendment substituted “It is” for “It shall be” and “or have carnal knowledge of any offender” for “with any offender” in the first sentence.

The 2005 amendment, in the first sentence, deleted “or without” preceding “the offender’s consent,” and added “or who is serving on probation parole earned-release supervision post-release supervision earned probation or any other form of correctional supervision.”

ATTORNEY GENERAL OPINIONS

The term “offender” is not limited to criminal detainees, but rather includes any person detained in a facility described in the statute. McDonald, Feb. 4, 2005, A.G. Op. 05-0017.

RESEARCH REFERENCES

<p>Practice References. Anthony Morosco, <i>The Prosecution and Defense of Sex Crimes</i> (Matthew Bender). Paul DerOhannessian II, <i>Sexual Assault Trials</i>, Second Edition (Michie). McCloskey and Schoenberg, <i>Criminal Law Deskbook</i> (Matthew Bender).</p>	<p>Mississippi Criminal and Traffic Law Manual (Michie). Mississippi Penal Code Annotated (Michie).</p>
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§ 97-3-105. Hazing; initiation into organization.

(1) A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.

(2) Any person violating the provisions of subsection (1) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than Two Thousand Dollars (\$2,000.00) or imprisonment in the county jail for not more than six (6) months, or both.

(3) A person is guilty of hazing in the second degree when, in the course of another person's initiation into or affiliation with any organization, he

intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

(4) Any person violating the provisions of subsection (3) of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00).

(5) The provisions of this section shall be in addition to other criminal laws, and actions taken pursuant to this section shall not bar prosecutions for other violations of criminal law.

SOURCES: Laws, 1990, ch. 343, § 1, eff from and after July 1, 1990.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Law Reviews. Halcomb Lewis, The criminalization of fraternity, non-fraternity and non-collegiate hazing. 61 Miss. L. Journal 111 (Spring, 1991).

§ 97-3-107. Stalking.

(1) Any person who willfully, maliciously and repeatedly follows or harasses another person, or who makes a credible threat, with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or by both such fine and imprisonment. A violation of this subsection by a person required to register as a sex offender for a sex offense listed in Section 45-33-23, in this state or another jurisdiction, whether state, federal or military, where the victim is under the age of eighteen (18) years, is a felony subject to a fine of Two Thousand Dollars (\$2,000.00) and imprisonment for two (2) years in the State Penitentiary.

(2) Any person who violates subsection (1) of this section when there is a valid temporary restraining order, ex parte protective order, protective order after hearing, court approved consent agreement, or an injunction issued by a municipal, justice, county, circuit or chancery court, federal or tribal court or by a foreign court of competent jurisdiction in effect prohibiting the behavior described in subsection (1) of this section against the same party, shall be punishable by imprisonment in the county jail for not more than one (1) year and by a fine of not more than One Thousand Five Hundred Dollars (\$1,500.00). A violation of this subsection by a person required to register as a sex offender for a sex offense listed in Section 45-33-23, in this state or another jurisdiction, whether state, federal or military, where the victim is under the age of eighteen (18) years, is a felony subject to a fine of Three Thousand Dollars (\$3,000.00) and imprisonment for two (2) years in the State Penitentiary.

(3) A second or subsequent conviction occurring within seven (7) years of a prior conviction under subsection (1) of this section against the same victim,

and involving an act of violence or “a credible threat” of violence as defined in subsection (5) of this section, shall be punishable by imprisonment for not more than three (3) years and by a fine of not more than Two Thousand Dollars (\$2,000.00). A second or subsequent conviction under this subsection by a person required to register as a sex offender for a sex offense listed in Section 45-33-23, in this state or another jurisdiction, whether state, federal or military, where the victim is under the age of eighteen (18) years, is punishable by imprisonment for six (6) years in the State Penitentiary and a fine of Four Thousand Dollars (\$4,000.00).

(4) For the purposes of this section, “harasses” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.”

(5) For the purposes of this section, “a credible threat” means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety.

SOURCES: Laws, 1992, ch. 532, § 1; Laws, 1996, ch. 326, § 1; Laws, 2000, ch. 553, § 1; Laws, 2006, ch. 583, § 1, eff from and after passage (approved Apr. 21, 2006.)

Editor’s Note — Laws, 1992, ch. 532, § 2, effective from and after July 1, 1992, provides as follows:

“SECTION 2. The provisions of this act shall not be construed to disallow a prosecution for a criminal offense other than stalking against a person who is being or has been prosecuted for the offense of stalking, regardless of any differences in the degree of punishment which may be prescribed for the different offenses.”

Amendment Notes — The 2006 amendment added the last sentences in (1) through (3).

JUDICIAL DECISIONS

1. In general.

Defendant’s display of pistol and his heated request for victim to shoot him, following his repeated threats against victim, constituted violation of stalking statute

and was an unlawful act which would preclude defendant’s use of accident as a defense to homicide charge. *Nicholson ex rel. Gollott v. State*, 672 So. 2d 744 (Miss. 1996).

ATTORNEY GENERAL OPINIONS

No legal precedent requires charges under the statute to be based upon a threat made directly to the victim; thus, where

threats are made to an officer and the officer believes the individual is capable of carrying out the threat, then the facts

may be such that would substantiate the definition of "credible threat." Boone, Apr. 23, 2001, A.G. Op. #01-0215.

RESEARCH REFERENCES

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).
Mississippi Criminal and Traffic Law Manual (Michie).
Mississippi Penal Code Annotated (Michie).

§ 97-3-109. Drive-by shooting; drive-by bombing.

(1) A person is guilty of a drive-by shooting if he attempts, other than for lawful self-defense, to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle.

(2) A person is guilty of a drive-by bombing if he attempts to cause serious bodily injury to another or attempts to cause damage to the property of another, or causes such injury or damage purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by throwing or ejecting any bomb or explosive device from a vehicle while in or on the vehicle.

(3) A person convicted of violating subsection (1) or (2) of this section shall be punished by commitment to the custody of the State Department of Corrections for a term not to exceed thirty (30) years and a fine not to exceed Ten Thousand Dollars (\$10,000.00). A drive-by shooting or a drive-by bombing shall be a felony.

(4) This section shall not be construed to restrict the power to apprehend or arrest a person committing an offense if such apprehension or arrest is otherwise lawful.

SOURCES: Laws, 1993, ch. 376, § 1; Laws, 1994, ch. 373, § 1; Laws, 1995, ch. 608, § 2, eff from and after July 1, 1995.

Cross References — Forfeiture of vehicles used in drive-by shootings, see § 97-3-111.

JUDICIAL DECISIONS

1. Indictment.
2. Evidence.

1. Indictment.

The trial court committed reversible error by granting an instruction on the elements of the crime of drive-by shooting that contained an additional charge for reckless indifference that was not in-

cluded in the indictment. *Smith v. State*, 754 So. 2d 1159 (Miss. 2000).

The indictment was not required to include the element of lack of self-defense where the jury was properly instructed that it had to find that defendants were not acting in self-defense before convicting them of the charge, and the evidence supported the jury's finding that the defen-

dants were not acting in self-defense. *Smith v. State*, 754 So. 2d 1159 (Miss. 2000).

The omission of the phrases “purposely or recklessly under circumstances manifesting extreme indifference to the value of human life” and “other than for lawful self defense” did not render an indictment fatally defective. *Moore v. State*, — So. 2d —, 1999 Miss. App. LEXIS 204 (Miss. Ct. App. Apr. 20, 1999).

An indictment for a drive-by shooting was sufficient where it charged that the defendant unlawfully, willfully, feloniously, and knowingly caused serious bodily injury to victim by discharging a firearm while in a vehicle and thus striking the victim, with bullets fired from the firearm. *Smith v. State*, — So. 2d —, 1999 Miss. App. LEXIS 126 (Miss. Ct. App. Mar. 23, 1999).

2. Evidence.

Jury could reasonably find defendant guilty of the crime of drive-by shooting where the victim testified that defendant was inside the car when the shot was fired and the fact that a bullet matching the gun fired by defendant was found lodged in the victim’s car, which had been parked outside his apartment, bolstered the victim’s testimony that he had not stepped outside of his doorway and that defendant was pointing the gun in his direction; therefore, the trial judge did not err in denying defendant’s motion for judgment notwithstanding the verdict. *Richardson v. State*, 875 So. 2d 1106 (Miss. Ct. App. 2004).

Evidence was held sufficient to establish that the defendant intended to cause serious bodily injury to another. *Fox v. State*, 724 So. 2d 968 (Ct. App. 1998).

§ 97-3-110. Seizure and forfeiture of firearms unlawfully possessed by juveniles and of motor vehicles used in drive-by shootings or bombings.

(1) Whenever a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or conviction, shall be subject to forfeiture.

(2) Whenever a person under eighteen (18) years of age unlawfully discharges a firearm in or throws or ejects a bomb from a motor vehicle in violation of Section 97-3-109, Mississippi Code of 1972, the motor vehicle shall be subject to seizure and, after an adjudication of delinquency or conviction, be subject to forfeiture pursuant to the procedures set forth in Section 97-3-111, Mississippi Code of 1972.

SOURCES: Laws, 1995, ch. 608 § 1, eff from and after July 1, 1995.

RESEARCH REFERENCES

ALR. Propriety of search of nonoccupant visitor’s belongings pursuant to warrant issued for another’s premises. 51 A.L.R.5th 375.

Am Jur. 21 Am. Jur. 2d, Criminal Law § 35.

36 Am. Jur. 2d, Forfeitures and Penalties § 20.

68 Am. Jur. 2d, Searches and Seizures § 11.

68 Am. Jur. 2d, Searches and Seizures § 32.

CJS. 43 C.J.S., Infants §§ 23-25.

79 C.J.S., Searches and Seizures §§ 78, 84, 88.

94 C.J.S., Weapons § 18-21.

§ 97-3-111. Forfeiture of vehicles used in drive-by shootings or bombings.

(1) All vehicles which are used in any manner to facilitate the discharging

of a firearm or the throwing or ejection of a bomb or explosive device in violation of Section 97-3-109 shall be subject to forfeiture, however:

(a) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of Section 97-3-109 and this section;

(b) No conveyance is subject to forfeiture under this section by reason of any act or omission proved by the owner thereof to have been committed or omitted without his knowledge or consent; if the confiscating authority has reason to believe that the conveyance is a leased or rented conveyance, then the confiscating authority shall notify the owner of the conveyance within five (5) days of the confiscation;

(c) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(2) Except as otherwise provided in subsection (16), when any property is seized pursuant to subsection (1), proceedings under this section shall be instituted promptly.

(3) A petition for forfeiture shall be filed promptly in the name of the State of Mississippi, the county or the municipality and may be filed in the county in which the seizure is made, the county in which the criminal prosecution is brought or the county in which the owner of the seized property is found. Forfeiture proceedings may be brought in (a) the circuit court, or (b) the county court if a county court exists in the county and the value of the seized property is within the jurisdictional limits of the county court as set forth in Section 9-9-21, Mississippi Code of 1972, or (c) the youth court in the case of a person adjudicated delinquent where the underlying basis for the delinquency is a violation of Section 97-3-109, Mississippi Code of 1972. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(a) The owner of the property, if address is known;

(b) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the local law enforcement agency by making a good faith effort to ascertain the identity of such secured party as described in subsections (4), (5), (6), (7) and (8) of this section;

(c) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the local law enforcement agency has actual knowledge; and

(d) Any person in possession of property subject to forfeiture at the time that it was seized.

(4) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the local law enforcement agency shall make inquiry of the State Tax Commission as to what the records of the State

Tax Commission show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(5) If the property is a motor vehicle and is not titled in the State of Mississippi, then the local law enforcement agency shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the local law enforcement agency shall make inquiry of the appropriate agency of that state as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest or other instrument in the nature of a security device which affects the vehicle.

(6) In the event the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest or other interest which affects the property, the local law enforcement agency shall cause any record owner and also any lienholder, secured party or other person who holds an interest in the property in the nature of a security interest which affects the property to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(7) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the property is unknown, the local law enforcement agency shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of _____", filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, Mississippi Code of 1972, and shall be served as provided in Section 11-33-37, Mississippi Code of 1972, for publication of notice for attachments at law.

(8) No proceedings instituted pursuant to the provisions of this section shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with. Any answer received from an inquiry required by subsections (4) through (5) of this section shall be introduced into evidence at the hearing.

(9) Except as otherwise provided in subsection (16), an owner of property that has been seized pursuant to subsection (1) shall file an answer within thirty (30) days after the completion of service of process. If an answer is not filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the local law enforcement agency. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court, if court would not be in progress within thirty (30) days after filing the answer. Provided, however, that upon request by the local law enforcement agency or the owner of the property, the court may postpone said forfeiture hearing to a date past the time any criminal action is pending against said owner.

(10) If the owner of the property has filed an answer denying that the property is subject to forfeiture, then the burden is on the petitioner to prove that the property is subject to forfeiture. However, if an answer has not been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture. The standard of proof placed upon the petitioner in regard to property forfeited under the provisions of Section 97-3-109 and this section shall be by a preponderance of the evidence.

(11) At the hearing any claimant of any right, title or interest in the property may prove his lien, encumbrance, security interest or other interest in the nature of a security interest to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(12) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property to the local law enforcement agency. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party or other person holding an interest in the property in the nature of a security interest is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited to the local law enforcement agency.

(13) All other property which is forfeited under this section shall be liquidated and, after deduction of court costs and the expenses of liquidation, the proceeds shall be divided and deposited as follows:

(a) In the event only one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be forwarded to the State Treasurer and deposited in the General Fund of the state and fifty percent (50%) of the proceeds shall be deposited and credited to the budget of the participating law enforcement agency.

(b) In the event more than one (1) law enforcement agency participates in the underlying criminal case out of which the forfeiture arises, fifty percent (50%) of the proceeds shall be deposited and credited to the budget of the law enforcement agency whose officers initiated the criminal case and fifty percent (50%) shall be divided equitably between or among the other participating law enforcement agencies, and shall be deposited and credited to the budgets of the participating law enforcement agencies. In the event that the other participating law enforcement agencies cannot agree on the division of their fifty percent (50%), a petition shall be filed by any one (1) of them in the court in which the civil forfeiture case is brought and the court shall make an equitable division.

(14) All other property that has been forfeited shall, except as otherwise provided, be sold at a public auction for cash by the chief law enforcement officer of the initiating law enforcement agency, or his designee, to the highest and best bidder after advertising the sale for at least once each week for three

(3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation in the jurisdiction in which said law enforcement agency is located. Such notices shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be disposed of as follows:

(a) To any bona fide lienholder, secured party or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(b) The balance, if any, remaining after deduction of all storage, court costs and expenses of liquidation shall be divided, forwarded and deposited in the same manner set out in subsection (13) of this section.

(15) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

(16) When any property the value of which does not exceed Five Thousand Dollars (\$5,000.00) is seized pursuant to subsection (1), the property may be forfeited by the administrative forfeiture procedures provided for in subsections (16) through (22).

(17) The attorney for the seizing law enforcement agency shall provide notice of intention to forfeit the seized property administratively, by certified mail, return receipt requested, to all persons who are required to be notified.

(18) In the event that notice of intention to forfeit the seized property administratively cannot be given as provided in subsection (17) of this section because of refusal, failure to claim, insufficient address or any other reason, the attorney for the seizing law enforcement agency shall provide notice by publication in a newspaper of general circulation in the county in which the seizure occurred for once a week for three (3) consecutive weeks.

(19) Notice pursuant to subsections (17) and (18) of this section shall include the following information:

(a) A description of the property;

(b) The approximate value of the property;

(c) The date and place of the seizure;

(d) The connection between the property and the violation of Section 97-3-109;

(e) The instructions for filing a request for judicial review; and

(f) A statement that the property will be forfeited to the seizing law enforcement agency if a request for judicial review is not timely filed.

(20) Persons claiming an interest in the seized property may initiate judicial review of the seizure and proposed forfeiture by filing a request for judicial review with the attorney for the seizing law enforcement agency, within thirty (30) days after receipt of the certified letter or within thirty (30) days after the first publication of notice, whichever is applicable.

(21) If no request for judicial review is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfei-

ture of the subject property and the forfeited property shall be used, distributed or disposed of in accordance with the provisions of this section.

(22) Upon receipt of a timely request for judicial review, the attorney for the seizing law enforcement agency shall promptly file a petition for forfeiture and proceed as provided in subsections (3) through (15).

SOURCES: Laws, 1993, ch. 376, § 2; Laws, 1995, ch. 608, § 3, eff from and after July 1, 1995.

Cross References — Mississippi Motor Vehicle Title Law, see §§ 63-21-1 et seq.

RESEARCH REFERENCES

ALR. Forfeiture of property for unlawful use before trial of individual offender. 3 A.L.R.2d 738.

Conviction or acquittal in criminal prosecution as bar to action for seizure, condemnation, or forfeiture of property. 27 A.L.R.2d 1137.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities. 38 A.L.R.4th 515.

Jurisdiction of United States District Court under 28 USCS § 1346(a) in civil

action to order return of fines, forfeitures, and costs imposed after criminal conviction subsequently held to have been unconstitutional. 41 A.L.R. Fed. 350.

Am Jur. 36 Am. Jur. 2d, Forfeitures and Penalties § 20.

12 Am. Jur. Pl & Pr Forms (Rev), Forfeitures and Penalties, Forms 10-17 (notice of forfeiture; claim for return of property; answer).

8A Am. Jur. Legal Forms 2d, Forfeitures and Penalties, Forms 123:1 et seq.

CJS. 24 C.J.S., Criminal Law § 1467.

37 C.J.S., Forfeitures §§ 1 et seq.

§ 97-3-113. Mississippi Carjacking Act; short title.

Sections 97-3-113, 97-3-115 and 97-3-117 shall be known and may be cited as the "Mississippi Carjacking Act of 1993."

SOURCES: Laws, 1993, ch. 471, § 1, eff from and after passage (approved March 27, 1993).

JUDICIAL DECISIONS

1. In general.
2. Immediate actual possession found.
3. Possession may be actual or constructive.

1. In general.

Fair minded jurors could have accepted defendant's assertion that there was no common plan to commit a carjacking in Mississippi, and that he was merely a bystander. They also could have inferred from his actions of stealing a car earlier,

on the same date, with his companions that did conduct the carjacking, that he was an active participant; thus, his admission to the earlier theft was admissible under Miss. R. Evid. 404(b), and the evidence was sufficient for the trial court to deny his motions for a directed verdict and for judgment notwithstanding the verdict. *Washington v. State*, 912 So. 2d 996 (Miss. Ct. App. 2005).

Actual possession for purposes of a carjacking charge is the physical occu-

pancy or control over property. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

2. Immediate actual possession found.

State proved that defendant took from the victim's immediate actual possession a car for purposes of a carjacking charge where: (1) the victim was sitting in the passenger seat with the keys in the ignition, (2) the victim could easily have swung her legs over and driven the car away, (3) at the time of defendant's approach, the victim quite literally had direct physical control of the car, and (4) clearly, the victim occupied the vehicle at

the time defendant seized it as she was in possession of the vehicle, and she had control of the running vehicle at the time it was seized. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

3. Possession may be actual or constructive.

Virginia Court of Appeals has stated that possession of a vehicle for purposes of carjacking may be actual or constructive; constructive possession occurs where an individual has the means of exercising dominion or control over the vehicle. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state carjacking statutes. 100 A.L.R.5th 67.

Validity, construction, and application of Anti-Car Theft Act (18 USCS § 2119). 140 A.L.R. Fed. 249.

§ 97-3-115. Mississippi Carjacking Act; definitions.

The following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) "Carjacking" means taking of a motor vehicle from another person's immediate actual possession knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means.

(b) "Motor vehicle" includes every device in, upon or by which any person or property is or may be transported or drawn upon a highway, which is self-propelled.

SOURCES: Laws, 1993, ch. 471, § 2, eff from and after passage (approved March 27, 1993).

JUDICIAL DECISIONS

1. Immediate actual possession defined.

In defining "immediate actual possession" for purposes of carjacking, the court of appeals in the District of Columbia has stated that a thing is within one's immediate actual possession so long as it is within such range that he could, if not deterred by violence or fear, retain actual physical control over it; the court of ap-

peals in the District of Columbia has held, in agreement with the District of Columbia Circuit, that immediate actual possession is retained if the car is within such range that the victim could, if not deterred by violence or fear, retain actual physical control over it. *Murphy v. State*, 868 So. 2d 1030 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

§ 97-3-117. Mississippi Carjacking Act; what constitutes offense of carjacking; attempted carjacking; armed carjacking; penalties.

(1) Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person's immediate actual possession shall be guilty of carjacking.

(a) A person who is convicted of carjacking shall be fined not more than Five Thousand Dollars (\$5,000.00) and be committed to the custody of the State Department of Corrections for not more than fifteen (15) years.

(b) A person who is convicted of attempted carjacking shall receive the same punishment as the person who is convicted of carjacking.

(2) Whoever commits the offense of carjacking while armed with or having readily available any pistol or other firearm or imitation thereof or other dangerous or deadly weapon, including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade, razor, blackjack, billy, or metallic or other false knuckles, or any object capable of inflicting death or serious bodily harm, shall be guilty of armed carjacking.

(a) Any person who is convicted of armed carjacking shall be fined not more than Ten Thousand Dollars (\$10,000.00) and be committed to the custody of the State Department of Corrections for not more than thirty (30) years.

(b) Any person who is convicted of attempted armed carjacking shall receive the same punishment as the person who is convicted of armed carjacking.

(3) Any person convicted of a second or subsequent offense under this section shall be fined an amount up to twice that otherwise authorized and shall be imprisoned for a term up to twice the term otherwise authorized.

SOURCES: Laws, 1993, ch. 471, § 3, eff from and after passage (approved March 27, 1993).

JUDICIAL DECISIONS

1. Evidence.
2. Indictment.
3. Jury instructions.
4. Double jeopardy.
5. Sentence.

1. Evidence.

Where defendant fit the description of the perpetrator, his car fit the description of the two-toned vehicle that followed the victim, and eyewitnesses testified to seeing a car similar to the victim's parked behind defendant's grandparents' home on the morning following the carjacking,

the evidence was sufficient to convict defendant of armed carjacking under Miss. Code Ann. § 97-3-117(2)(b). *Walters v. State*, — So. 2d —, 2006 Miss. App. LEXIS 115 (Miss. Ct. App. Feb. 14, 2006).

Evidence was sufficient to support a conviction for armed carjacking where (1) the testimony presented by the state reflected that the defendant participated in and was involved in planning and committing several crimes, including the armed carjacking, (2) the testimony presented by the defense showed that he was not iden-

tified as one of the carjackers and was not involved in the commission of the carjacking, and (3) the conflicting testimony was a question of fact resolved by the jury in favor of the state. *Simmons v. State*, 754 So. 2d 618 (Miss. Ct. App. 2000).

2. Indictment.

An indictment charged the defendant with carjacking, rather than armed carjacking, where the indictment read, in part, that the defendant "did recklessly and knowingly by force or violence, by the exhibition of a knife, take a motor vehicle from" the victim; the indictment did not charge the defendant with armed carjacking since it failed to allege the essential elements relative to the alleged use of the knife. *Williams v. State*, 772 So. 2d 406 (Miss. Ct. App. 2000).

Although the technical language of the statute for the crime of carjacking may not have been recited in the indictment, the statute was enumerated and the facts that were stated were sufficient to notify the defendant of the crime he was being charged with, therefore allowing him the opportunity to prepare a defense where the indictment stated that he was being charged with the crime of carjacking because he "did recklessly and knowingly by force or violence, by the exhibition of a knife, take a motor vehicle from" the victim. *Williams v. State*, 772 So. 2d 406 (Miss. Ct. App. 2000).

3. Jury instructions.

Jury instructions were insufficient with regard to armed carjacking where the jury was instructed that the state was required to prove that the defendant took an automobile by the exhibition of a knife, but was not instructed that the knife was a deadly weapon capable of inflicting death or serious bodily injury; however, the jury instructions were sufficient with regard to carjacking. *Williams v. State*, 772 So. 2d 406 (Miss. Ct. App. 2000).

4. Double jeopardy.

Convictions for armed carjacking and armed robbery occurring during the same episode did not constitute double jeopardy where the carjacking charge was based on the taking of a delivery truck and the robbery charge was based on the theft of money from one of the occupants of the truck. *McCline v. State*, 856 So. 2d 556 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

5. Sentence.

Consecutive sentences of 30 and 45 years for armed carjacking and armed robbery were within the statutory limits for those offenses and were not excessive despite the length of the sentences and regardless of the fact that defendant chose to go to trial rather than accept a plea bargain for 10 years on each count as his co-defendants elected to do. *McCline v. State*, 856 So. 2d 556 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

RESEARCH REFERENCES

ALR. Validity, construction, and application of Anti-Car Theft Act (18 USCS § 2119). 140 A.L.R. Fed. 249.

CHAPTER 5

Offenses Affecting Children

SEC.

- 97-5-1. Abandonment of child under age six.
- 97-5-3. Desertion or nonsupport of child under age eighteen.
- 97-5-5. Enticing child for concealment, prostitution or marriage.
- 97-5-7. Enticing child for employment.
- 97-5-9. Iceboxes, etc.; abandonment without removing latch prohibited.
- 97-5-11. Pool room or billiard hall; certain minors prohibited from entering.
- 97-5-13 through 97-5-19. Repealed.
- 97-5-21. Repealed.
- 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.
- 97-5-24. Sexual involvement of school employee with student; duty to report.
- 97-5-25. Repealed.
- 97-5-27. Dissemination of sexually oriented material to persons under eighteen years of age; use of computer for purpose of luring or inducing persons under eighteen years of age to engage in sexual contact.
- 97-5-29. Public display of sexually oriented materials.
- 97-5-31. Exploitation of children; definitions.
- 97-5-33. Exploitation of children; prohibitions.
- 97-5-35. Exploitation of children; penalties.
- 97-5-37. Exploitation of children; other remedies.
- 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.
- 97-5-40. Condoning child abuse.
- 97-5-41. Carnal knowledge of step or adopted child; carnal knowledge of child by cohabitating partner.
- 97-5-42. Protection of children from parents convicted of felony child sexual abuse; creation of local registry; penalties; standards for visitation.
- 97-5-43 through 97-5-47. Repealed.

§ 97-5-1. Abandonment of child under age six.

If the father or mother of any child under the age of six years, or any other person having the lawful custody of such child, or to whom such child shall have been confided, shall expose such child in any highway, street, field, house, outhouse, or elsewhere, with intent wholly to abandon it, such person shall, upon conviction, be punished by imprisonment in the penitentiary not more than seven years, or in the county jail not more than one year.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (32); 1857, ch. 64, art. 57; 1871, § 2528; 1880, § 2752; 1892, § 1001; Laws, 1906, § 1078; Hemingway's 1917, § 805; Laws, 1930, § 824; Laws, 1942, § 2050.

Cross References — Child welfare provisions, see §§ 43-15-1 et seq.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Emergency medical services providers and Department of Human Services to take custody of voluntarily abandoned children under baby drop-off law, see §§ 43-15-201 et seq.

Absolute affirmative defense to prosecution under this section for parent who voluntarily delivers unharmed child to emergency medical services provider under baby drop-off law, see § 43-15-205.

Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Desertion and nonsupport of children under the age of 16 years, see § 97-5-3.

JUDICIAL DECISIONS

1. In general.

Proof of abandonment in a habeas corpus proceeding by a mother to obtain custody of a minor child does not require that the evidence show an abandonment as that term is defined in this section

[Code 1942, § 2050] or to show that the parent has been guilty of child desertion such as would render him liable to criminal prosecution under Code 1942, § 2087. *Governale v. Haley*, 228 Miss. 271, 87 So. 2d 686 (1956).

RESEARCH REFERENCES

ALR. Failure to provide medical attention for child as criminal neglect. 12 A.L.R.2d 1047.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 A.L.R.2d 886.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Father's criminal liability for desertion or failure to support child where divorce decree awards custody to another. 73 A.L.R.2d 960.

Application, to illegitimate children, of criminal statutes relating to abandonment, neglect, and nonsupport of children. 99 A.L.R.2d 746.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control. 75 A.L.R.3d 933.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 A.L.R.3d 712.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding. 79 A.L.R.3d 417.

Parents' criminal liability for failure to provide medical attention to their children. 118 A.L.R.5th 253.

Am Jur. 23 Am. Jur. 2d, Desertion and Nonsupport §§ 29 et seq.

CJS. 67A C.J.S., Parent and Child §§ 359-362, 366.

§ 97-5-3. Desertion or nonsupport of child under age eighteen.

Any parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children, including the natural parent of an illegitimate child or children wherein paternity has been established by law or when the natural parent has acknowledged paternity in writing, while said child or children are under the age of eighteen (18) years shall be guilty of a felony and, on conviction thereof, shall be punished for a first offense by a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or by commitment to the custody of the Department of Corrections not more than five (5) years, or both; and for a second or subsequent offense, by a fine of not less than One Thousand Dollars (\$1,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or by commit-

ment to the custody of the Department of Corrections not less than two (2) years nor more than five (5) years, or both, in the discretion of the court.

SOURCES: Codes, 1930, § 861; Laws, 1942, § 2087; Laws, 1928, Ex. ch. 89; Laws, 1962, ch. 311; Laws, 1995, ch. 533, § 1, eff from and after July 1, 1995.

Cross References — Emergency medical services providers and Department of Human Services to take custody of voluntarily abandoned children under baby drop-off law, see §§ 43-15-201 et seq.

Absolute affirmative defense to prosecution under this section for parent who voluntarily delivers unharmed child to emergency medical services provider under baby drop-off law, see § 43-15-205.

Guardians, generally, see §§ 93-13-1 et seq.

Enforcement of support of dependents, see §§ 93-25-1 et seq.

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

Abandonment of child under six years of age, see § 97-5-1.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction.
3. Indictment.
4. Bar of limitations.
5. Evidence; generally.
6. —Admissibility.
7. —Presumptions and burden of proof.
8. Witnesses.
9. Instructions.

1. In general.

The retroactive application of the 1995 amendment to the statute, which substantively changed the elements of the crime by deleting the requirement of proving that the children were left in destitute and necessitous circumstances and raising the age of the children protected, violated the constitutional prohibition against ex post facto laws. *Knowles v. State*, 708 So. 2d 549 (Miss. 1998).

The court could lawfully convict the defendant for the crime of willful failure to support and maintain his children under the statute without violating the double jeopardy clause, notwithstanding that he had previously been found not to be in civil contempt for failing to make support payments. *Knowles v. State*, 708 So. 2d 549 (Miss. 1998).

Former wife improperly obtained process over her former husband to enforce judgment for child support arrearage by

bringing criminal charges solely for purpose of bringing him to state to obtain personal jurisdiction in civil contempt action; she brought charges against him for desertion of child under age 16, when her youngest child was 24 years of age, solely to obtain personal jurisdiction. *Shook v. Hopkins*, 697 So. 2d 1162 (Miss. 1997).

In a prosecution for child desertion under this section the fact that the jury saw the defendant's grievously afflicted child in the corridors of the courthouse did not constitute error, even though the judge had excluded her from the courtroom to avoid undue prejudice against the defendant because of the child's affliction; it would not have been error for the court to permit the jury to see the child since this was clearly relevant to the State's case in proving the child's helpless condition and her dire need of financial support. Additionally, the State made no effort to make a prominent display of the child before the jury and there was no error committed by the jury simply seeing the child. *Bryant v. State*, 567 So. 2d 234 (Miss. 1990).

One charged under this statute [Code 1942, § 2087] should be permitted to withdraw a plea of guilty entered without an investigation by the trial judge as to whether he has been properly advised. *Lambert v. State*, 245 Miss. 227, 147 So. 2d 480 (1962).

Under this section [Code 1942, § 2087] the gist of the crime is the willful failure to provide for the support and maintenance of the children and the statutory offense is a continuing one. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 44 A.L.R.2d 881 (1953).

The application of this section [Code 1942, § 2087] is not limited only to cases when father leaves the jurisdiction of the state. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 44 A.L.R.2d 881 (1953).

Where the husband was guilty of statutory offense of desertion of and willful failure to support his children, and the mother then leaves her husband and moves to a different county, the removal of the children by the wife did not relieve the father of his responsibilities. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 44 A.L.R.2d 881 (1953).

Where in prosecution for nonsupport of children the fact that the proof showed that the necessitous circumstances of the children were relieved by their neighbors and church organization and the county welfare department did not preclude the prosecution of the father. *Archer v. State*, 214 Miss. 742, 59 So. 2d 339 (1952).

To establish willful neglect to support minor children state must allege and prove either desertion of children who were in destitute and necessitous circumstances, or willful neglect to support them. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

Father, who had deposited in bank to credit of two children under 16 years of age approximately \$500, available to them, could not be convicted of neglecting to provide for their support. *Ladner v. State*, 165 Miss. 140, 146 So. 888 (1933).

Neglect or refusal to provide for support and maintenance of children, to constitute criminal offense, must be willful. *Page v. State*, 160 Miss. 300, 133 So. 216 (1931).

"Willful" neglect or refusal to support children means neglect or refusal with stubborn purpose and without justifiable excuse. *Page v. State*, 160 Miss. 300, 133 So. 216 (1931).

2. Jurisdiction.

This section is not an unconstitutional infringement upon chancery court jurisdiction, nor is it imprisonment for debt.

The State has a legitimate interest in criminally prosecuting financially able parents who willfully desert or fail to support their children when in destitute or necessitous circumstances. *Bryant v. State*, 567 So. 2d 234 (Miss. 1990).

This section does not usurp jurisdiction of chancery court. *Kelley v. State*, 218 Miss. 459, 67 So. 2d 459, 44 A.L.R.2d 881 (1953).

County court to which circuit court has transferred criminal case for trial has right to proceed with prosecution of father for desertion and failure to support child, although chancery court had acquired jurisdiction in matter prior to commencement of prosecution through divorce action brought by mother against father. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

3. Indictment.

The parentage of the child alleged to have been neglected is a material part of the crime defined by this section [Code 1442, § 2087]. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606 (1963).

In prosecution for desertion and neglecting to provide for minor children, an indictment which charged that the defendant did willfully, unlawfully and feloniously, desert and willfully neglect and refuse to support his minor children of the names and ages as follows, naming them and giving their ages, was sufficient to charge that the defendant was the father of the children. *Fortenberry v. State*, 227 Miss. 666, 86 So. 2d 663 (1956).

Where an indictment, charging a father with neglect to provide for the support and maintenance of his children failed to state the year in which the offense was committed, and where a demurrer was interposed, it was not error for the court to permit an amendment so as to state the year and overrule the demurrer. *Archer v. State*, 214 Miss. 742, 59 So. 2d 339 (1952).

Indictment alleging that father did willfully desert "and neglect" child under age of 16 years, leaving it in destitute and necessitous circumstances, held to charge offense of child desertion, desertion of a child leaving it destitute implying "non-support," words "and neglect" being sur-

plusage. *Horton v. State*, 175 Miss. 687, 166 So. 753 (1936).

4. Bar of limitations.

Offense of child desertion is a continuing one, so that prosecution therefore was not barred by three-year statute of limitations, where father deserted family more than two years before prosecution was commenced, but never returned. *Horton v. State*, 175 Miss. 687, 166 So. 753 (1936).

5. Evidence; generally.

Evidence held insufficient to establish guilt beyond a reasonable doubt. *Thomas v. State*, 247 Miss. 704, 159 So. 2d 77 (1963).

Evidence held to warrant finding of refusal and neglect to support child. *Evans v. State*, 242 Miss. 428, 135 So. 2d 174 (1961).

In a habeas corpus proceeding by a mother to obtain custody of a minor child, to prove abandonment it is not necessary that the evidence show an abandonment as that term is defined [Code 1942, § 2050], or to show that the parent has been guilty of child desertion, such as would render him liable to criminal prosecution under this section [Code 1942, § 2087]. *Governale v. Haley*, 228 Miss. 271, 87 So. 2d 686 (1956).

In prosecution of parent for failure to support and maintain child, it is incumbent upon prosecution to show beyond every reasonable doubt that child was left in destitute or necessitous circumstances and proof should do more than tend to show that child was in destitute or necessitous circumstances so far as any contribution made to it by defendant is concerned. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Where proof shows willful neglect to provide support, desertion within usual and ordinary meaning of term need not be shown. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

Evidence held to sustain conviction for willfully neglecting to support children. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

6. —Admissibility.

It was no error for the state to adduce evidence as to the continued neglect and

support of the children after the original desertion, since the offense charged was a continuous one. *Fortenberry v. State*, 227 Miss. 666, 86 So. 2d 663 (1956).

Where a mother was charged under this section [Code 1942, § 2087], evidence that the mother was forced to leave the home where her children and husband lived because of mistreatment by the husband should have been admitted. *Nobles v. State*, 223 Miss. 24, 77 So. 2d 674 (1955), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Since the offense under this section [Code 1942, § 2087] is a continuing one, evidence of accused's conduct or neglect of a child before and after the time charged was admissible to show intent and motive, and as tending to show the commission of the offense charged, and as to whether or not it was committed at or about the time charged. *Nobles v. State*, 223 Miss. 24, 77 So. 2d 674 (1955), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Where a premature or a six months baby was begotten after separation of a month, the husband should be permitted to prove non-access to the mother of the child after the separation. *Boone v. State*, 211 Miss. 318, 51 So. 2d 473 (1951).

Testimony offered by prosecution and by defendant which covers period of four and one-half years prior to return of indictment incompetent, since alleged offense is continuing one, and it is error for court to confine testimony on behalf of defendant to period of two years prior to return of indictment. *Williams v. State*, 207 Miss. 816, 43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Under indictment charging that defendant father both deserted and failed to provide for support and maintenance of child, it is error to exclude testimony offered by defendant to show facts and circumstances under which he failed to live with and support child tending to show that he was kept away from it by repeated personal assaults committed on him by his brother-in-law while child was living with its maternal grandmother and mother. *Williams v. State*, 207 Miss. 816,

43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

It was proper for state to show failure to support children was due to improper diversion of funds. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

Testimony contradicting defendant's denial of misconduct with another woman, held not reversible error where not objected to as attempt to prove separate and distinct offense. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

After state rested its case in chief, in prosecution for child desertion, and defendant had introduced evidence in defense, admitting, in rebuttal, testimony that defendant had admitted he was father of children, held not error. *Roney v. State*, 167 Miss. 827, 150 So. 774 (1933).

7. —Presumptions and burden of proof.

In a prosecution under this section [Code 1942, § 2087], there is a presumption of innocence, and guilt must be proved beyond a reasonable doubt. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606 (1963).

Burden of proving that there has been willful neglect or refusal to support and maintain child is upon state, and not on accused to prove that his action was excusable or justifiable in such neglect or refusal. *Williams v. State*, 207 Miss. 816,

43 So. 2d 389 (1949), overruled on other grounds, *Lenoir v. State*, 237 Miss. 620, 115 So. 2d 731 (1959).

Burden of proving that willful neglect or refusal to support children was excusable or justifiable is not on defendant, not being defensive matter. *Page v. State*, 160 Miss. 300, 133 So. 216 (1931).

8. Witnesses.

Where defendant attempted to explain why he was separated from wife and consented to wife stating her side of the matter, error if any in permitting wife to testify held not reversible. *Clark v. State*, 181 Miss. 455, 180 So. 602 (1938).

Wife is incompetent to testify against husband in criminal case, otherwise than as permitted to do so under common law; wife was not competent witness against husband in prosecution under law relating to desertion or refusal to provide for support and maintenance of child. *Ulmer v. State*, 157 Miss. 807, 128 So. 749 (1930).

9. Instructions.

In a prosecution under this section [Code 1942, § 2087], it is error to instruct the jury as to the presumption of legitimacy of a child born in wedlock, without stating that such presumption is rebuttable, particularly where the evidence of paternity is in sharp conflict and the jury could have decided the case without the benefit of presumptions. *Gladney v. State*, 246 Miss. 584, 151 So. 2d 606 (1963).

RESEARCH REFERENCES

ALR. Failure to provide medical attention for child as criminal neglect. 12 A.L.R.2d 1047.

Jurisdiction and venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 A.L.R.2d 886.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Father's criminal liability for desertion or failure to support child where divorce decree awards custody to another. 73 A.L.R.2d 960.

Application, to illegitimate children, of criminal statutes relating to abandonment, neglect, and nonsupport of children. 99 A.L.R.2d 746.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support. 32 A.L.R.3d 1055.

Parent's involuntary confinement, or failure to care for child as result thereof, as permitting adoption without parental consent. 78 A.L.R.3d 712.

Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child. 14 A.L.R.4th 717.

Am Jur. 23 Am. Jur. 2d, Desertion and Nonsupport §§ 29 et seq.

CJS. 67A C.J.S., Parent and Child §§ 359-362, 366.

Law Reviews. Family Law At the Turn of the Century, 71 Miss. L.J. 781, Spring, 2002.

§ 97-5-5. Enticing child for concealment, prostitution or marriage.

Every person who shall maliciously, wilfully, or fraudulently lead, take, carry away, decoy or entice away, any child under the age of fourteen years, with intent to detain or conceal such child from its parents, guardian, or other person having lawful charge of such child, or for the purpose of prostitution, concubinage, or marriage, shall, on conviction, be imprisoned in the penitentiary not exceeding ten years, or imprisoned in the county jail not more than one year, or fined not more than one thousand dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (31); 1857, ch. 64, art. 58; 1871, § 2529; 1880, § 2753; 1892, § 1002; Laws, 1906, § 1079; Hemingway's 1917, § 806; Laws, 1930, § 825; Laws, 1942, § 2051.

Cross References — Abduction for purposes of marriage, see § 97-3-1.

Statutory rape, see §§ 97-3-65 et seq.

Seduction of female child, see §§ 97-3-65, 97-3-95, 97-3-101, 97-5-23 and 97-29-55.

Violation of person of child, see § 97-5-23.

Prostitution, see §§ 97-29-49 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Sexual intercourse is not essential to the commission of the offense of taking a 13-year-old girl away for the purpose of concubinage. *Hooks v. State*, 197 So. 2d 238 (Miss. 1967).

On the trial of a defendant indicted for the crime of enticing a child under the age of 14 years for the felonious purpose of "concubinage or marriage", it was error for the prosecution to cross examine a

witness introduced by the state unless there was a showing that the prosecuting attorney had been taken by surprise. *Hooks v. State*, 197 So. 2d 238 (Miss. 1967).

A father who by agreement surrendered the custody of his minor child to his wife is not guilty of kidnapping because he enticed the child away from the custody of the mother. *State v. Powe*, 107 Miss. 770, 66 So. 207 (1914).

RESEARCH REFERENCES

ALR. Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Am Jur. 63C Am. Jur. 2d, Prostitution §§ 1 et seq.

CJS. 73 C.J.S., Prostitution §§ 1, 8-13, 15-19.

§ 97-5-7. Enticing child for employment.

Any person who shall persuade, entice or decoy away from its father or mother with whom it resides any child under the age of eighteen (18) years, being unmarried, for the purpose of employing such child without the consent of its parents, or one of them, shall upon conviction be punished by a fine of not more than twenty dollars (\$20.00) or imprisoned in the county jail not more than thirty (30) days, or both.

SOURCES: Codes, 1880, § 2755; 1892, § 1003; Laws, 1906, § 1080; Hemingway's 1917, § 807; Laws, 1930, § 827; Laws, 1942, § 2053; Laws, 1980, ch 357, eff from and after passage (approved April 23, 1980).

Cross References — Regulation of child labor, see §§ 71-1-17 et seq.

JUDICIAL DECISIONS

1. In general.

Parents permitting minor to remain in another's employment for six weeks after acquiring knowledge thereof must be held

to have "consented" thereto. *Gulf & S.I.R.R. v. Sullivan*, 155 Miss. 1, 119 So. 501, 62 A.L.R. 191 (1928).

RESEARCH REFERENCES

ALR. Applicability of statutes relating to offenses against children of a specified age with respect to a child who has passed

the anniversary date of such age. 73 A.L.R.2d 874.

§ 97-5-9. Iceboxes, etc.; abandonment without removing latch prohibited.

If any person shall have on his premises, or shall suffer to be or remain upon his premises, any abandoned chest, icebox, refrigerator, or any other box-type container not in active use, any door to which has a latch or lock which automatically fastens upon the closing of such container's door, and which cannot be readily opened from the inside, he shall remove the latch or lock, or otherwise render it inoperative, and on failure to so do shall be guilty of a misdemeanor.

SOURCES: Codes, 1942, § 2055.5; Laws, 1954, ch. 233; Laws, 1966, ch. 356, § 1, eff from and after passage (approved April 20, 1966).

RESEARCH REFERENCES

ALR. Liability for injury or death of child in refrigerator. 86 A.L.R.2d 709.

§ 97-5-11. Pool room or billiard hall; certain minors prohibited from entering.

No person under the age of eighteen (18) years shall be allowed to enter

and remain in any poolroom or billiard hall except that municipalities shall have the discretion to establish a lower minimum age. However, no person under the age of eighteen (18) years shall be allowed to enter and remain in any poolroom or billiard hall in which beer is sold or consumed. No owner or manager of any poolroom or billiard hall, and no agent or employee of any such owner or manager, shall permit or allow any person under the age of eighteen (18) years to enter and remain in any such poolroom or billiard hall except when a municipality has established a lower minimum age, and provided that in such municipality beer is neither sold nor consumed in such poolroom or billiard hall. Any manager or owner of any poolroom or billiard hall, and any agent or employee of such owner or manager, shall for each offense, upon conviction, be fined not more than one hundred dollars (\$100.00).

For the purposes of this section, a poolroom or billiard hall shall not be deemed to include a place of amusement, either for profit or otherwise, wherein the operation of pool and billiard tables is not the main attraction held out to the public, or the primary amusement engaged in by the participants and wherein less than fifteen percent (15%) of the gross revenue derived directly from the operation of such amusement or recreation center within the same room or immediately connecting and adjacent rooms shall be derived directly or indirectly from the operation of such pool or billiard tables and further, all nonprofit corporations, associations and organizations, and educational and religious institutions, shall not be considered as operating poolrooms or billiard halls for the purposes of this section.

SOURCES: Codes, Hemingway's 1917, § 1067; Laws, 1930, § 1098; Laws, 1942, § 2331; Laws, 1910, ch. 166; Laws, 1918, ch. 150; Laws, 1968, ch. 354; Laws, 1972, ch. 353, § 1; Laws, 1977, ch. 316, eff from and after passage (approved February 23, 1977).

Cross References — Wagers generally, see §§ 97-33-1 et seq.
Slot machines, etc., see § 97-33-7.

ATTORNEY GENERAL OPINIONS

The fifteen-percent revenue requirement for prosecuting minors in pool or billiard halls is not a provable element of	the offense but an affirmative defense. Segars, March 20, 1998, A.G. Op. #98-0118.
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§§ 97-5-13 through 97-5-19. Repealed.

Repealed by Laws, 1979, ch. 475, § 4, eff from and after July 1, 1979.

§ 97-5-13. [Codes, 1942, § 2674-21; Laws, 1968, ch. 349, § 1]

§ 97-5-15. [Codes, 1942, § 2674-22; Laws, 1968, ch. 349, § 2, eff from and after passage (approved July 25, 1968)]

§ 97-5-17. [Codes, 1942, § 2674-23; Laws, 1968, ch. 349, § 3, eff from and after passage (approved July 25, 1968)]

§ 97-5-19. [Codes, 1942, § 2674-24; Laws, 1968, ch. 349, § 4, eff from and after passage (approved July 25, 1968)]

Editor's Note — Former § 97-5-13 was entitled: Sale or exhibition of obscene material to minors — definitions.

Former § 97-5-15 was entitled: Sale or exhibition of obscene material to minors — unlawful sales or loans.

Former § 97-5-17 was entitled: Sale or exhibition of obscene material to minors — unlawful exhibition or shows.

Former § 97-5-19 was entitled: Sale or exhibition of obscene material to minors — penalties.

§ 97-5-21. Repealed.

Repealed by Laws, 1998, ch. 549, § 7, eff from and after July 1, 1998.

[Codes, 1857, ch. 64, art. 59; 1871, § 2530; 1880, § 2754; 1892, § 1004; 1906, § 1081; Hemingway's 1917, § 808; 1930, § 828; 1942, § 2054; Laws, 1980, ch. 392; 1985, ch. 389, § 2]

Editor's Note — Former § 97-5-21 specified the crime of seduction of a child under the age of eighteen and provided penalties for such crime. See now, §§ 97-3-65, 97-3-95, 97-5-23 and 97-3-101.

For judicial decision notes under former § 97-5-21 relating to the seduction of persons under eighteen, see § 97-3-65.

§ 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court.

(2) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court. A person in a position of trust or authority over a child includes without limitation a child's teacher, counselor, physician, psychiatrist,

psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

(3) Upon a second conviction for an offense under this section, the person so convicted shall be punished by commitment to the State Department of Corrections for a term not to exceed twenty (20) years, however, upon conviction and sentencing, the offender shall serve at least one-half (½) of the sentence so imposed.

SOURCES: Codes, Hemingway's 1921 Supp. § 1142c; Laws, 1930, § 826; Laws, 1942, § 2052; Laws, 1920, ch. 215; Laws, 1958, ch. 276; Laws, 1980, ch. 387; Laws, 1985, ch. 389, § 1; Laws, 1993, ch. 512, § 4; Laws, 1995, ch. 487, § 1; Laws, 1998, ch. 549, § 5, eff from and after July 1, 1998.

Editor's Note — For judicial decision notes under former § 97-3-67 relating to rape and carnal knowledge of unmarried persons over fourteen and under eighteen years of age and under former § 97-5-21 relating to the seduction of persons under eighteen, see § 97-3-65.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Definition of "unlawful activity" pursuant to requirement of principal, teacher or other school employee to report unlawful activity, see § 37-11-29.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Conduct within meaning of this section as domestic abuse, see § 93-21-3.

Criminal sexual conduct committed against minor constituting abuse for purposes of §§ 93-21-101 through 93-21-113 on domestic violence shelters, see § 93-21-101.

Abduction of females, see § 97-3-1.

Statutory rape, see §§ 97-3-65 et seq.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Enticing children for prostitution or marriage, see § 97-5-5.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Time limitation on prosecution, see § 99-1-5.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 42 USCS §§ 13001 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Sentence.
5. Defense.
6. Ineffective assistance of counsel.
- 6.5. Lesser nonincluded offenses.

1. In general.

Denial of defendant's motion for post-conviction relief on grounds that his guilty plea was not knowing and intelligent was

proper as he was not prejudiced by his alleged lack of understanding of the proper sentencing range when he only received a 12-year sentence for each of three counts, to run concurrently, of touching a child for lustful purposes, when he could have received over 30 years. *Pope v. State*, 922 So. 2d 828 (Miss. Ct. App. 2006).

Trial court conducted a hearing outside the presence of the jury to determine

whether the eight-year-old fondling victim was competent to testify as a witness and the victim testified that she knew the difference between a lie and the truth and that telling a lie was wrong. She also stated that she knew why she was in court, knew that she would be questioned by attorneys, remembered most of what had occurred, and would be able to say she did not remember if asked a question about a matter in which she had no recollection; as a result, the trial judge properly found that the victim was a competent witness. *Barnes v. State*, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

In a child fondling case, the State's objection to defendant's proffered instruction which explained that the victim's knowledge of sexual matters was acquired from persons or experiences other than defendant, on the basis that it was a comment on the weight of the evidence, was properly upheld by the trial court; defendant's proffered instruction, which set forth, in part, his contention that he did not have access to the child so as to have committed the offense, was also properly rejected, as access was not an element of the offense nor was it a defense. *Barnes v. State*, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

Trial judge mistakenly determined the crime of molestation under Miss. Code Ann. § 97-5-23 to be a lesser-included offense of sexual battery, Miss. Code Ann. § 97-3-95; molestation was recognized as a separate offense from sexual battery, as defendants were frequently charged with both crimes simultaneously; to allow defendant to be convicted of a crime for which he was never charged would have created an injustice, as the legislature felt it necessary to construct two separate and distinct statutes regarding sexual battery and molestation. *Friley v. State*, 856 So. 2d 654 (Miss. Ct. App. 2003).

Evidence was sufficient to sustain defendant's conviction of fondling a child under the age of 16 when the victim testified that defendant had touched her "pee-pee," the victim was four years old at the time of the incident, and a physician testified that the child had an enlarged

hymen. *Voyles v. State*, 822 So. 2d 333 (Miss. Ct. App. 2002).

The court properly refused an instruction on simple assault as a lesser included offense because even if the jury found that defendant pinched the child victim between the legs, no evidence warranted finding defendant guilty of simple assault, which required an attempt to cause bodily injury. *Goodnite v. State*, 799 So. 2d 64 (Miss. 2001).

In order to support a conviction under this section, there must be some evidence to give rise to an inference that an undisputed act of touching was for the purpose of satisfying the defendant's depraved sexual desires. *Bradford v. State*, — So. 2d —, 1999 Miss. App. LEXIS 1777 (Miss. Ct. App. 1999).

The elements of fondling or unlawful touching are: (1) a handling or touching or rubbing with any part of the assailant's body or any member thereof, (2) of a child under the age of 14 years, (3) by a person above the age of 18 years, (4) for the purposes of gratifying the lust or indulging licentious sexual desires of the assailant. *Brady v. State*, 722 So. 2d 151 (Ct. App. 1998).

Fondling is not a lesser included offense of sexual battery. *Brady v. State*, 722 So. 2d 151 (Ct. App. 1998).

Prosecution for fondling under amendment to statute of limitations extending limitation period in effect at time of crime was not ex post facto violation; statute of limitations is procedural and does not come within recognized exception creating substantive right as fondling statute is separate from limitations period statute, defendant's acts were criminal at time of their commission, and defendant was not subjected to longer punishment by prosecution under lengthier limitations period. *Christmas v. State*, 700 So. 2d 262 (Miss. 1997), reh'g denied, 700 So. 2d 331 (Miss. 1997).

It is possible in some circumstances to commit forcible rape without committing child fondling, and thus child fondling under this section is not a necessarily included offense of forcible rape under § 97-3-65(2) as it read prior to amendment in 1985. *Hailey v. State*, 537 So. 2d 411 (Miss. 1988).

In absence of legislative standard for determining "crime of violence," a separate standard of determining violence applies when the victim is a child, and, thus, one of the 2 prior offenses of defendant, assault with attempt to commit sodomy, was a crime that was violent per se, and defendant was subject to sentencing as a habitual offender. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

Imposition of a life sentence in prison without parole or probation imposed upon defendant who was convicted of child fondling, and who had 2 prior convictions—one for assault with intent to commit sodomy and the other for indecency with a child—did not constitute cruel and unusual punishment. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

At trial of charge of child fondling, the court properly refused defendant's proposed jury instruction that testimony of child of tender years should be received with caution. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

Forty-six year old male who engages in wholly consensual sexual intercourse with 13 year old female may not be convicted under child seduction statute (former § 97-5-21) where child has previously been intimate with at least 2 other men; nor may he be convicted under this section on basis of foreplay leading to intercourse. *McBrayer v. State*, 467 So. 2d 647 (Miss. 1985).

The decision invalidating the fondling statute would be given prospective effect only. *Harrell v. State*, 386 So. 2d 390 (Miss. 1980).

Defendant was improperly convicted under this section since it is applicable only to males and therefore violates equal protection. *Carley v. State*, 382 So. 2d 1090 (Miss. 1980).

A conviction for fondling would be reversed since this section is unconstitutional. *Catchot v. State*, 374 So. 2d 807 (Miss. 1979).

The fondling statute is void since it discriminates against males and denies them equal protection of the law. *Tatro v. State*, 372 So. 2d 283 (Miss. 1979).

A conviction under this section [Code 1942, § 2052] was set aside where attorney retained by defendant withdrew on

the day of the trial and defendant, on being denied a continuance to the next term of court, was granted only a few minutes to find another attorney, and failed to do so. *Mabry v. State*, 245 Miss. 143, 149 So. 2d 25 (1963).

The phrase, "for the purpose of," was incorporated in this section [Code 1942, § 2052] in order to exclude from its coverage affectionate, lawful caresses of a child. *Kendall v. State*, 244 Miss. 618, 145 So. 2d 924 (1962).

Voluntary drunkenness is no defense to a prosecution under this section [Code 1942, § 2052], where not of a degree as to render accused unable to understand what he was doing. *Kendall v. State*, 244 Miss. 618, 145 So. 2d 924 (1962).

The offense of indecent assault upon a female child is a statutory and not a common-law crime. *Love v. State*, 211 Miss. 606, 52 So. 2d 470 (1951).

The age of accused is an affirmative fact which must be charged and proved by the state. *Love v. State*, 211 Miss. 606, 52 So. 2d 470 (1951).

In prosecution for violation of the person of a female child under thirteen years of age, question of prosecuting attorney, in examining witness, containing suggestion that defendant might have been guilty of previous offenses with other children held improper but not to require reversal, where court sustained objections to testimony. *Allen v. State*, 175 Miss. 745, 166 So. 922 (1936).

2. Indictment.

In defendant's prosecution for fondling a child victim, his argument that the indictment failed to properly advise him of the date of the offense because it alleged that the offense occurred over more than a two-year period, and deprived him of a fair opportunity to prepare defense, was rejected; the indictment was amended at the conclusion of the State's case to narrow, to a three-month window, the time period, and the child was very specific as to the dates of the offense. *Barnes v. State*, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

A trial court did not err in allowing the State to amend an indictment charging the defendant with touching a child for a lustful purpose under this section by

changing the dates on which the offenses occurred since the change was one of mere form rather than substance. *Baine v. State*, 604 So. 2d 258 (Miss. 1992).

An indictment which specified the principal charge against the defendant, a violation of this section, and went on to cite with specificity the other 2 previous convictions against him, without ever informing him that the state sought to sentence him as a habitual offender under § 99-19-83, was inadequate, but the inadequacy of the indictment did not require reversal where the defendant had notice of the habitual offender charge, because his attorney had gleaned from the indictment that defendant was charged under § 99-19-83. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

In a prosecution for fondling a child, the failure of the original indictment to specifically charge that the defendant was a male person was a formal defect which was properly cured by granting the state's motion to amend. *Peterson v. State*, 357 So. 2d 113 (Miss. 1978).

An indictment that charged the defendant with indecent assault on a female child under the age of thirteen years, was insufficient because of the failure to charge that the defendant was a male person above the age of eighteen years. *Love v. State*, 211 Miss. 606, 52 So. 2d 470 (1951).

3. Evidence.

Eleven-year-old victim testified that defendant propositioned her to play a deviant game of hide-and-seek and began touching her on the thigh; that conduct clearly constituted touching and handling a child for lustful purposes under the provisions of Miss. Code Ann. § 97-5-23. Also, the corroborated testimony of the victim provided a sound basis for the jury's determination of guilt; thus, the evidence was sufficient to convict defendant of touching and handling a child for lustful purposes. *Smith v. State*, 925 So. 2d 825 (Miss. 2006).

Where defendant appealed his conviction of three counts of fondling child victims, asserting that the testimony of the State's expert forensic interviewer should not have been allowed because the forensic interviewer could not cite evidence

that her methods had ever been independently tested, nor could she shed any light on the rate of error regarding her interviewing methods, and the expert's methods were unreliable, as there was no single accrediting or sanctioning body for the field of forensic interviewing, and the State properly countered that (1) the area of investigations of sexual abuse cases, especially through interviews, was a competent area of expertise, (2) the expert's testimony was based upon sufficient facts and data, as she testified in detail how she conducted her interview with the victim and what the victim told her; (3) the testimony was the product of reliable principles and methods, despite the general consensus within the field that there was no single "right way" to conduct an interview; and (4) the expert applied the principles and methods of her interviewing skills reliably to the facts of the case, the trial court did not abuse its discretion in admitting the expert testimony. *Mooneyham v. State*, 915 So. 2d 1102 (Miss. Ct. App. 2005).

Evidence was sufficient to have convicted defendant of touching a child for lustful purposes, where: (1) defendant was forty-six years old when the incident occurred; (2) the victim, who was twelve years old when the incident occurred, gave compelling testimony and other witnesses for the State testified that the mother screamed and yelled at defendant as he was lying on the floor next to the mattress where the victim slept that night; and (3) the jury chose to believe the testimony of the victim as to what happened and could have reasonably inferred that defendant's actions were prompted by the need to gratify his lust or indulge his depraved sexual desires. *Weathersby v. State*, 919 So. 2d 1146 (Miss. Ct. App. 2005).

Where defendant was convicted of touching a child for lustful purposes, the trial court did not abuse its discretion in denying his motion for a new trial because although there were two versions of what happened, it was the function of the jury to pass upon the credibility of the evidence, and the jury obviously found the State's version more credible; from the evidence presented at trial, reasonable jurors could have found beyond a reason-

able doubt that defendant was guilty of touching a child for lustful purposes. *Weathersby v. State*, 919 So. 2d 1146 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of two counts of touching a child for lustful purposes where, even though the minor victims' testimony slightly differed regarding the events of the sexual abuse, the word of the victim of a sex crime, even if unsupported, was sufficient to support a guilty verdict when that testimony had not been discredited or contradicted by credible evidence; based on the evidence presented, the jury decided which testimony to accept and which to reject and returned a reasonable verdict. *Bradley v. State*, 921 So. 2d 385 (Miss. Ct. App. 2005).

From the colloquies set forth in the record, the child psychologist did not offer a direct opinion that the child fondling victim was telling the truth. However, whether his testimony ran afoul of the prohibition against syndrome testimony was a closer question; while the psychologist did not specifically testify that the victim displayed the "so-called typical characteristics" of child-victims of sexual abuse, he came very close, but there was no reversible error because defendant never objected to the testimony on the basis that he urged on appeal. *Barnes v. State*, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

Court of appeals erred when it reversed defendant's conviction for molestation where molestation was a lesser included offense of sexual battery; defendant's actions were done with the purpose of gratifying his lust, and the victim was under the age of 14 at the time of the incident, and defendant's acts of grabbing the victim, touching her genital area, and touching himself, demonstrated that he was gratifying his lust, and intent could be inferred from a defendant's actions. *Friley v. State*, 879 So. 2d 1031 (Miss. 2004).

Defendant's conviction was affirmed; the 13-year-old victim's testimony that defendant massaged her nipple the entire time they were riding a three-wheeler together was sufficient to prove defendant touched for the purpose of satisfying his lustful desires. *Ladnier v. State*, 878 So. 2d 926 (Miss. 2004).

Jury's verdict that defendant was guilty of gratification of lust was not against the weight of the evidence, where the evidence showed that defendant surreptitiously entered the bedroom where children were sleeping, and touched the body of one of the girls; when he was observed, he ran from the room; and he later returned and grabbed the legs of the child, tried to pull her from the bed, then again ran from the room after being observed by others. *Jordan v. State*, 868 So. 2d 1065 (Miss. Ct. App. 2004).

Where nine-year-old victim testified that defendant kissed the victim on her lips, touched the victim's breasts, asked the victim if it felt good, and told her not to tell anyone, while defendant asserted the touching was not sexually motivated, credibility was a jury issue, the evidence was sufficient to sustain defendant's conviction for unlawful touching of a child for lustful purposes, and defendant's motion for a new trial was properly denied. *Smith v. State*, 867 So. 2d 276 (Miss. Ct. App. 2004).

Discrepancies in a child's prior statements regarding sexual abuse by defendant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making inquiry. *Sharp v. State*, 862 So. 2d 576 (Miss. Ct. App. 2004).

There certainly was evidence to support conviction of one count of touching a child for lustful purposes, a violation of former Miss. Code Ann. § 97-5-23(1), where, during the child's testimony, she stated that defendant had touched her all over her body with his hands. *Peters v. State*, 864 So. 2d 983 (Miss. Ct. App. 2004).

Each of the minor victims testified to being fondled by defendant and the testi-

mony of the minor victims was corroborated and given credence by defendant's statements to the police that defendant had homosexual tendencies and defendant's admissions to touching the genital area of each of the minor victims; thus, the evidence was sufficient to sustain defendant's convictions for fondling, and a new trial was not warranted. *Poe v. State*, 872 So. 2d 686 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Evidence was sufficient to convict defendant of touching of a child for lustful purposes where the unsupported word of the victim was sufficient to support a guilty verdict where the testimony was not discredited or contradicted by other credible evidence, especially if the conduct of the victim was consistent with the conduct of one who had been victimized by a sex crime; the victim's testimony was not discredited or contradicted. *Byars v. State*, 835 So. 2d 965 (Miss. Ct. App. — January 28, 2003).

Evidence was sufficient where the 10-year-old victim gave a statement to the police, alleging that defendant had committed sexual acts on her; the child was not presumed to be dishonest; and the McClain standard was not met and reversal was thus not required. *Parker v. State*, 825 So. 2d 59 (Miss. Ct. App. 2002).

Evidence was sufficient to establish that the defendant fondled a child where the victim, her sister, and a school counselor who the victim spoke to shortly after the incident all testified that the defendant approached the victim from behind while unclothed, rubbed her breasts with his hands, and rubbed his penis on her buttocks. *Peet v. State*, 811 So. 2d 380 (Miss. Ct. App. 2001).

Evidence was sufficient to support a conviction where (1) the defendant was over 18 years old and the victim was 14 years old at the time of the incident at issue, (2) the victim testified that she awakened to find the defendant on top of her and that he "put his private part inside of [her] and started moving around," and (3) a nurse testified that her physical examination of the victim revealed that there were no signs of sexual penetration, but that there were numerous signs of external contact that could be

related to sexual molestation. *Jones v. State*, 783 So. 2d 771 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction where the victim testified that the defendant fondled her breasts and genitalia and that she suffered from Huntington's disease, notwithstanding defendant's assertion that he merely tried to help her get up from where she had fallen on the floor; thus, the defendant was not entitled to judgment notwithstanding the verdict or a new trial. *Sherrod v. State*, 755 So. 2d 569 (Miss. Ct. App. 2000).

Evidence was insufficient to support a conviction under this section where (1) the only evidence of the defendant's activities consisted of testimony that, in a car crowded with children, he was engaged in a game involving contact of only the briefest duration consisting of a pinch that was followed by a laughing attempt to place the blame for the contact on one of the other children, (2) there was no evidence of any attempt to grope or rub either of the children in a sexually suggestive manner, and (3) there was no evidence that the defendant was unnaturally aroused or sexually excited by this seemingly prankish behavior. *Bradford v. State*, — So. 2d —, 1999 Miss. App. LEXIS 1777 (Miss. Ct. App. 1999).

In a prosecution for touching a child for a lustful purpose under this section, arising from the defendant's sexual molestation of a child who attended his wife's daycare center, evidence of other crimes concerning other children was admissible since the defendant's conduct toward other children at the daycare center was integrally related in time, place and fact to his conduct toward the victim. *Baine v. State*, 604 So. 2d 258 (Miss. 1992).

In a prosecution for child fondling, testimony that the defendant had exposed himself to children other than the victim was not admissible to show the defendant's custom of criminal action and lustful disposition toward children in general; evidence of other sexual relations is limited to those between the defendant and the particular victim to show the lustful, lascivious disposition of the defendant toward that victim. *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989).

In proving gratification of lust pursuant to this section, which prohibits a person over the age of 18 from having contact with a child under the age of 14 for lustful purposes, the state bears the burden of proving that the person so charged was above 18 years of age. *Crenshaw v. State*, 520 So. 2d 131 (Miss. 1988).

Defendant's intent to commit crime of gratification of lust can be determined from acts of accused and his conduct and inferences of guilt may be fairly deducible from all circumstances, where testimony showed that on numerous occasions over course of one to 2 years, defendant had rubbed vaginal area of 9-year-old female. *Shive v. State*, 507 So. 2d 898 (Miss. 1987).

At trial of child fondling charge, the age of the child-victim was properly proved by testimony of the victim and of her mother, while the defendant's age was in his admission to arresting officers. *Bandy v. State*, 495 So. 2d 486 (Miss. 1986).

There was ample evidence for the jury to find that defendant was guilty of the crime of fondling a child, given the admission of defendant's statement and the testimony of the prosecuting witness. *Harrell v. State*, 357 So. 2d 643 (Miss. 1978).

In a prosecution under this section [Code 1942, § 2052] testimony of the outraged female does not require corroboration. *Pittman v. State*, 236 Miss. 592, 111 So. 2d 415 (1959).

Evidence held sufficient to sustain conviction for violation of the person of a female child under 13 years of age. *Mad-dox v. State*, 230 Miss. 529, 93 So. 2d 649 (1957).

Evidence held sufficient to sustain conviction for violation of the person of a female child under thirteen years of age. *Allen v. State*, 175 Miss. 745, 166 So. 922 (1936).

4. Sentence.

Denial of defendant's motion for post-conviction relief on grounds that his guilty plea was not voluntary was proper as he was not prejudiced by his lack of understanding of the proper sentencing range; he only received a 12-year sentence for each of three counts, to run concurrently, of touching a child for lustful purposes, when he could have received over 30

years. *Pope v. State*, 922 So. 2d 828 (Miss. Ct. App. 2006).

Where defendant was sentenced to five years of incarceration, a 10 year suspended sentence, and five years post-release supervision, defendant's sentence was well within the statutory maximum of Miss. Code Ann. § 97-5-23 because a defendant's period of supervised release was not counted toward the defendant's time served. *Hobson v. State*, 910 So. 2d 1139 (Miss. Ct. App. 2005).

The retroactive application of an amendment to the statute pertaining to sentencing was an ex post facto violation where it resulted in a longer sentence than that allowed under the version of the statute that existed at the time of the crime. *McGowan v. State*, 742 So. 2d 1183 (Miss. Ct. App. 1999).

5. Defense.

The defense of mistake of age is not available to a person accused of fondling a child under the age of 14. *Todd v. State*, 806 So. 2d 1086 (Miss. 2001).

6. Ineffective assistance of counsel.

Where there was nothing in the record before the appellate court that would have permitted a meaningful analysis of what uncalled witnesses might have testified to or whether there might have been compelling reasons not to call them even if they were prepared to offer the testimony defendant in his brief contended they would, defendant's ineffective assistance of counsel claim could only be raised by means of a motion for postconviction relief. *Sharp v. State*, 862 So. 2d 576 (Miss. Ct. App. 2004).

6.5. Lesser nonincluded offenses.

Where defendant was indicted for sexual battery, it was not plain error for the trial court to convict defendant of the crime of touching and handling a child for lustful purposes; unlawful touching was not a lesser-included offense of sexual battery, however, unlike in *Friley v. State*; not only did defendant not object to the lesser offense instruction, defendant offered an instruction on the form of verdict that asked the jury to determine whether defendant was guilty of the lesser crime of touching and handling a child for lustful

purposes. *Dupuis v. State*, — So. 2d —, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Mistake or lack of information as to victim's age as defense to statutory rape. 46 A.L.R.5th 499.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

1985 Mississippi Supreme Court Review—Criminal Law. 55 Miss. L. J. 789, December, 1985.

Recent amendments to the Mississippi Rules of Evidence—the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

§ 97-5-24. Sexual involvement of school employee with student; duty to report.

If any person eighteen (18) years or older who is employed by any public or private school district in this state is accused of fondling or having any type of sexual involvement with any child under the age of eighteen (18) years who is enrolled in such school, the principal of such school and the superintendent of such school district shall timely notify the district attorney with jurisdiction where the school is located of such accusation, provided that such accusation is reported to the principal and to the school superintendent and that there is a reasonable basis to believe that such accusation is true.

SOURCES: Laws, 1994, ch. 595, § 11, eff from and after July 1, 1994.

Editor's Note — Laws, 1994, ch. 595, § 10, eff from and after July 1, 1994, provides as follows:

"SECTION 10. Unless otherwise prohibited or restricted by other laws or constitutional provisions of this state, the provisions of Section 97-5-24 shall apply to both public and private schools."

RESEARCH REFERENCES

Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

§ 97-5-25. Repealed.

Repealed by Laws, 1997, ch. 578, § 16, eff from and after February 1, 1998.

[Codes, 1892, § 1005; 1906, § 1082; Hemingway's 1917, § 809; 1930, § 829; 1942, § 2055; Laws, 1994, ch. 486, § 8]

Editor's Note — Former § 97-5-25 prohibited the sale or gift of tobacco to children. For provisions in effect after February 1, 1998, see Mississippi Juvenile Tobacco Access Prevention Act, §§ 97-32-1 et seq.

§ 97-5-27. Dissemination of sexually oriented material to persons under eighteen years of age; use of computer for purpose of luring or inducing persons under eighteen years of age to engage in sexual contact.

(1) Any person who intentionally and knowingly disseminates sexually oriented material to any person under eighteen (18) years of age shall be guilty of a misdemeanor and upon conviction shall be fined for each offense not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not more than one (1) year in the county jail, or be punished by both such fine and imprisonment. A person disseminates sexually oriented material within the meaning of this section if he:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide, any sexually oriented writing, picture, record or other representation or embodiment that is sexually oriented; or

(b) Presents or directs a sexually oriented play, dance or other performance or participates directly in that portion thereof which makes it sexually oriented; or

(c) Exhibits, presents, rents, sells, delivers or provides, or offers or agrees to exhibit, present, rent or to provide any sexually oriented still or motion picture, film, filmstrip or projection slide, or sound recording, sound tape or sound track or any matter or material of whatever form which is a representation, embodiment, performance or publication that is sexually oriented.

(2) For purposes of this section, any material is sexually oriented if the material contains representations or descriptions, actual or simulated, of masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

(3)(a) A person is guilty of computer luring when:

(i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and

(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual

intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.

(b) A person who engages in the conduct proscribed by this subsection (3) is presumed to do so with knowledge of the character and content of the material.

(c) In any prosecution for computer luring, it shall be a defense that:

(i) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(ii) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to the materials prohibited, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(iii) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(iv) The defendant has in good faith established a mechanism such that the labeling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

(d) In any prosecution for computer luring:

(i) No person shall be held to have violated this subsection (3) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software or other related capabilities that are incidental to providing such access or connection that do not include the creation of the content of the communication.

(ii) No employer shall be held liable for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency or the employer, having knowledge of such conduct, authorizes or ratifies such conduct, or recklessly disregards such conduct.

(iii) The limitations provided by this paragraph (d) shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate such provisions, or who knowingly advertises the availability of such communications, nor to a person who provides access or connection to a facility, system or network engaged in the violation of such provisions that is owned or controlled by such person.

(e) Computer luring is a felony, and any person convicted thereof shall be punished by commitment to the custody of the Department of Corrections for a term not to exceed three (3) years and by a fine not to exceed Ten Thousand Dollars (\$10,000.00).

SOURCES: Laws, 1979, ch. 475, § 1; Laws, 2002, ch. 319, § 1, eff from and after July 1, 2002.

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Effect of prior conviction for violation of this section on penalty for violation of § 97-29-101 or § 97-29-103, see § 97-29-109.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

Validity and application of statute exempting nonmanagerial nonfinancially in-

terested employees from obscenity prosecution. 35 A.L.R.4th 1237.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials. 13 A.L.R.5th 567.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity, § 30.

§ 97-5-29. Public display of sexually oriented materials.

(1) Any person who intentionally and knowingly places sexually oriented materials upon public display, or who knowingly and intentionally fails to take prompt action to remove such a display from property in his possession after learning of its existence shall be guilty of a misdemeanor and upon conviction shall be fined for each offense not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not more than one (1) year in the county jail, or be punished by both such fine and imprisonment.

(2) For purposes of this section any material is sexually oriented if the material consists of representations or descriptions of actual or simulated masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion.

(3) A person places sexually oriented material upon public display within the meaning of this section if he places the material on or in a billboard, viewing screen, theater stage or marquee, newsstand, display rack, window, showcase, display case or other similar place, including a viewing screen in a vehicle, so that sexually oriented material is easily visible from a public street,

public road or sidewalk or from areas of public businesses in which minors are normally business invitees.

SOURCES: Laws, 1979, ch. 475, § 2; Laws, 2005, ch. 491, § 4, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment substituted “other similar place, including a viewing screen in a vehicle” for “similar place” in (3).

Cross References — Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Effect of prior conviction for violation of this section on penalty for violation of § 97-29-101 or § 97-29-103, see § 97-29-109.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

Playing sexually oriented material on an electronic media device in an automobile where the viewing screen is easily visible to individuals on the public street,

road or sidewalk would be a violation of this section. Pepper, May 28, 2004, A.G. Op. 04-0234.

RESEARCH REFERENCES

ALR. Applicability of criminal statutes relating of offenses against children of a specified age with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Validity and application of statute exempting nonmanagerial nonfinancially in-

terested employees from obscenity prosecution. 35 A.L.R.4th 1237.

Musical sound recording as punishable obscenity. 30 A.L.R.5th 718.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

§ 97-5-31. Exploitation of children; definitions.

As used in Sections 97-5-33 through 97-5-37, the following words and phrases shall have the meanings given to them in this section:

(a) “Child” means any individual who has not attained the age of eighteen (18) years.

(b) “Sexually explicit conduct” means actual or simulated:

(i) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) Bestiality;

(iii) Masturbation;

(iv) Sadistic or masochistic abuse;

(v) Lascivious exhibition of the genitals or pubic area of any person;

or

(vi) Fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.

(c) “Producing” means producing, directing, manufacturing, issuing, publishing or advertising.

(d) "Visual depiction" includes without limitation developed or undeveloped film and video tape or other visual unaltered reproductions by computer.

(e) "Computer" has the meaning given in Title 18, United States Code, Section 1030.

(f) "Simulated" means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.

SOURCES: Laws, 1979, ch. 479, § 1; Laws, 1995, ch. 484, § 1; Laws, 2003, ch. 562, § 1, eff from and after July 1, 2003.

Cross References — Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Crime of cyberstalking, see § 97-45-15.

RESEARCH REFERENCES

<p>ALR. Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.</p> <p>Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.</p>	<p>preme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.</p>
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§ 97-5-33. Exploitation of children; prohibitions.

(1) No person shall, by any means including computer, cause, solicit or knowingly permit any child to engage in sexually explicit conduct or in the simulation of sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(2) No person shall, by any means including computer, photograph, film, video tape or otherwise depict or record a child engaging in sexually explicit conduct or in the simulation of sexually explicit conduct.

(3) No person shall, by any means including computer, knowingly send, transport, transmit, ship, mail or receive any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(4) No person shall, by any means including computer, receive with intent to distribute, distribute for sale, sell or attempt to sell in any manner any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(5) No person shall, by any means including computer, possess any photograph, drawing, sketch, film, video tape or other visual depiction of an actual child engaging in sexually explicit conduct.

(6) No person shall, by any means including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce, or order a child to meet with the defendant or any other person for the purpose of engaging in sexually explicit conduct.

(7) No person shall by any means, including computer, knowingly entice, induce, persuade, seduce, solicit, advise, coerce or order a child to produce any visual depiction of adult sexual conduct or any sexually explicit conduct.

(8) The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section shall not constitute a defense to a prosecution under this section.

(9) For purposes of determining jurisdiction, the offense is committed in this state if all or part of the conduct described in this section occurs in the State of Mississippi or if the transmission that constitutes the offense either originates in this state or is received in this state.

SOURCES: Laws, 1979, ch. 479, § 2; Laws, 1988, ch. 558; Laws, 1995, ch. 484, § 2; Laws, 2003, ch. 562, § 2; Laws, 2005, ch. 467, § 1; Laws, 2005, ch. 491, § 1, eff from and after July 1, 2005.

Joint Legislative Committee Note — Section 1 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 1 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The first 2005 amendment (ch. 467) inserted (7); and renumbered former (7) and (8) as present (8) and (9).

The second 2005 amendment (ch. 491) inserted (7); and renumbered former (7) and (8) as present (8) and (9).

Cross References — Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

Time limitation on prosecution, see § 99-1-5.

JUDICIAL DECISIONS

1. In general.
2. Testimony.
3. Closing arguments.
4. Cross examination.
5. Evidence.
6. Jury Instructions.

1. In general.

No plain error existed as to defendant's arguments concerning jury instructions where the jury was instructed on all of the essential elements of the crime of child exploitation by three jury instructions tracking the language of Miss. Code Ann.

§ 97-5-33(2); although one instruction was erroneously given, no injustice occurred as the jury instructions, when read as a whole, fairly announced the law of the case and did not create an injustice. *Blackwell v. State*, 915 So. 2d 453 (Miss. Ct. App. 2005).

Producers of child pornography may be convicted under Federal Protection of Children Against Sexual Exploitation Act of 1977, which prohibits interstate transportation, shipment, distribution, receipt, or reproduction of visual depictions of minors engaged in sexually explicit conduct,

without proof that producers had actual knowledge of fact that performer was a minor. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), on remand, 77 F.3d 491 (9th Cir. 1996).

State was permitted under First Amendment to ban possession and viewing of child pornography because state did not rely on paternalistic interest in regulating person's mind but sought to serve compelling state interest in protecting victims of child pornography, and it was reasonable for state to conclude that such proscriptions were necessary to decrease production of child pornography; statute as construed by state Supreme Court to include elements of scienter and lewd exhibition was not constitutionally overboard, and state Supreme Court properly applied its narrowed construction of statute to accused's conduct; but it was necessary to remand case for new trial to insure that conviction stemmed from finding that prosecution had proved each of elements of offense. *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), reh'g denied, 496 U.S. 913, 110 S. Ct. 2605, 110 L. Ed. 2d 285 (1990), on remand, 52 Ohio St. 3d 705, 557 N.E.2d 1210 (1990).

2. Testimony.

Defendant's argument that since the victim was the actual procurer of the obscene photographs, his conviction under Miss. Code Ann. § 97-5-33(2) was improper, and was procedurally barred, Miss. R. App. P. 28(a)(6), because defendant's only source of authority was an opinion supporting nothing other than the assertion that he was convicted under an anti-pornography law. *Minor v. State*, 904 So. 2d 1164 (Miss. Ct. App. 2004).

3. Closing arguments.

Where one of defendant's primary defenses was the possibility that someone else had placed the pornographic images on his computer, trial court did not err in denying a mistrial because of comments made by the prosecutor concerning the failure of the defense to call a witness; there was overwhelming evidence, including testimony by a number of witnesses and the actual presence of pornographic

images on defendant's computer. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

4. Cross examination.

Where the purported purpose of the prosecution's question to defendant's father was to impeach the credibility of the witness using a prior inconsistent statement made by defendant, the circuit court sustained the objection but denied a mistrial because it determined that the statements would not affect the ultimate issue of the case and could be removed from the minds of the jury by a verbal instruction to disregard. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

5. Evidence.

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

6. Jury Instructions.

Circuit had not erred in not giving defendant's proposed instructions that dealt with instructing the jury on circumstantial evidence because the child rape victim's statements about being shown pornography were introduced through the

testimony of doctors who examined her and the child was, of course, an eyewitness to the pornography, and that direct

evidence alone allowed the jury to be given direct evidence instructions only. *Foley v. State*, 914 So. 2d 677 (Miss. 2005).

ATTORNEY GENERAL OPINIONS

Defendant charged with exploitation of children under subsection (2) of this section is not eligible for non-adjudication

under § 99-15-26. *Terry*, Sept. 5, 2003, A.G. Op. 03-0450.

RESEARCH REFERENCES

ALR. Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child. 42 A.L.R.5th 291.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 27 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S. Obscenity § 6.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 97-5-35. Exploitation of children; penalties.

Any person who violates any provision of Section 97-5-33 shall be guilty of a felony and upon conviction shall be fined not less than Fifty Thousand Dollars (\$50,000.00) nor more than Five Hundred Thousand Dollars (\$500,000.00) and shall be imprisoned for not less than five (5) years nor more than forty (40) years. Any person convicted of a second or subsequent violation of Section 97-5-33 shall be fined not less than One Hundred Thousand Dollars (\$100,000.00) nor more than One Million Dollars (\$1,000,000.00) and shall be confined in the custody of the Department of Corrections for life or such lesser term as the court may determine, but not less than twenty (20) years.

SOURCES: Laws, 1979, ch. 479, § 3; Laws, 1995, ch. 484, § 3; Laws, 2003, ch. 562, § 3; Laws, 2005, ch. 467, § 2; Laws, 2005, ch. 491, § 2, eff from and after July 1, 2005.

Joint Legislative Committee Note — Section 2 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 2 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The first 2005 amendment (ch. 467) rewrote the section to revise the penalties for exploitation of children.

The second 2005 amendment (ch. 491) rewrote the section to revise the penalties for exploitation of children.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 42 USCS 13001 et seq.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 27 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S. Obscenity § 6.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

§ 97-5-37. Exploitation of children; other remedies.

The provisions of Sections 97-5-31 through 97-5-37 are supplemental to any statute relating to child abuse or neglect, obscenity, enticement of children or contributing to delinquency of a minor and acquittal or conviction pursuant to any other statute shall not be a bar to prosecution under Sections 97-5-31 through 97-5-37. Acquittal or conviction under Sections 97-5-31 through 97-5-37 shall not be a bar to prosecution and conviction under other statutes defining crimes or misdemeanors, nor to any civil or administrative remedy otherwise available.

SOURCES: Laws, 1979, ch. 479, § 4, eff from and after July 1, 1979.

Cross References — Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 27 et seq.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S. Obscenity § 6.

§ 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.

(1)(a) Except as otherwise provided in this section, any parent, guardian or other person who willfully commits any act or omits the performance of any duty, which act or omission contributes to or tends to contribute to the

neglect or delinquency of any child or which act or omission results in the abuse of any child, as defined in Section 43-21-105(m) of the Youth Court Law, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency or institution to which the child shall have been committed by the youth court shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment not to exceed one (1) year in jail, or by both such fine and imprisonment.

(b) If the child's deprivation of necessary food, clothing, shelter, health care or supervision appropriate to the child's age results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment for not more than five (5) years or to payment of a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(c) A parent, legal guardian or other person who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(2)(a) Any person who shall intentionally (i) burn any child, (ii) torture any child or, (iii) except in self-defense or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse of a child and, upon conviction, shall be sentenced to imprisonment in the custody of the Department of Corrections for life or such lesser term of imprisonment as the court may determine, but not less than ten (10) years. For any second or subsequent conviction under this subsection, the person shall be sentenced to imprisonment for life.

(b)(i) A parent, legal guardian or caretaker who endangers a child's person or health by knowingly causing or permitting the child to be present where any person is selling, manufacturing or possessing immediate precursors or chemical substances with intent to manufacture, sell or possess a controlled substance as prohibited under Section 41-29-139 or 41-29-313, is guilty of child endangerment and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(ii) If the endangerment results in substantial harm to the child's physical, mental or emotional health, the person may be sentenced to imprisonment for not more than twenty (20) years or to payment of a fine of not more than Twenty Thousand Dollars (\$20,000.00), or both.

(3) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

(4) After consultation with the Department of Human Services, a regional mental health center or an appropriate professional person, a judge may suspend imposition or execution of a sentence provided in subsections (1) and (2) of this section and in lieu thereof require treatment over a specified period of time at any approved public or private treatment facility. A person may be eligible for treatment in lieu of criminal penalties no more than one (1) time.

(5) In any proceeding resulting from a report made pursuant to Section 43-21-353 of the Youth Court Law, the testimony of the physician making the report regarding the child's injuries or condition or cause thereof shall not be excluded on the ground that the physician's testimony violates the physician-patient privilege or similar privilege or rule against disclosure. The physician's report shall not be considered as evidence unless introduced as an exhibit to his testimony.

(6) Any criminal prosecution arising from a violation of this section shall be tried in the circuit, county, justice or municipal court having jurisdiction; provided, however, that nothing herein shall abridge or dilute the contempt powers of the youth court.

SOURCES: Laws, 1979, ch. 506, § 75; Laws, 1980, ch. 550, § 28; Laws, 1986, ch. 383; Laws, 1989, ch. 566, § 3; Laws, 2005, ch. 467, § 3; Laws, 2005, ch. 491, § 3, eff from and after July 1, 2005.

Joint Legislative Committee Note — Section 3 of ch. 467 Laws, 2005, effective July 1, 2005 (approved March 29, 2005), amended this section. Section 3 of ch. 491, Laws, 2005, effective July 1, 2005 (approved April 19, 2005), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 491, Laws, 2005, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Editor's Note — Laws, 1979, ch. 506, §§ 76, 77 and 79, effective from and after July 1, 1979, provide as follows:

"SECTION 76. Codification. The attorney general of the State of Mississippi is hereby directed to contact those persons responsible for the codification of laws into the Mississippi code of 1972, and the assigning of code section numbers thereto in order to ensure that section 75 of this act is included with Chapter 5, Title 97, Mississippi Code of 1972. Further, it is the intent of the legislature that sections 1 through 69 and sections 71 through 74 be codified as Chapter 21, Title 43, Mississippi Code of 1972.

"SECTION 77. Article numbers and headings; section headings. The article numbers and headings and the section headings appearing in this act are for reference purposes and are not a part of this act."

"SECTION 79. This act shall apply only to offenses committed after the effective date of this act."

Section 43-1-1 provides that the term "State Department of Public Welfare" shall mean the Department of Human Services.

Amendment Notes — The first 2005 amendment (ch. 467) rewrote the section to revise the penalties for felonious abuse or battery of a child.

The second 2005 amendment (ch. 491) rewrote the section to revise the penalties for felonious abuse or battery of a child.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Applicability of this section for the failure of a parent, guardian or custodian of a compulsory-school age child to comply with the Mississippi Compulsory School Attendance Law, see § 37-13-91.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Proceedings for protection from domestic abuse, see §§ 93-21-1 et seq.

Death caused by one in violation of this section, see § 97-3-19.

Penalties for condoning child abuse, see § 97-5-40.

Carnal knowledge of step or adopted child or child of cohabitating partner, see § 97-5-41.

Time limitation on prosecution, see § 99-1-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Consideration of violation of this section in proceeding to impose death penalty, see § 99-19-101.

Federal Aspects — Victims of Child Abuse Act of 1990, P. L. 101-647 §§ 201 et seq., 42 USCS §§ 13001 et seq.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Indictment.
3. Lesser included offenses.
4. Evidence.
5. Serious bodily harm.
6. Sentence and punishment.
7. Jury instructions.
- 8.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.
12. Jurisdiction.
13. What constitutes offense.
14. Instructions.
15. Sentence and punishment.

I. UNDER CURRENT LAW.

1. In general.

Parent's acts of omission, including allowing a two-year-old child to become dehydrated and malnourished, was adequate to constitute felony child abuse. *Buffington v. State*, 824 So. 2d 576 (Miss. 2002).

Miss. Code Ann. § 97-5-39(2) does not require that the abuse be dispensed over a period of time before a charge for felonious abuse will arise; the intentional act of murdering a child by any manner or form constitutes felonious child abuse and, therefore, constitutes capital murder under Miss. Code Ann. § 97-3-19(2); the murder of a child constitutes serious child

abuse, and the murder may be elevated to capital murder. *Stevens v. State*, 806 So. 2d 1031 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195 (2003).

"Serious bodily harm," as it pertains to this section, means bodily injury that creates a substantial risk of death, or permanent or temporary disfigurement, or impairment of any bodily organ or function. *Wolfe v. State*, 743 So. 2d 380 (Miss. 1999).

There was sufficient evidence that defendant committed underlying offense of felonious abuse or battery of child victim to support his capital murder conviction, where evidence suggested that defendant had gone to victim's house to have sex with victim, victim's nude body was discovered in house with her bra pulled behind her head, and victim had multiple wounds on body in addition to fatal chop wound to her head. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

One act alone may constitute felonious abuse and/or battery of child; statute does not require that abuse be dispensed over period of time before charge for felonious abuse will arise. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

During penalty phase of capital murder prosecution involving murder of child victim while engaging in felonious abuse and/or battery, it was proper to instruct jury that it could consider as aggravating factor that murder had occurred during commission of crime of felonious abuse and/or battery of child. *Brown v. State*, 690 So. 2d 276 (Miss. 1996), reh'g denied, 691 So. 2d 1027 (Miss. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

Elements necessary to prove felonious child abuse are whether defendant did: (1) willfully (2) cause (3) serious bodily harm (4) to child. *Yates v. State*, 685 So. 2d 715 (Miss. 1996).

Welfare worker exceeded scope of her knowledge and expertise, in prosecution for manslaughter of 11-month-old child, by testifying as lay witness that she was certain the child was given cocaine overdose, which was one cause of child's death, from an adult and through a vaporizer; welfare worker was not proffered as expert on methods of cocaine ingestion, and she had no personal knowledge of how cocaine got into child's bloodstream. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Jury could have reasonably found, in prosecution for manslaughter of 11-month-old child, that defendants were culpably negligent in failing to obtain prompt medical attention and in failing to supervise their child with result that child ingested cocaine, regardless of how child ingested cocaine; it was the presence of cocaine in an 11-month-old child and not necessarily the way in which it got there that evidenced culpable negligence. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

It was not harmless error, in prosecution for manslaughter of 11-month old child, to admit welfare worker's testimony that she was certain about method by which child ingested cocaine which caused death by overdose, even though such testimony was not necessary to establish culpable negligence; given welfare worker's certainty and her official capacity, her testimony likely was instrumental in the jury's decision. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

Defendants were not harmed, in prosecution for manslaughter of their 11-

month-old child, by admission of police officer's testimony that he had asked one defendant whether cocaine had been used to quiet the child, where officer qualified the statement by testifying that defendant had denied using cocaine in that way or in any other way. *Jones v. State*, 678 So. 2d 707 (Miss. 1996).

The crime of misdemeanor child neglect is not encompassed within the definition of the more serious crime of felonious child abuse. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

The evidence was sufficient to support a conviction of felonious child abuse under this section where there was evidence that the defendant's beating of his 9-year-old son had left scars on the child's back, and no evidence or testimony was introduced at trial by the defendant. *Ahmad v. State*, 603 So. 2d 843 (Miss. 1992).

This section does not require a showing of "continuing" abuse toward the child. *Ahmad v. State*, 603 So. 2d 843 (Miss. 1992).

In a prosecution for felonious child abuse arising from the defendant's beating of his 9-year-old son, the defendant's constitutional right to confront his accuser was not violated, in spite of the defendant's argument that his accuser was his wife and that he was not allowed to "confront" her, where the defendant's wife was not a witness at the trial, the defendant was allowed to fully cross-examine all State witnesses against him, and the record did not indicate that the defendant's wife ever accused him of felonious child abuse. *Ahmad v. State*, 603 So. 2d 843 (Miss. 1992).

There is no requirement that a pattern of child abuse be established before a defendant can be said to have committed felony child abuse. *Monk v. State*, 532 So. 2d 592 (Miss. 1988).

Defendant's act of throwing child to pavement which resulted in skull fractures and broken bones clearly was intended to be classified as felonious abuse of child; statute does not require that abuse be dispensed over period of time before charge for felonious abuse will arise. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988),

reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Intent of legislature was that serious child abusers would be guilty of capital murder if child died. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Statute was not vague at time of defendant's trial, although legislature subsequently amended statute to insert word "or", at which point defendant contended statute could previously have been read to mean "and", because to allow defendant's construction to stand would advocate pummeling and mutilation of children as long as neither torture nor burning was involved. *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988), reh'g denied, 487 U.S. 1263, 109 S. Ct. 25, 101 L. Ed. 2d 976 (1988), post-conviction relief denied, 557 So. 2d 771 (Miss. 1990).

Indictment charging attempted child abuse may be amended to reflect code section under which defendant is charged and need not use precise words of statute. *Watson v. State*, 483 So. 2d 1326 (Miss. 1986).

Photographs of injuries of child are admissible, in prosecution of parent for attempted child abuse, on issue of whether fall resulting in injuries was accidental or result of parent's deliberate act. *Watson v. State*, 483 So. 2d 1326 (Miss. 1986).

2. Indictment.

The court erred by allowing the case to go to the jury on the element of torture, which was not mentioned in the indictment, after finding that there was insufficient evidence to support the element of serious bodily harm, which was mentioned in the indictment. *Wolfe v. State*, 743 So. 2d 380 (Miss. 1999).

3. Lesser included offenses.

The misdemeanor offense of contributing to neglect of a child in violation of Miss. Code Ann. § 97-5-39(1) was not a lesser included offense of felony child abuse in violation of Miss. Code Ann.

§ 97-5-39(2), but was a lesser non-included offense as the same facts would have supported both charges; defendant charged with only the felony offense waived any objection based on the giving of the misdemeanor instruction as defendant not only failed to object to the giving of the instruction but had requested it be given. *Moore v. State*, 799 So. 2d 89 (Miss. 2001).

Trial court's failure to give any manslaughter instructions in prosecution for capital murder during course of felonious child abuse was reversible error; jury was given no choice other than convicting defendant's of capital murder or acquitting him and, at the time, statutes were indistinguishable. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

State Supreme Court's *Butler* decision, under which defendant was entitled to manslaughter instructions in prosecution for capital murder during course of felonious child abuse, applied retroactively, even though it had been reversed on appeal on other grounds; rule was not specifically designated as "purely prospective" in nature, and failure to give manslaughter instruction was overwhelmingly prejudicial where jury ultimately found that defendant had caused child's death, but not that he either attempted to kill child or intended death. (Per Pittman, J., with two Justices concurring, two Justices concurring in the result only, and one Justice concurring in part.) *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

Defendant charged with felonious child abuse was entitled to instruction on lesser-included offense of misdemeanor child abuse where evidence adduced at trial was such that jury could have found that defendant inflicted nonaccidental physical injury on victim rather than serious bodily harm; evidence indicated that victim, who was two-year-old child of defendant's live-in girlfriend, had superficial bruises and contusions on buttocks and right thigh and that defendant admitted spanking victim with belt on buttocks but denied bruising victim's thigh. *Yates v. State*, 685 So. 2d 715 (Miss. 1996).

Evidence did not establish that defendant, who admittedly spanked his live-in girlfriend's two-year-old child three times with belt, inflicted serious bodily harm, rather than nonaccidental physical injury, and thus, evidence was such that reasonable jury could find defendant not guilty of child abuse but guilty of misdemeanor child abuse; evidence included examining physician's testimony that child's bruises were superficial and did not require medical treatment. *Yates v. State*, 685 So. 2d 715 (Miss. 1996).

Trial court's failure, in prosecution of defendant for felonious child abuse against his live-in girlfriend's two-year-old child, to give instruction on lesser-included offense of misdemeanor child abuse, though error because evidence adduced at trial was such that reasonable jury could have found defendant guilty of misdemeanor child abuse but not guilty of felonious child abuse, did not require new trial, but only required remand for resentencing, where Supreme Court found that the evidence sufficiently established defendant's guilt of misdemeanor child abuse, thus obviating need for child, his family, defendant, or state to be required to endure additional expense and draining of emotions of another trial. *Yates v. State*, 685 So. 2d 715 (Miss. 1996).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser-included offense of misdemeanor child abuse, since no reasonable juror could find that broken glass slivers in an infant's food does not constitute a means likely to cause "serious" bodily injury. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

In a prosecution for felony child abuse arising from an infant's ingestion of glass slivers in her food, the evidence was insufficient to support an instruction on the lesser-included offense of simple assault, since no reasonable juror could find that the glass slivers were not used in "such a manner as to cause serious bodily harm," and there was no evidence from which a juror could conclude that the infant accidentally ingested the glass. *Payton v. State*, 642 So. 2d 1328 (Miss. 1994).

4. Evidence.

Where the evidence showed that defendant was in charge of two minor children when one suffered a head injury that was determined by a treating physician to be intentional, there was sufficient evidence to support a conviction for felony child abuse. *Wells v. State*, 913 So. 2d 1053 (Miss. Ct. App. 2005).

Where defendant was convicted of felony child abuse, the trial court did not err in denying her motions for JNOV and a new trial because there was ample undisputed evidence that defendant had intentionally burned the child; the child testified that defendant had forced him to take a bath in scalding hot water and he had permanent, visible scars and, while defendant and her sister testified to a different version of events, the conflict between the two versions was a question of fact for the jury. The jury credited the child's version and the child's testimony alone provided sufficient evidence with which a rational juror could have found that the State had proved the elements of felonious child abuse. *Horton v. State*, 919 So. 2d 44 (Miss. 2005).

Sufficient evidence supported mother's and stepfather's convictions for felonious child abuse under Miss. Code Ann. § 97-5-39(2), where they failed to provide adequate medical treatment to child after witnessing numerous falls and failed to offer adequate explanation for the child's multiple fractures and burns, which had occurred in separate incidents. The parents' failure to provide adequate medical treatment to the child after they witnessed or knew of numerous falls that were severe enough to result in multiple fractures could be interpreted as intentional. *Scarborough v. State*, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004).

Mother and stepfather's failure to provide adequate medical treatment to their child after they witnessed or knew of numerous falls that were severe enough to result in multiple fractures could be interpreted as sufficient intentional conduct to support their conviction for felonious child abuse under Miss. Code Ann. § 97-5-39(2) because Miss. Code Ann. § 97-5-39(1) of the child abuse statute clearly included

acts of omission that result in the abuse and/or battering of any child as misdemeanor crimes, but it did not contain language that designated all acts of omission to be misdemeanor offenses. Miss. Code Ann. § 97-5-39(2) pertaining to felonious child abuse included a catch-all, "or otherwise abuse," which has been interpreted by the Mississippi Supreme Court to be a clear indicator that the list provided was not exhaustive. *Scarborough v. State*, 2004 Miss. App. LEXIS 910 (Miss. Ct. App. Sept. 14, 2004).

Defendant's capital murder convictions and death sentence were proper where the killings occurred within a few hours and were all part of the common scheme to rob his ex-father-in-law and eliminate any witnesses, Miss. Code Ann. § 97-3-19(2)(f); further, shooting his child fit the description of felony child abuse in that it was a strike to the child in such a manner as to cause serious bodily harm, Miss. Code Ann. § 97-5-39. *Brawner v. State*, 872 So. 2d 1 (Miss. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), none of the issues raised by defendant father rose to the level of reversible error either standing alone or when considered together as the evidence supported the finding that defendant father was the ringleader of the abominable enterprise and he failed to demonstrate any procedural or substantive errors that warranted reversal; thus, defendant father's convictions and sentences were affirmed. *King v. State*, 857 So. 2d 702 (Miss. 2003).

Evidence was sufficient to support a conviction for felonious child abuse because (1) there was no question that the child sustained serious bodily harm or that the blow that caused the injury was intentional because the medical testimony clearly established that the child was not old enough to self-inflict his injuries and could not have sustained his injuries accidentally, and (2) although both the defendant and the child's mother were alone

with the child during the time that the child sustained his injuries, it was shown that the defendant lied about various events and the jury determined that he inflicted the injuries. *Wheat v. State*, 758 So. 2d 1072 (Miss. Ct. App. 2000).

5. Serious bodily harm.

Evidence supported the convictions of defendants, husband and wife, for third-degree felonious child abuse under Miss. Code Ann. § 97-5-39 because defendants' failure to provide adequate medical treatment for their child after they witnessed his falls, which were severe enough to result in multiple fractures, could be interpreted as intentional. *Scarborough v. State*, 893 So. 2d 265 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

"Serious bodily harm," as it pertains to Miss. Code Ann. § 97-5-39(2), is any physical injury that amounts to child maltreatment such as death, or permanent or temporary disfigurement, or impairment of any function of any bodily organ or function. *Buffington v. State*, 824 So. 2d 576 (Miss. 2002).

6. Sentence and punishment.

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, Miss. Code Ann. §§ 97-1-1 and 97-3-95(1)(d), sexual battery, Miss. Code Ann. § 97-3-95(1)(d), and contributing to the delinquency of a minor, Miss. Code Ann. § 97-5-39(1), defendant father was sentenced to five years and a \$ 5,000 fine on the conspiracy count; 30 years and a \$ 10,000 fine on the sexual battery count; and one year and a \$ 1,000 fine on the contributing to the delinquency of a minor charge and the trial court ordered that the prison time be served consecutively; however, nothing in the record or presented by defendant father warranted reversal or reduction of his sentence because his sentence was within the statutory limits and it was a just punishment for the despicable crimes for which he was found guilty by a fair and impartial jury. *King v. State*, 857 So. 2d 702 (Miss. 2003).

7. Jury instructions.

Jury instruction on the elements of felonious child abuse was neither vague nor

insufficient as it accurately tracked the language of the felonious child abuse statute, Miss. Code Ann. 97-5-39. *Rubenstein v. State*, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005).

8.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. In general.

In a prosecution for child abuse [Code 1972, § 43-21-27(b)[Repealed] allegedly caused by the infant's parents, the trial court did not err in allowing testimony which showed that the child had sustained fractures of its arms and legs, including X-rays of the injuries which showed varying degrees of healing indicating that the injuries had been inflicted at different times where such evidence strongly supported an ongoing, continuing and purposeful course of criminal abuse of the child and tended to negate the theory that the injuries had been the result of a fall or other isolated accident. The evidence, although circumstantial, supported the conviction where there was no fact or circumstance in evidence tending in any way to support any other reasonable explanation of these injuries except that they had been inflicted by the parents and where no other person was shown to have had custody or care of the infant save its parents. *Aldridge v. State*, 398 So. 2d 1308 (Miss. 1981).

A father is primarily required by law to support and maintain his children. *King v. King*, 191 So. 2d 409 (Miss. 1966).

Failure of the title of the Youth Act to mention the offense of contributing to the neglect of a minor child defined in one of its provisions does not invalidate such provision. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245 (1961).

The definition of neglected child in Code 1942, § 7185-02(h), is in pari materia with this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245 (1961).

12. Jurisdiction.

Jurisdiction of the offense created by this section [Code 1942, § 7185-13] is in the regular criminal courts and not the Youth Court. *Harris v. State*, 241 Miss. 46, 129 So. 2d 372 (1961).

The Youth Court does not supersede the regular criminal courts in prosecutions under this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245 (1961).

13. What constitutes offense.

This section [Code 1942, § 7185-13] applies to any person who "willfully" commits any act which contributes to, or tends to contribute to, the delinquency of a child, or who "knowingly" aids any child in being a delinquent as defined in Code 1942, § 7185-02. *Guyot v. State*, 252 Miss. 509, 175 So. 2d 184 (1965).

A mother who entrusted her 7-months-old daughter to a nursery without informing it of the child's need for regular daily medication for a weak heart may be convicted under this section [Code 1942, § 7185-13]. *Matthews v. State*, 240 Miss. 189, 126 So. 2d 245 (1961).

Where defendant was convicted in justice court under an affidavit charging him with attributing to delinquency of his minor son by permitting and using the son to aid in loading and distributing intoxicating liquors, and defendant appealed to Circuit Court, amendment of affidavit charging defendant contributing to delinquency of son also by knowingly and intentionally permitting son to be present while defendant was loading intoxicating liquors was allowed, since the essential charge was the same in the affidavit and the amendment. *Mays v. State*, 216 Miss. 631, 63 So. 2d 110 (1953).

Under this statute, employment of minor under age of 18 years to commit or aid in commission of misdemeanor constitutes contributing to his delinquency. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

In prosecution under this section for contributing to delinquency of minor under 18 years of age, where gravamen of offense is employment of minor to sell whiskey for and at place of appellant, and minor was actually paid by appellant, it is immaterial that minor was working at the place of another who furnished money for his salary. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

14. Instructions.

A defendant was entitled to have the jury instructed according to subsection (2)

of this section, as it read at the time of the commission of the offense prior to the 1989 amendment. *Butler v. State*, 608 So. 2d 314 (Miss. 1992).

Instruction in prosecution for contributing to delinquency of minor under age of 18 years which does not follow exact language of indictment but follows statute and defines offense is sufficient. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

15. Sentence and punishment.

In prosecution for contributing to delin-

quency of minor under 18 years of age, failure to quash jury panel is not error when trial judge in sentencing defendant in case immediately preceding trial of defendant, involving similar circumstances, stated as reason for imposing fine and jail sentence that he was interested in protection of boys and girls, though statement was in presence of prospective jurors, since degree of punishment is matter with which trial jury has no concern. *Broadstreet v. State*, 208 Miss. 789, 45 So. 2d 590 (1950).

ATTORNEY GENERAL OPINIONS

Under subsection (3) of this section a municipality may enact a "parental responsibility" ordinance with appropriate criminal penalties without conflicting with state law. Of course, the ordinance must be reasonable in scope and must pass constitutional scrutiny. *Patten*, January 10, 1996, A.G. Op. #95-0822.

A person can be charged with the failure to utilize a child restraint device or seat belt and child abuse without violating the double jeopardy clause. *Bishop*, Feb. 16, 2001, A.G. Op. #2001-0733.

RESEARCH REFERENCES

ALR. Parents' liability for injury or damage intentionally inflicted by minor child. 54 A.L.R.3d 974.

Sexual child abuser's civil liability to child's parent. 54 A.L.R.4th 93.

Parent's right to recover for loss of consortium in connection with injury to child. 54 A.L.R.4th 112.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

Waiver of evidentiary privilege by inadvertent disclosure — state law. 51 A.L.R.5th 603.

Parents' criminal liability for failure to provide medical attention to their children. 118 A.L.R.5th 253.

Am Jur. 47 Am. Jur. 2d, *Juvenile Courts and Delinquent and Dependent Children* §§ 128 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), *Juvenile Courts and Delinquent and Dependent Children*, Form 102 (judgment or decree adjudging minor a neglected and dependent child and ordering change of custody).

2 Am. Jur. Proof of Facts 2d, *Child Abuse-The Battered Child Syndrome*, §§ 35 et seq. (proof of physical abuse in juvenile or family court proceeding).

3 Am. Jur. Proof of Facts 2d, *Child Neglect*, §§ 25 et seq. (proof of physical neglect — malnutrition and lack of adequate clothing); §§ 44 et seq. (proof of emotional neglect — child's emotional well-being endangered by parent's disturbed condition); §§ 72 et seq. (proof of medical neglect — parent's refusal to consent to blood transfusion during surgery for alleviation of facial disfigurement).

6 Am. Jur. Proof of Facts 2d, *Failure to Report Suspected Case of Child Abuse*, §§ 10 et seq. (proof of physicians' negligent failure to diagnose and report suspected case of child abuse).

Law Reviews. Comment: Recent amendments to the Mississippi Rules of Evidence — the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

§ 97-5-40. Condoning child abuse.

(1) Any parent, guardian, custodian, stepparent or any other person who lives in the household with a child, who knowingly condones an incident of felonious child abuse of that child, which consists of one or more violations of (a) subsection (2) of Section 97-5-39 or (b) felonious sexual battery of that child, which consists of one or more violations of Section 97-3-95 shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year or by a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(2) A person shall not be considered to have condoned child abuse merely because such person does not report an act of child abuse.

(3) The provisions of this section shall be in addition to any other criminal law.

SOURCES: Laws, 1989, ch. 566, § 1; Laws, 1992, ch. 557, § 1, eff from and after July 1, 1992.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. Proof of Facts 3d Abuse Allegations with Behavioral Evidence, Corroboration of a Child's Sexual

§ 97-5-41. Carnal knowledge of step or adopted child; carnal knowledge of child by cohabitating partner.

(1) Any person who shall have carnal knowledge of his or her unmarried stepchild or adopted child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

(2) Any person who shall have carnal knowledge of an unmarried child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, with whose parent he or she is cohabiting or living together as husband and wife, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

SOURCES: Laws, 1984, ch. 390; Laws, 1985, ch. 389, § 5, eff from and after July 1, 1985.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Other sexually related offenses against children, see §§ 97-3-65, 97-3-95, 97-5-5, 97-5-23, 97-5-27 through 97-5-37.

Rape of female under 12 years of age, see §§ 97-3-65, 97-3-95, and 97-5-23.

Sexual battery, see §§ 97-3-95 through 97-3-103.

Felonious abuse of children, see § 97-5-39.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201 and 99-19-203.

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 A.L.R.3d 225.

Marital or sexual relationship between parties as affecting right to adopt. 42 A.L.R.4th 776.

Am Jur. 65 Am. Jur. 2d, Rape §§ 2, 5-10, 15-20, 24.

70C Am. Jur. 2d, Sodomy §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms, Assault and Battery, Forms 191-193 (complaints and instructions as to sex offenses).

Forms 195.1, 196.1 (complaint, petition or declaration, sexual molestation of minor daughter during daughter's childhood, against father).

CJS. 6A C.J.S., Assault and Battery §§ 75, 84-88.

75 C.J.S., Rape §§ 30-43.

Law Reviews. 1979, Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December, 1979.

Recent amendments to the Mississippi Rules of Evidence—the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall, 1991).

Practice References. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Paul DerOhannessian II, *Sexual Assault Trials*, Second Edition (Michie).

§ 97-5-42. Protection of children from parents convicted of felony child sexual abuse; creation of local registry; penalties; standards for visitation.

(1)(a) For purposes of this section, a conviction of felony parental child sexual abuse shall include any nolo contendere plea, guilty plea or conviction at trial to any offense enumerated in Section 93-15-103(3)(g) or any other statute of the State of Mississippi whereby a parent may be penalized as a felon on account of sexual abuse of his or her own child; and shall include any conviction by plea or trial in any other state of the United States to an offense whereby a parent may be penalized as a felon for sexual abuse of his or her own child under the laws of that state, or which would be so penalized for such conduct had the act or acts been committed in the State of Mississippi.

(b) A certified copy of the court order or judgment evidencing such a conviction shall be accepted by any public office with responsibilities pursuant to this section, and by any court in the State of Mississippi, as conclusive evidence of the conviction.

(2)(a) No person who has been convicted of felony parental child sexual abuse shall contact or attempt to contact the victim child without the prior express written permission of the child's then legal custodian, who may be the other parent, a guardian, person in loco parentis or person with legal or physical custody of a child.

(b) No person who has been convicted of felony parental child sexual abuse shall harass, threaten, intimidate or by any other means menace the victim child or any legal custodian of the child, who may be the other parent, a guardian, person in loco parentis or person with legal or physical custody of a child.

(c) Any person who believes that a person who has been convicted of felony parental child sexual abuse may violate the provisions of subsection (2) (a) or (2) (b) hereof may register with the sheriff and any municipal law enforcement agency of the child's county and municipality of residence, setting forth the factual basis for that belief which shall include a certified copy of the court order or judgment evidencing the conviction of the child sexual abuse felon. The sheriff's office of each county and all municipal law enforcement agencies shall maintain a separate and distinct register for the purpose of recording the data required herein, and shall advise the reporting party of how emergency contact can be made with that office at any time with respect to a threatened violation of subsection (2) (a) or (2) (b) hereof. Immediate response with police protection shall be provided to any emergency contact made pursuant to this section, which police protection shall be continued in such reasonable manner as to deter future violations and protect the child and any person with legal custody of the child.

(d) Any person who has been convicted of felony parental child sexual abuse who violates subsection (2) (a) hereof shall, upon conviction, be punished by imprisonment in the county jail for not more than one (1) year. Any person who has been convicted of felony parental child sexual abuse who violates subsection (2) (b) hereof shall, upon conviction, be punished by imprisonment in the state penitentiary for not more than five (5) years.

(3) No person who has been convicted of felony parental child sexual abuse shall be entitled to have parental or other visitation rights as to that child who was the victim, unless he or she files a petition in the chancery court of the county in which the child resides, reciting the conviction, and joining as parties defendant any other parent, guardian, person standing in loco parentis or having legal or physical custody of the child. A guardian ad litem shall be appointed to represent the child at petitioner's expense. The court shall appoint a qualified psychologist or psychiatrist to conduct an independent examination of the petitioner to determine whether contact with that person poses a physical or emotional risk to the child, and report to the court. Such examination shall be at petitioner's expense. The court shall require any such petitioner to deposit with the court sufficient funds to pay expenses chargeable to a petitioner hereunder, the amount of such deposit to be within the discretion of the chancellor. Any defendant and the child through his or her guardian ad litem shall be entitled to a full evidentiary hearing on the petition. In no event shall a child be required to testify in court or by deposition, or be subjected to any psychological examination, without the express consent of the child through his or her guardian ad litem. Such guardian ad litem shall consult with the child's legal guardian or custodians before consenting to such testimony or examination. At any hearing there is a rebuttable presumption

that contact with the child poses a physical and emotional risk to the child. That presumption may be rebutted and visitation or contact allowed on such terms and conditions that the chancery court shall set only upon specific written findings by the court that:

(a) Contact between the child and the offending parent is appropriate and poses minimal risk to the child;

(b) If the child has received counseling, that the child's counselor believes such contact is in the child's best interest;

(c) The offending parent has successfully engaged in treatment for sex offenders or is engaged in such treatment and making progress; and

(d) The offending parent's treatment provider believes contact with the child is appropriate and poses minimal risk to the child. If the court, in its discretion, allows visitation or contact it may impose such conditions to the visitation or contact which it finds reasonable, including supervision of contact or visitation by a neutral and independent adult with a detailed plan for supervision of any such contact or visitation.

SOURCES: Laws, 2000, ch. 403, § 1, eff from and after July 1, 2000.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error appearing in (1)(b). The words "this act" were changed to "this section" so that "responsibilities pursuant to this act" now reads as "responsibilities pursuant to this section." The Joint Committee ratified the correction at its May 16, 2002 meeting.

Cross References — Child welfare, see §§ 43-15-1 et seq.

Mississippi Sex Offenders Registration Law, see §§ 45-33-21 et seq.

Grounds for termination of parental rights, see § 93-15-103.

§§ 97-5-43 through 97-5-47. Repealed.

Repealed by Laws, 1997, ch. 578, § 16, eff from and after February 1, 1998.

§ 97-5-43. [Laws, 1994, ch. 486, § 5]

§ 97-5-45. [Laws, 1994, ch. 486, § 6]

§ 97-5-47. [Laws, 1994, ch. 486, § 7]

Editor's Note — Former § 97-5-43 related to posting signs prohibiting the sale of tobacco products to children.

Former § 97-5-45 related to notice to employees and agreements prohibiting the sale of tobacco products to children.

Former § 97-5-47 related to requirements for the sale of tobacco products through vending machines.

CHAPTER 7

Crimes Against Sovereignty or Administration of Government

SEC.

- 97-7-1. Assessment; failure or refusal to deliver by taxpayer.
- 97-7-3. Assessment; failure to deliver by banker.
- 97-7-5. Assessment; frauds on.
- 97-7-7. Capitol building; not to be used for sleeping-rooms.
- 97-7-9. Capitol building; defacing.
- 97-7-10. Fraudulent statements and representations.
- 97-7-11. Conspiracy to defraud state; obtaining public funds fraudulently.
- 97-7-13. Conspiracy to defraud state; defeating or preventing prosecution of just claim due state.
- 97-7-15. Conspiracy to defraud state; each party guilty of felony when one or more conspirators act.
- 97-7-17. Conspiracy to prevent holding a public office or discharging its duties, etc.; by use of force, etc.
- 97-7-19. Conspiracy to prevent holding public office or discharging its duties, etc.; by use of boycott.
- 97-7-21. Criminal syndicalism; definition.
- 97-7-23. Criminal syndicalism; penalty for commission of certain acts.
- 97-7-25. Criminal syndicalism; unlawful assemblage to advocate.
- 97-7-27. Criminal syndicalism; penalty for permitting use of place or building for unlawful assemblage.
- 97-7-29. Destroying, injuring, etc. property to hinder war efforts.
- 97-7-31. Destroying, injuring, etc. state or federally licensed communication systems.
- 97-7-33. False statements to federal authorities as to denial of constitutional rights by the state or its agents.
- 97-7-35. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents.
- 97-7-37. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents with intent or purpose to deceive or cause investigation.
- 97-7-39. Flags; desecration of national or state flag prohibited.
- 97-7-41. Food commodity donated by federal or state government; obtaining fraudulently, sale or unauthorized disposition.
- 97-7-42. Fraudulent use of food coupons dispensed by state welfare department.
- 97-7-43. Impersonating state, county or municipal officer or employee.
- 97-7-44. Impersonation of state, county, municipal or other public officer or employee prohibited; penalties.
- 97-7-45. Legislature; preventing or attempting to prevent meetings.
- 97-7-47. Legislature; disturbing proceedings.
- 97-7-49. Legislature; altering bills or resolutions before passage.
- 97-7-51. Legislature; altering bills or resolutions after passage.
- 97-7-53. Legislature; bribing or influencing member.
- 97-7-55. Legislature; member accepting or agreeing to accept bribes.
- 97-7-57. Legislature; influence peddling.
- 97-7-59. Military service; failure to report for active duty.
- 97-7-61. Military service; organizing military body for public drill or parade; license required.
- 97-7-63. Picketing which interferes with access to government buildings, property, streets and sidewalks.
- 97-7-65. Timber; cutting and rafting from state lands.

- 97-7-67. Treason; punishment.
 97-7-69. Treason; essential proof.
 97-7-71. Advocacy of violent overthrow of constitution or government; punishment.

§ 97-7-1. Assessment; failure or refusal to deliver by taxpayer.

If any taxpayer shall refuse or wilfully neglect to deliver a list of his taxable property, as required by law, to the assessor, under oath or affirmation, when required, he shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than five hundred dollars, or imprisoned not exceeding three months in the county jail, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 8, art. 17 (5); 1857, ch. 3, art. 17; 1871, § 1674; 1880, § 497; 1892, § 970; Laws, 1906, § 1046; Hemingway's 1917, § 774; Laws, 1930, § 790; Laws, 1942, § 2014.

Cross References — Tax assessments, see §§ 27-35-23 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-3. Assessment; failure to deliver by banker.

If the president, cashier, or other officer having like duties, of any bank or banking association shall wilfully fail to deliver to the assessor a written statement, under oath, as required by law, of all the bank's effects and assets, other than land, liable to taxation, he shall, on conviction, be fined not exceeding five hundred dollars, or be imprisoned not exceeding three months in the county jail, or both.

SOURCES: Codes, 1892, § 972; Laws, 1906, § 1048; Hemingway's 1917, § 776; Laws, 1930, § 792; Laws, 1942, § 2016; Laws, 1890, p. 6.

Cross References — Assessment of branch banks, see § 27-35-37.

RESEARCH REFERENCES

ALR. Sufficiency of evidence of nonre- been inaccessible to testator—modern vocation of lost will not shown to have cases. 70 A.L.R.4th 323.

§ 97-7-5. Assessment; frauds on.

If any taxpayer shall wilfully render to the assessor for taxation a false list of his taxable property, or shall so render a list which does not contain the whole of his property liable to be listed or taxed, or shall wilfully undervalue the property so listed, he shall be liable to prosecution for fraud on the assessment, and, on conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than one week nor more than three months, or both.

SOURCES: Codes, 1892, § 971; Laws, 1906, § 1047; Hemingway's 1917, § 775; Laws, 1930, § 791; Laws, 1942, § 2015.

Cross References — Tax assessments, see §§ 27-35-23 et seq.

§ 97-7-7. Capitol building; not to be used for sleeping-rooms.

If any person shall occupy any of the offices, apartments, halls, or other portion of the capitol building at Jackson as a lodging or sleeping-room, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than one hundred dollars, and be imprisoned in the county jail not exceeding thirty days.

SOURCES: Codes, Hutchinson's 1848, ch. 4, art. 23 (3); 1857, ch. 6, art. 96; 1871, § 190; 1880, § 272; 1892, § 999; Laws, 1906, § 1076; Hemingway's 1917, § 803; Laws, 1930, § 822; Laws, 1942, § 2048.

Cross References — Restrictions on use of capitol buildings, see §§ 29-5-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-9. Capitol building; defacing.

If any person shall, by any means whatsoever, wilfully injure or destroy any of the works, materials, furniture, or ornaments of the capitol, or any of the buildings or monuments on the grounds belonging thereto, or shall wilfully deface any of the walls thereof, or shall write or make any drawing or characters thereon with pencil-mark, or otherwise, or do any indecent act, either on or to said walls, or within the same, or shall wilfully deface or injure the trees, fences, pavement, or soil on said grounds, such person, on conviction, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not more than six months, or both.

SOURCES: Codes, 1857, ch. 6, art. 101; 1871, § 194; 1880, § 273; 1892, § 1000; Laws, 1906, § 1077; Hemingway's 1917, § 804; Laws, 1930, § 823; Laws, 1942, § 2049.

§ 97-7-10. Fraudulent statements and representations.

(1) Whoever, with intent to defraud the state or any department, agency, office, board, commission, county, municipality or other subdivision of state or local government, knowingly and willfully falsifies, conceals or covers up by trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(2) This section shall not prohibit the prosecution under any other criminal statute of the state.

SOURCES: Laws, 1988, ch. 511, § 2, eff from and after July 1, 1988.

Cross References — White-collar crime investigations, see § 7-5-59.

JUDICIAL DECISIONS

1. Evidence.

Evidence was sufficient to support a conviction where testimony showed that the defendant submitted an invoice to a county board of education for, inter alia,

grinding 46 tree stumps, but that only seven or eight tree stumps were actually ground. *Pool v. State*, 724 So. 2d 1044 (Ct. App. 1998).

§ 97-7-11. Conspiracy to defraud state; obtaining public funds fraudulently.

If any person shall enter into any agreement, combination or conspiracy to defraud the State of Mississippi, or any department or political subdivision thereof, by obtaining or aiding to obtain the payment or allowance from the public funds of the state, or of any department or political subdivision thereof, of any false or fraudulent claim, he shall be subject to indictment therefor, and upon conviction thereof, shall be imprisoned in the state penitentiary for a term not to exceed five years, or shall be punished by a fine not to exceed \$1000.00, or by imprisonment in the county jail for a term of not more than six months, or by both such fine and imprisonment, within the discretion of the court.

SOURCES: Codes, 1930, § 831; Laws, 1942, § 2057; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-1 et seq.

Unfair bidder on public contracts, see § 19-13-113.

Proceedings for execution and enforcement of antitrust laws, see §§ 75-21-19 et seq.

Conspiracy, generally, see § 97-1-1.

Conspiracy and collusion connected with state highway work, see §§ 97-15-5, 97-15-11.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Conspiracy **CJS.** 15A C.J.S., Conspiracy §§ 226 et seq. § 1 et seq. seq.

§ 97-7-13. Conspiracy to defraud state; defeating or preventing prosecution of just claim due state.

If any person, with intent to defraud the State of Mississippi, or any department or political subdivision thereof, shall enter into any agreement, combination or conspiracy to defeat, by any unlawful or fraudulent means, the payment of any just claim or penalty due the State of Mississippi, or any department or political subdivision thereof, or to prevent, by any unlawful or fraudulent means, the prosecution of suit for the proper enforcement of any such claim or penalty, or to defraud the State of Mississippi or any department

or political subdivision thereof, in any manner, or for any purpose, he shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term not to exceed five years, or by imprisonment in the county jail for not more than six months, or by fine of not more than \$1000.00, or by both such imprisonment and fine, within the discretion of the court.

SOURCES: Codes, 1930, § 832; Laws, 1942, § 2058; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-11 et seq.

Conspiracy, generally, see § 97-1-1.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 16 **Am. Jur.** 2d, Conspiracy **CJS.** 15A C.J.S., Conspiracy § 244-246.
§§ 1 et seq.

§ 97-7-15. Conspiracy to defraud state; each party guilty of felony when one or more conspirators act.

If two or more persons, with intent to defraud the State of Mississippi, or any department or political subdivision thereof, shall conspire to defeat by any unlawful or fraudulent means, the payment of any just claim or penalty due the State of Mississippi, or any department or political subdivision thereof, or shall conspire to prevent by any unlawful or fraudulent means, the prosecution of suit for the proper enforcement of any such claim or penalty, or shall conspire to defraud the State of Mississippi, or any department or political subdivision thereof, in any manner, or for any purpose, and one or more of such parties shall do any act to effect the object of the conspiracy each of the parties to such conspiracy shall be guilty of a felony, and upon conviction thereof shall be punished as provided in section 97-7-13.

SOURCES: Codes, 1930, § 833; Laws, 1942, § 2059; Laws, 1930, ch. 97.

Cross References — Suits by the state, see §§ 11-45-11 et seq.

Conspiracy, generally, see § 97-1-1.

RESEARCH REFERENCES

Am Jur. 16 **Am. Jur.** 2d, Conspiracy **CJS.** 15A C.J.S., Conspiracy § 244-246.
§§ 1 et seq.

§ 97-7-17. Conspiracy to prevent holding a public office or discharging its duties, etc.; by use of force, etc.

If two (2) or more persons conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the State of Mississippi, or any subdivision thereof, or from

discharging any duties thereof, or to induce by like means any officer of the State of Mississippi or subdivision thereof, to leave the place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined upon conviction not more than one thousand dollars (\$1,000.00) or imprisoned for not more than five (5) years, or both.

SOURCES: Codes, 1942, § 2059.1; Laws, 1968, ch. 344, § 1, eff from and after passage (approved July 30, 1968).

§ 97-7-19. Conspiracy to prevent holding public office or discharging its duties, etc.; by use of boycott.

If two (2) or more persons conspire to prevent any person from accepting or holding any office, trust, or place of confidence under the State of Mississippi or any subdivision thereof, or to induce any officer of the State of Mississippi or subdivision thereof to leave the place where his duties as an officer are required to be performed and as a means of carrying out the object of such conspiracy, shall cause or attempt to cause, or induce or encourage any individual or individuals to cease doing business with any other person or to cease using, buying, selling, or otherwise dealing in the products of any other person, each of such persons shall be fined upon conviction not more than one thousand dollars (\$1,000.00), or imprisoned for not more than five (5) years, or both.

SOURCES: Codes, 1942, § 2059.2; Laws, 1968, ch. 344, § 2, eff from and after passage (approved July 30, 1968).

§ 97-7-21. Criminal syndicalism; definition.

Criminal syndicalism as used in Sections 97-7-23 through 97-7-27 is hereby defined to be the doctrine or precept which advocates, teaches or aids and abets the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damages or injury to physical property), unlawful acts of violence and force, arson or other unlawful acts or methods of terrorism as a means of accomplishing or effecting a change in agricultural or industrial ownership or control or in effecting any political or social change or for profit.

SOURCES: Codes, 1942, § 2066.5-01; Laws, 1964, ch. 323, § 1, eff from and after passage (approved June 11, 1964).

Cross References — Destroying, injuring, etc., property to hinder war effort, see § 97-7-29.

Interference with government licensed communications systems, see § 97-7-31.

Treason, see §§ 97-7-67 et seq.

JUDICIAL DECISIONS

1. In general.

The Mississippi Criminal Syndicalism Act (Code 1942, §§ 2066.5-01 to 2066.5-06) on its face unconstitutionally abridges

the freedoms of speech, press and assembly. *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 1 et seq.

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq.

§ 97-7-23. Criminal syndicalism; penalty for commission of certain acts.

Any person who:

(a) By word of mouth or written words or personal conduct advocates, instigates, suggests, teaches or aids and abets criminal syndicalism or the duty, necessity, propriety or expediency of committing crime, criminal syndicalism, sabotage, violence or any other unlawful method of terrorism as a means of accomplishing or effecting a change in agricultural or industrial ownership or control or effecting any political or social change or for profit; or

(b) Openly, wilfully and deliberately by spoken or written words justifies, or attempts to justify, criminal syndicalism or the commission or the attempt to commit crime, sabotage, violence or other unlawful methods of terrorism with intent to exemplify, approve, spread, advocate, instigate, teach, aid, suggest or further the doctrine of criminal syndicalism; or

(c) Prints, publishes, edits, issues, circulates, sells, distributes or publicly displays any book, paper, pamphlet, document, poster, handbill or written or printed matter in any form whatsoever containing, advocating, instigating, advising, suggesting, aiding and abetting or teaching criminal syndicalism; or

(d) Organizes or helps to organize or knowingly becomes a member of or voluntarily assembles with any society, organization, group or assemblage of persons organized, formed or assembled to advocate, teach, aid and abet criminal syndicalism; or

(e) Wilfully, by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism with intent to accomplish a change in agricultural or industrial ownership or control, or effecting any social or political change or for profit; is guilty of a felony, and upon conviction thereof shall be punished by a fine of not less than two hundred dollars (\$200.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2066.5-02; Laws, 1964, ch. 323, § 2, eff from and after passage (approved June 11, 1964).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 52 et seq. **CJS.** 77 C.J.S., Riot; Insurrection §§ 1 et seq.

§ 97-7-25. Criminal syndicalism; unlawful assemblage to advocate.

Whenever two or more persons assemble or consort for the purpose of advocating, encouraging, teaching or suggesting the doctrine of criminal syndicalism as defined in Section 97-7-21, such assemblage is unlawful, and every person voluntarily participating therein by his presence, aid or instigation is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not less than two hundred dollars (\$200.00), nor more than one thousand dollars (\$1,000.00), or by both such imprisonment and fine.

SOURCES: Codes, 1942, § 2066.5-03; Laws, 1964, ch. 323, § 3, eff from and after passage (approved June 11, 1964).

Cross References — Penalty for permitting use of place or building for unlawful assemblage, see § 97-7-27.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 52 et seq. **CJS.** 77 C.J.S., Riot; Insurrection §§ 1 et seq.

§ 97-7-27. Criminal syndicalism; penalty for permitting use of place or building for unlawful assemblage.

The owner, lessee, agent, superintendent, janitor, caretaker or other person in charge, or occupant of any place, building, room or rooms or structure who knowingly permits therein any assembly or consort of persons prohibited by the provisions of Section 97-7-23 or who, after notification by authorized public or peace officer that the place or premises, or any part thereof, is so used, permits such use to be continued is guilty of a misdemeanor and punishable by imprisonment in the county jail for not less than sixty days nor more than one

year, or by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or by both such imprisonment and fine.

SOURCES: Codes, 1942, § 2066.5-04; Laws, 1964, ch. 323, § 4, eff from and after passage (approved June 11, 1964).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 52 et seq. **CJS.** 77 C.J.S., Riot; Insurrection §§ 1 et seq.

§ 97-7-29. Destroying, injuring, etc. property to hinder war efforts.

Whoever intentionally destroys, impairs, injures, interferes or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, shall be punished by imprisonment for not more than ten years, or by a fine of not more than ten thousand dollars (\$10,000.00), or both.

SOURCES: Codes, 1942, § 2400; Laws, 1942, ch. 183.

Cross References — Criminal syndicalism, see §§ 97-7-21 et seq. Treason, see §§ 97-7-67 et seq.

RESEARCH REFERENCES

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq. 87 C.J.S., Treason §§ 1 et seq.

§ 97-7-31. Destroying, injuring, etc. state or federally licensed communication systems.

Whoever intentionally destroys, impairs, injures, or tampers or interferes with any real or personal property used or useful in the maintenance, repair or operation of any telephone or telegraph system or radio station which is subject to regulation or licensing by any agency of the United States of America or of the State of Mississippi, with reasonable grounds to believe that such act will hinder, delay or interfere with the maintenance, repair or operation of such telephone or telegraph system or radio station, on conviction shall be punished as prescribed in Section 97-7-29.

SOURCES: Codes, 1942, § 2401; Laws, 1942, ch. 183.

Cross References — Criminal syndicalism, see §§ 97-7-21 et seq. Treason, see §§ 97-7-67 et seq.

RESEARCH REFERENCES

ALR. Criminal liability for unauthorized interference with or reception of radio or television transmission. 43 A.L.R.4th 991.

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq.

87 C.J.S., Treason §§ 1 et seq.

§ 97-7-33. False statements to federal authorities as to denial of constitutional rights by the state or its agents.

It shall be unlawful for any person or persons to wilfully and knowingly, whether orally or in writing, make or cause to be made, to any agency, or board, or commission, or member, or officer or official, or appointee, or employee, or representative thereof, of the executive, or the legislative, or the judicial department, of the United States or any subdivision thereof, which may be now in existence, or who may be now appointed, or hereafter created or appointed, including but not limited to any commissioner, or referee, or voting referee now appointed or who may be hereafter appointed by any court of the United States or any judge thereof, and further including but not limited to any member of the Federal Bureau of Investigation and any agent or representative, or investigator, or member of the Commission on Civil Rights of the United States, or the Advisory Committee or Board of the Commission on Civil Rights of the United States appointed in and for the State of Mississippi, any false or fictitious or fraudulent statement or statements, or to use any false writing or document asserting or claiming, that such person, or persons, or any other person or persons have been, or are about to be denied or deprived of any right, or privilege, or immunity granted or secured to them, or to any of them, by the United States Constitution and laws, or by the Mississippi Constitution and laws, by any officer, or agency, or employee, or representative, or board, or commission, or any member thereof of the State of Mississippi, or of any county or municipality, of the State of Mississippi, or of any other political subdivision of the State of Mississippi, or by the State of Mississippi and any person or persons violating the provisions of this section shall be guilty of the crime of making a false statement, which is created by this section, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2155.4; Laws, 1960, ch. 263, § 1.

Cross References — False sworn statements to federal authorities, see §§ 97-7-35, 97-7-37.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-35. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents.

(1) It shall be unlawful for any person or persons to wilfully and knowingly make any oral or written sworn false statement, or affidavit, or attestation, or complaint, or allegation before any individual or officer authorized to administer oaths, to any agency, or board, or commission, or member, or official, or appointee, or employee, or representative thereof, of the executive, or the legislative, or the judicial department, of the United States, or any subdivision thereof, which may be now in existence, or who may be now appointed, or hereafter created or appointed, including but not limited to any member of the Federal Bureau of Investigation and any agent, or representative, or investigator, or member of the Commission on Civil Rights of the United States, or the Advisory Committee or Board of the Commission on Civil Rights of the United States appointed in and for the State of Mississippi, that such person, or persons, or other persons have been or are about to be deprived of any right, or privilege, or immunity granted or secured by the United States Constitution and Laws or by the Mississippi Constitution and Laws, by any officer, or agency, or employee, or representative, or board, or commission, or any member thereof of the State of Mississippi, or of any county or municipality, of the State of Mississippi, or of any other political subdivision of the State of Mississippi, or by the State of Mississippi, and any person or persons violating the provisions of this section shall be guilty of the crime of false swearing which is created by this section, a felony, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(2) Corroboration or proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this section. It shall not be necessary to prove, to sustain or charge under this section, that the oath or matter sworn to was material, or, if before an executive, legislative or judicial tribunal committee or commission that the tribunal committee or commission had jurisdiction.

SOURCES: Codes, 1942, § 2155.5; Laws, 1960, ch. 256, §§ 1, 2.

Cross References — False statements to federal authorities, see §§ 97-7-33, 97-7-37.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-37. False swearing; false sworn statements to federal authorities as to denial of constitutional rights by the state or its agents with intent or purpose to deceive or cause investigation.

(1) It shall be unlawful for any person or persons to wilfully make any oral or written sworn false statements or affidavit or attestation or complaint or allegation before any individual or officer authorized to administer oaths, that such person or persons or other persons have been or are about to be deprived of any right or privilege or immunity granted or secured by the United States Constitution and laws, or either, or by the Mississippi Constitution and laws, or either, knowing the same, or any material part thereof to be false, with the intent or purpose to cause or encourage an investigation or which causes or contributes in any way to causing an investigation thereof, or any other action to be taken as a result thereof by any executive or legislative or judicial department, officer or agent, or representative of the United States, including but not limited to any member of the Federal Bureau of Investigation or member or representative or employee of, the Commission on Civil Rights created by an act of the Congress of the United States, or the State Advisory Group or Council, or Committee of the Commission on Civil Rights appointed in or for the State of Mississippi, and any person or persons violating the provisions of this section shall be guilty of the crime of false swearing which is created by this section, a felony, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(2) Corroboration or proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecutions under this section. It shall not be necessary to prove, to sustain any charge under this section, that the oath or matter sworn to was material, or, if before an executive, legislative or judicial tribunal, committee, or commission that the tribunal, committee, or commission had jurisdiction.

SOURCES: Codes, 1942, § 2155.6; Laws, 1960, ch. 255, §§ 1, 2.

Cross References — False statements to federal authorities, see §§ 97-7-33, 97-7-35.

Perjury, see §§ 97-9-59 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 97-7-39. Flags; desecration of national or state flag prohibited.

Any person who, in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the

United States or state flag of the State of Mississippi, or ensign or Confederate flag, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall be attached, appended, affixed or annexed any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale or to give away, or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise, or article or things for carrying or transporting merchandise upon which, shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance, on which so placed, or who shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act, upon any such flag, standard, color or ensign, with the intent to desecrate or dishonor such, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than thirty (30) days, or both, in the discretion of the court; shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars (\$100.00) or by imprisonment for not more than thirty (30) days, or both, in the discretion of the court; and shall also forfeit a penalty in the discretion of the court, of not more than fifty dollars (\$50.00) for each such offense, to be recovered with costs in a civil action or suit, in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this state. Such penalty when collected, less the reasonable cost and expense of action or suit, shall be paid into the treasury of this state. Two (2) or more penalties may be sued for and recovered in the same action or suit. The words "flag," "standard," "color," or "ensign," as used in this section, shall include any flag, standard, color, ensign or any picture or representation of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign of the United States of America or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard or ensign of the United States of America or of the State of Mississippi or Confederate flag.

SOURCES: Codes, Hemingway's 1917, § 903; Laws, 1930, § 930; Laws, 1942, § 2159; Laws, 1916, ch. 118; Laws, 1971, ch. 311, § 1, eff from and after passage (approved February 8, 1971).

Editor's Note — Although the retention of the duplicate penalty provision in the section of the Mississippi Code of 1942 from which this section is derived, § 2159, as amended by Chapter 311, Laws of 1971, was probably inadvertent on the legislature's part, the office of the attorney general was of the opinion that the duplicate provision should be brought into the Mississippi Code of 1972, and the matter noted for legislative clarification.

Cross References — Flags of national guard, see § 33-7-29.

Display and study of flags in schools, see § 37-13-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Prosecution under federal Flag Protection Act (18 USCS § 700) for burning American flag violated Federal Constitution's First Amendment, as defendants' flag burning constituted expressive conduct; Court would not reconsider holding in earlier case that flag burning as mode of expression enjoys full protection of First Amendment; Act improperly suppressed expression out of concern for its likely communicative impact even though it contained no explicit content-based limitation on scope of prohibited conduct, therefore was subject to most exacting scrutiny, Act did not advance government's legitimate interest in preserving flag's function as incident of sovereignty, and even assuming national consensus favoring prohibition against flag burning, suggestion that government's interest in suppressing speech becomes more weighty as popular opposition grows is foreign to First Amendment. *United States v. Eichman*, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990).

Conviction of protestor for burning American flag as part of political demonstration violated First Amendment, since conduct was sufficiently imbued with elements of communication to implicate First Amendment, state's interest in preventing breaches of peace was not implicated on record in particular case, and state's asserted interest in preserving flag as symbol of nationhood and national unity does not justify conviction. *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

A state statute (in this instance, N.Y. former Penal Law § 1425(16)(d), now N.Y. Gen Bus § 136) making it a misdemeanor publicly to mutilate, deface, defile, trample upon, or cast contempt upon an American flag either by words or acts, is unconstitutionally applied insofar as it permits a person to be punished merely for speaking defiant or contemptuous words about the American flag. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969), on remand, 24 N.Y.2d 1026, 302 N.Y.S.2d 848, 250 N.E.2d 250 (1969).

RESEARCH REFERENCES

ALR. What constitutes violation of flag desecration statutes. 41 A.L.R.3d 502.

Am Jur. 3 Am. Jur. 2d, Advertising § 4. 35 Am. Jur. 2d, Flag §§ 3-5.

Lawyers' Edition. Constitutionality of statutes, ordinances, or administrative provisions prohibiting defiance, disre-

spect, mutilation, or misuse of American Flag. 22 L. Ed. 2d 972.

Supreme Court's views as to constitutionality of laws prohibiting, or of criminal convictions for, desecration, defiance, disrespect, or misuse of American flag. 105 L. Ed. 2d 809.

§ 97-7-41. Food commodity donated by federal or state government; obtaining fraudulently, sale or unauthorized disposition.

(1) Whoever obtains, or attempts to obtain, or aids or abets any person to obtain by means of a willfully false statement or representation or by impersonation, or other fraudulent device, any food commodity donated under any program of the federal or state government: (a) to which he is not entitled; or (b) being an employee of the state, makes any unauthorized disposition of such food commodity; or (c) not being an authorized recipient thereof converts

to his own use or benefit any such donated food commodities; or (d) being an authorized recipient, sells, exchanges or makes an unauthorized disposition of such donated food commodity in any other way than as prescribed or directed by lawful rules and regulations, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00), or be imprisoned for not more than six (6) months, or be both so fined and imprisoned in the discretion of the court. In assessing the penalty the court shall take into consideration the value of the commodities.

(2) Any person who purchases, barter, exchanges or otherwise obtains any donated food commodities from any authorized recipient knowing it to have been furnished said recipient by the state or federal government, or places the same in a channel of trade shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00), or be imprisoned for not more than six (6) months, or be both so fined and imprisoned in the discretion of the court.

SOURCES: Codes, 1942, § 2159.5; Laws, 1964, ch. 339, §§ 1, 2, eff from and after passage (approved June 11, 1964).

Cross References — Representing or personating another to obtain money or property, see § 97-19-35.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-42. Fraudulent use of food coupons dispensed by state welfare department.

Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain food coupons, by means of a willfully false statement or representation or by impersonation or in any manner not authorized by law or regulations issued by the state department of welfare, or presents or causes to be presented any food coupons to which he is not entitled or food coupons of a greater value than that to which he is justly entitled shall be guilty of a misdemeanor and upon conviction thereof be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the county jail not more than one (1) year, or both in the discretion of the court; provided further, that any person who sells or gives coupons which he legally possesses to another person, and any person not legally entitled to coupons who accepts or purchases same, shall be guilty of a misdemeanor and upon conviction thereof be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) or imprisoned in the county jail not more than one (1) year, or both in the discretion of the court. Each violation shall be a separate and distinct offense; and any person committing a third offense shall be guilty of a felony and upon conviction thereof be fined not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00) or imprisoned in the penitentiary not less than one (1) nor more than five (5) years, or both in the discretion of the court.

SOURCES: Laws, 1973, ch. 420, § 1, eff from and after passage (approved March 29, 1973).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

Since Justice Court cannot order restitution over \$1,000.00, each misappropriation of food stamp is separate charge. Phillips Sept. 9, 1993, A.G. Op. #93-0565.

A prosecution for fraud in connection with state or federally funded assistance programs under Miss. Code Section 97-19-71 must be commenced within two

years from the commission of such offense, but a prosecution under this section for the fraudulent use of food coupons dispensed by the state welfare department may begin at any time without a time limitation. Taylor, July 18, 1997, A.G. Op. #97-0407.

§ 97-7-43. Impersonating state, county or municipal officer or employee.

Whoever falsely and willfully assumes or pretends to be an officer or employee acting under the authority of the State of Mississippi or any department, agency or officer thereof; or of any county, municipality or any other subdivision of the State of Mississippi, or of any department, agency or officer of such county, municipality or subdivision, shall be guilty of a misdemeanor and punished for each separate such offense by a fine of not more than five hundred dollars (\$500.00) or by imprisonment of not more than six (6) months in jail, or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2144.5; Laws, 1956, ch. 245.

Cross References — Impersonation of weights and measures officer, see § 75-27-57.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. "Acts as such" element of 18 USCS § 912, making it a crime to pretend to be an officer or employee of the United States. 55 A.L.R. Fed. 494.

Am Jur. 32 Am. Jur. 2d, False Personation § 4.

CJS. 35 C.J.S., False Personation §§ 1 et seq.

§ 97-7-44. Impersonation of state, county, municipal or other public officer or employee prohibited; penalties.

Any person who falsely and willfully assumes or pretends to be an officer or employee acting under the authority of the State of Mississippi or any department, agency or officer thereof; or of any county, municipality or any other subdivision of the State of Mississippi, or of any department agency or officer of such county, municipality or subdivision, shall be guilty of a

misdemeanor and punished for each separate such offense by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment of not more than six (6) months in jail, or by both such fine and imprisonment.

SOURCES: Laws, 2001, ch. 322, § 1, eff from and after July 1, 2001.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error. The subsection (1) was deleted, there are no other subsections. The Joint Committee ratified the correction at its June 3, 2003 meeting.

§ 97-7-45. Legislature; preventing or attempting to prevent meetings.

Every person who wilfully, and by force or fraud, prevents, or attempts to prevent, the legislature, or either of the houses composing it, or any of the members thereof, from meeting or organizing, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary, not exceeding ten years.

SOURCES: Codes, 1892, § 1189; Laws, 1906, § 1267; Hemingway's 1917, § 997; Laws, 1930, § 1026; Laws, 1942, § 2258.

Cross References — Meeting and organization of legislature, see §§ 5-1-7 et seq. Compelling witness to testify in crimes against legislative power, see § 99-17-31.

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Trials, Investigating Particular Crimes §§ 37 et seq.

§ 97-7-47. Legislature; disturbing proceedings.

Every person who wilfully disturbs the legislature, or either of the houses composing it, while in session; or who commits any disorderly conduct in the view and presence of either house, tending to interrupt its proceedings, or impair the respect due to its authority, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine, not less than twenty dollars nor more than two hundred dollars, and by imprisonment in the county jail not more than three months.

SOURCES: Codes, 1892, § 1190; Laws, 1906, § 1268; Hemingway's 1917, § 998; Laws, 1930, § 1027; Laws, 1942, § 2259.

Cross References — Disorderly and contemptuous behavior when legislature is in session, see Miss Const Art. 4, § 58.

Duty of sergeant-at-arms of senate, see § 5-1-35.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-7-49. Legislature; altering bills or resolutions before passage.

Every person who fraudulently alters, destroys, or mutilates the draft of any bill or resolution which has been presented to either house composing the legislature, or the engrossed copy thereof, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or signed or certified by the presiding officer of either house, in language different than that intended by such house, shall be guilty of a felony, and, on conviction, shall be imprisoned in the penitentiary not exceeding ten years.

SOURCES: Codes, 1892, § 1191; Laws, 1906, § 1269; Hemingway's 1917, § 999; Laws, 1930, § 1028; Laws, 1942, § 2260.

Cross References — Duty of secretary and clerk of house of representatives, see § 5-1-31.

§ 97-7-51. Legislature; altering bills or resolutions after passage.

Every person who fraudulently alters, destroys, or mutilates the enrolled copy of any bill or resolution which has been passed or adopted by the legislature of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published as a statute or law, in language different from that in which it was passed or adopted by the legislature, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary not exceeding ten years.

SOURCES: Codes, 1892, § 1192; Laws, 1906, § 1270; Hemingway's 1917, § 1000; Laws, 1930, § 1029; Laws, 1942, § 2261.

§ 97-7-53. Legislature; bribing or influencing member.

Every person who gives or offers to give a bribe to any member of the legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not exceeding ten years.

SOURCES: Codes, 1892, § 1193; Laws, 1906, § 1271; Hemingway's 1917, § 1001; Laws, 1930, § 1030; Laws, 1942, § 2262.

Cross References — Lobbying, generally, see §§ 5-8-1 et seq.
Bribery, generally, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

ALR. Entrapment to commit bribery or offer to bribe. 69 A.L.R.2d 1397.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Am Jur. 12 Am. Jur. 2d, Bribery §§ 15 et seq.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-7-55. Legislature; member accepting or agreeing to accept bribes.

Every member of either house composing the legislature who asks, receives, or agrees to receive any bribe, upon any understanding, express or implied, that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

SOURCES: Codes, 1892, § 1194; Laws, 1906, § 1272; Hemingway's 1917, § 1002; Laws, 1930, § 1031; Laws, 1942, § 2263.

Cross References — Prohibition against legislative member being counsel or taking fee or reward, see Miss Const Art. 4, § 47.

Bribery, generally, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bribery §§ 15 et seq.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-7-57. Legislature; influence peddling.

Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim or representation that he can or will improperly influence, in any manner, the action of any member of the legislature or officer thereof, in regard to any vote or legislative matter, shall be guilty of felony, and, upon conviction, shall be imprisoned in the penitentiary not exceeding ten years.

SOURCES: Codes, 1892, § 1195; Laws, 1906, § 1273; Hemingway's 1917, § 1003; Laws, 1930, § 1032; Laws, 1942, § 2264.

Cross References — Bribery, generally, see §§ 97-11-11, 97-11-13.

§ 97-7-59. Military service; failure to report for active duty.

Any officer or enlisted man of the Mississippi national guard called out or notified for active duty, who shall fail to report at the time and place appointed, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment, at the discretion of the court, and if the conviction be by a military court in addition thereto, may be dismissed or dishonorably discharged from the military service of the state.

SOURCES: Codes, 1892, § 1211; Laws, 1906, § 1289; Hemingway's 1917, § 1021; Laws, 1930, § 1052; Laws, 1942, § 2284; Laws, 1916, ch. 245.

Cross References — Calling out militia for active duty, see §§ 33-5-9, 33-5-11.

Refusal of militia officer to obey order, see § 97-11-39.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military and Civil Defense §§ 54 et seq.

§ 97-7-61. Military service; organizing military body for public drill or parade; license required.

It shall be unlawful for any body of men whatsoever, other than the regularly organized land and naval militia of this state, the land and naval forces of the United States, and the students of public or of regularly chartered educational institutions where military science is a prescribed part of the course of instruction, to associate themselves together as a military organization for drill or parade in public with firearms in this state, without special license from the governor for each occasion, and application for such license must be approved by the mayor and board of aldermen or commissioners of the town or city where such organization may propose to parade, and any person or persons participating in such unlawful association shall be guilty of a misdemeanor and on conviction of same shall be punished by imprisonment in the county jail for a term not to exceed six months or by a fine not to exceed five hundred dollars, or both fine and imprisonment, at the discretion of the court. Provided that the governor may permit the passage through or the attendance in the state of the organized militia of other states for the purpose of attending joint maneuvers, rifle competitions, or for such other purposes as he may deem proper.

SOURCES: Codes, 1892, § 1212; Laws, 1906, § 1290; Hemingway's 1917, § 1022; Laws, 1930, § 1053; Laws, 1942, § 2285; Laws, 1916, ch. 245.

Cross References — Enrollment of militia, see § 33-5-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military, and Civil Defense §§ 54 et seq.

§ 97-7-63. Picketing which interferes with access to government buildings, property, streets and sidewalks.

(1) It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, state property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.

(2) Any person guilty of violating this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars (\$500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

(3) This section shall not be construed to affect any suit or prosecution pending on July 9, 1964 in any court.

SOURCES: Codes, 1942, § 2318.5; Laws, 1964, ch. 343, §§ 1-3; Laws, 1964, 1st Ex Sess ch. 23.

Cross References — Power of courts to punish for contempt, see § 9-1-17.

Picketing or demonstrating in or near courthouse or residence of judge, etc., see § 97-9-67.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

A state criminal statute prohibiting, among other things, picketing in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any courthouses or other public buildings is not so broad, vague, indefinite, and lacking in definitely ascertainable standard as to be unconstitutional on its face, is not void for overbreadth, but is a valid law dealing with conduct subject to

regulation so as to vindicate important interests of society. *Cameron v. Johnson*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), reh'g denied, 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968).

This section [Code 1942, § 2318.5] does not prohibit picketing or mass demonstrations on courthouse grounds, for the prohibited factor is the obstruction or unreasonable interference with free ingress or egress to and from the courthouse. *Cam-*

eron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966), probable jurisdiction noted, 389 U.S. 809, 88 S. Ct. 127, 19 L. Ed. 2d 63 (1967), *aff'd*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), *reh'g denied*, 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968).

Federal courts are prohibited by 28 USC § 2283 from enjoining the prosecution in state courts of defendants charged

with violating the provisions of this section [Code 1942, § 2318.5]. Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966), probable jurisdiction noted, 389 U.S. 809, 88 S. Ct. 127, 19 L. Ed. 2d 63 (1967), *aff'd*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), *reh'g denied*, 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887 (1968).

RESEARCH REFERENCES

ALR. Nonlabor picketing or boycott. 93 A.L.R.2d 1284.

Am Jur. 48A Am. Jur. 2d, Labor and Labor Relations §§ 2644 et seq.

Lawyers' Edition. Governmental regulation of nonlabor picketing as violating

freedom of speech or press under Federal Constitution's First Amendment — Supreme Court cases. 101 L. Ed. 2d 1052.

§ 97-7-65. Timber; cutting and rafting from state lands.

If any person shall be guilty of cutting or rafting any cypress, pine, oak, persimmon, gum, hickory, pecan, walnut, mulberry, poplar, cottonwood, sassafras, or ash trees, or other merchantable timber upon any lands belonging to this state or held in trust by this state, such person shall be guilty of crime, and on conviction, if the value of the trees or timber so cut or rafted shall be twenty-five dollars or more, such person shall be imprisoned in the penitentiary for a term not exceeding five years; and if the value of the said trees or timber so cut or rafted shall be under twenty-five dollars, such person shall be imprisoned in the county jail not exceeding six months or fined in a sum not less than one hundred dollars nor more than one thousand dollars, or both.

SOURCES: Codes, 1857, ch. 64, art. 230; 1871, § 2684; 1880, § 2955; 1892, § 1304; Laws, 1906, § 1378; Hemingway's 1917, § 1118; Laws, 1930, § 1148; Laws, 1942, § 2385; Laws, 1930, ch. 152.

Cross References — Cutting of merchantable timber, etc., before land is redeemed for tax sale, see § 27-41-83.

Protection of public lands from trespass and damages for trespass, see §§ 29-1-17, 29-1-19.

Prohibition on removal of pecans falling from private orchards onto public rights-of-way during harvesting season, see §§ 69-33-1 et seq.

Theft of timber, generally, see § 97-17-59.

Cutting or rafting of timber on lands of another, see § 97-17-81.

RESEARCH REFERENCES

ALR. Revocation of license to cut and remove timber as affecting rights in re-

spect of timber cut but not removed. 26 A.L.R.2d 1194.

§ 97-7-67. Treason; punishment.

If any person shall levy war against this state, or adhere to its enemies, giving them aid and comfort, he shall be guilty of treason, and, shall, upon conviction, suffer death or imprisonment for life in the state penitentiary.

SOURCES: Codes, Hutchinsons's 1848, ch. 64, art. 12, Title 2 (2); 1857, ch. 64, art. 236; 1871, § 2688; 1880, § 2965; 1892, § 1313; Laws, 1906, § 1387; Hemingway's 1917, § 1130; Laws, 1930, § 1160; Laws, 1942, § 2397; Laws, 1977, ch. 458, § 8, eff from and after passage (approved April 13, 1977).

Cross References — Criminal syndicalism, see §§ 97-7-21 et seq.

Destroying, injuring, etc., property to hinder war effort, see § 97-7-29.

Interference with government licensed communications systems, see § 97-7-31.

Separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

JUDICIAL DECISIONS

1. In general.

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme

Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

RESEARCH REFERENCES

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq. 87 C.J.S., Treason § 15.

§ 97-7-69. Treason; essential proof.

A person shall not be convicted of treason unless upon the testimony of two witnesses to the same overt act, or on his own confession in open court.

SOURCES: Codes, 1857, ch. 64, art. 237; 1871, § 2689; 1880, § 2966; 1892, § 1314; Laws, 1906, § 1388; Hemingway's 1917, § 1131; Laws, 1930, § 1161; Laws, 1942, § 2398.

RESEARCH REFERENCES

ALR. Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact. 33 A.L.R.5th 571.

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq. 87 C.J.S., Treason §§ 1 et seq.

§ 97-7-71. Advocacy of violent overthrow of constitution or government; punishment.

Any person who advocates in writing or in print or verbally, or otherwise, the overthrow of the constitution or government of the United States or the

constitution or the government of the State of Mississippi, by violence, shall be deemed guilty of a felony and on conviction be imprisoned in the state penitentiary not less than three and not more than twenty years.

SOURCES: Codes, Hemingway's 1921 Supp. § 1142f; Laws, 1930, § 1162; Laws, 1942, § 2399; Laws, 1920, ch. 216.

Cross References — Requirement that educational personnel of public schools and of universities and colleges file affidavits as to membership in organizations, see §§ 37-29-211, 37-101-187.

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 52 et seq.

CJS. 77 C.J.S., Riot; Insurrection §§ 1 et seq.
87 C.J.S., Treason §§ 1 et seq.

CHAPTER 9

Offenses Affecting Administration of Justice

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ARTICLE 1.

IN GENERAL.

SEC.	
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97-9-45.	Escape of prisoners; penalty; willful failure to return to jail after being entrusted to leave.
97-9-47.	Escape of prisoners; penalty for penitentiary convicts serving less than life term; attempt by force or violence.
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- 97-9-53. Indictments; penalty for disclosing facts relating to indictment.
- 97-9-55. Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice.
- 97-9-57. Officer not to converse with juror; penalty.
- 97-9-59. Perjury; definition.
- 97-9-61. Perjury; penalty.
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- 97-9-67. Picketing or demonstrating in or near courthouse or residence of judge, juror, witness, or court officer.
- 97-9-69. Property levied on; removing without authority.
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§ 97-9-1. Court forms and legal process; printing, selling or distributing simulated legal documents prohibited.

(1) It shall be unlawful for any person, firm or corporation to print for the purpose of sale or distribution, to circulate or offer for sale, to send or deliver, to cause to be sent or delivered, any letter, paper, document, notice of intent to bring suit, or other notice or demand which simulates a form of court or legal process, the intention of which document is to lead the recipient or addressee to believe the same to be a genuine court or legal process, for the purpose of obtaining anything of value.

(2) The printing, circulating, selling, sending or delivery of such simulating document shall be prima facie evidence of such intent, and it shall be no defense to show that the document bears any statement to the contrary, nor shall it be a defense to show that the thing of value sought to be obtained was to apply as payment on a valid obligation.

(3) In prosecutions for violation of this section, the prosecution may show that the simulating document was deposited in the post office for mailing or was delivered to any person with intent to be forwarded, and such showing shall be sufficient proof to the sending or delivery.

(4) Nothing in this section shall prevent the printing, publication, sale or distribution of genuine legal forms for the use of attorneys, clerks of court or justices of the peace.

(5) Any person, firm or corporation violating subsection (1) of this section shall be fined, for the first offense, not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00), or be imprisoned in the county jail not to exceed thirty (30) days, or by both such a fine and imprisonment; for subsequent offenses, not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail not to exceed ninety (90) days, or by both such a fine and imprisonment.

SOURCES: Codes, 1942, § 2150.5; Laws, 1966, ch. 386, §§ 1-5, eff from and after passage (approved February 17, 1966).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-9-3. Court records and public papers; stealing, concealing, destroying, etc.

The stealing and carrying away, or fraudulently withdrawing, concealing, or destroying or taking away any record, paper, or proceeding of a court of justice, or any paper or proceeding filed or deposited with any officer or in any public office, shall be larceny without reference to the value of the record, paper, or proceeding so stolen, taken away, or destroyed, and shall be punished by imprisonment in the penitentiary not more than five years, or in the county jail not more than one year, and by fine not exceeding five hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(70); 1857, ch. 64, art. 195; 1871, § 2656; 1880, § 2906; 1892, § 1179; Laws, 1906, § 1257; Hemingway's 1917, § 987; Laws, 1930, § 1015; Laws, 1942, § 2247.

Cross References — Custody and withdrawal of court exhibits, see §§ 9-13-27, 9-13-29.

Clerk of chancery court as custodian of records and papers, see § 9-5-163.

Filing together all papers related to a cause, see § 11-1-5.

Malicious mischief, see § 97-17-67.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

To sustain conviction for secretion of paper of public office, state must prove secretion of effective paper belonging to or kept in such office for public purpose;

concealment of blank teacher's certificates will not sustain conviction for concealing paper from public office. *Tally v. State*, 147 Miss. 226, 113 So. 547 (1927).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny § 78.

CJS. 52B C.J.S., Larceny §§ 3(4), 57 et seq.

§ 97-9-5. Bribery; jurors, arbitrators, and referees accepting, and person promising them, punished.

If any person drawn, summoned, chosen, or appointed as a juror, arbitrator, or referee shall, corruptly take or receive any gratuity, gift, or reward whatever, or any promise thereof, or if the wife of such person, with his knowledge and consent, shall so take or receive, to influence any verdict,

award, or report of such juror, arbitrator, or referee, he shall, on conviction, be imprisoned in the penitentiary not more than five years, or in the county jail not more than one year, or fined one thousand dollars, or both, and any person who shall make or offer any such gratuity, reward, or any promise thereof, shall, on conviction, suffer the same penalty.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(11); 1857, ch. 64, art. 36; 1871, § 2513; 1880, § 2729; 1892, § 983; Laws, 1906, § 1059; Hemingway's 1917, § 787; Laws, 1930, § 803; Laws, 1942, § 2029.

Cross References — White-collar crime investigation, see § 7-5-59.

Grounds for vacation of arbitration award, see § 11-15-23.

Arbitration of controversies arising out of construction contracts and related agreements, see §§ 11-15-101 et seq.

Challenge to array and quashing special venire facias, see § 13-5-81.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A defendant's acquittal of a drug charge at his second trial was irrelevant in a prosecution stemming from attempts to influence jurors in the defendant's first drug trial. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

The evidence was sufficient to support convictions of conspiracy and bribery stemming from attempts to influence jurors, where the secretary for one of the defendant's attorneys testified that the defendant did some of the talking when he and his father asked her to type up a list containing the jurors' names and that the

defendant took the list from her and made photocopies of it, a witness testified that the defendant drove his father to the witness' home where the father discussed the scheme to bribe a juror while the defendant listened, a juror testified that during the trial the defendant and his father entered the store where she worked, though they left without speaking to her, and an investigator testified that he discovered the photocopies of the jury list under the seat of the defendant's truck. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 35:12.

§ 97-9-7. Bribery; taking reward for compounding or concealing, etc. crime punishable by death or life imprisonment.

Every person having a knowledge of the actual commission of any offense punishable by death or by imprisonment in the penitentiary for life, who shall take any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal any such crime, or to abstain from

any prosecution thereof, or to withhold any evidence thereof, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not exceeding one year.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(17); 1857, ch. 64, art. 40; 1871, § 2517; 1880, § 2733; 1892, § 987; Laws, 1906, § 1063; Hemingway's 1917, § 791; Laws, 1930, § 807; Laws, 1942, § 2033.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

<p>Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq. 37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.</p>	<p>CJS. 11 C.J.S., Bribery §§ 8 et seq. Practice References. Young, Trial Handbook for Mississippi Lawyers § 3:4.</p>
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§ 97-9-9. Bribery; taking reward for compounding or concealing crime punishable by less than life imprisonment.

Every person having a knowledge of the actual commission of any offense punishable by imprisonment in the penitentiary for any other term than for life, who shall take any money or property of another, or any gratuity or reward, or any engagement or promise therefor, upon any agreement or understanding, expressed or implied, to compound or conceal any such crime, or to abstain from any prosecution therefor, or to withhold any evidence thereof shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding six months.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(18); 1857, ch. 64, art. 41; 1871, § 2518; 1880, § 2732; 1892, § 988; Laws, 1906, § 1064; Hemingway's 1917, § 792; Laws, 1930, § 808; Laws, 1942, § 2034.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

<p>Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq. 37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.</p>	<p>CJS. 11 C.J.S., Bribery §§ 1 et seq. Practice References. Young, Trial Handbook for Mississippi Lawyers § 3:4.</p>
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§ 97-9-10. Bribery; commercial bribery.

(1) Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's or fiduciary's action in relation to the principal's or employer's affairs.

(2) The agent's, employee's or fiduciary's acceptance of or offer to accept, directly or indirectly, anything of apparent present or prospective value under the circumstances set forth in subsection (1) of this section shall also constitute commercial bribery.

(3) The offender under this section who states the facts, under oath, to the district attorney charged with prosecution of the offense, who gives evidence tending to convict any other offender under this section and who testifies in support of the evidence he gives when requested by the district attorney, may, in the discretion of the district attorney, be granted full immunity from prosecution for commercial bribery, in respect to the particular offense reported.

(4) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than six (6) months, or by both such fine or imprisonment.

SOURCES: Laws, 1983, ch. 515, eff from and after July 1, 1983.

Cross References — White-collar crime investigations, see § 7-5-59.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq. **CJS.** 11 C.J.S., Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

§ 97-9-11. Champerty and maintenance; solicitation and stirring up of litigation prohibited.

It shall be unlawful for any person, firm, partnership, corporation, group, organization, or association, either incorporated or unincorporated, either before or after proceedings commenced: (a) to promise, give, or offer, or to conspire or agree to promise, give, or offer, (b) to receive or accept, or to agree or conspire to receive or accept, (c) to solicit, request, or donate, any money, bank note, bank check, chose in action, personal services, or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, or for the purpose of assisting such person to commence or prosecute further, any proceeding in any court or before any administrative board or other agency, regardless of jurisdiction; provided, however, this section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law or solicitor in chancery, for either a fixed fee or upon a contingent basis, to represent such person, firm, partnership, corporation, group, organization, or association before any court or administrative agency.

SOURCES: Codes, 1942, § 2049-01; Laws, 1956, ch. 253, § 1; Laws, 1976, ch. 359, eff from and after July 1, 1976.

Cross References — Unlawfulness of encouraging litigation, see § 73-3-57.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their attorneys were not required to execute the statutory champerty affidavits. *Sneed v. Ford Motor Co.*, 735 So. 2d 306 (Miss. 1999).

Mortgagee's assignment of rights under fire and extended care policy on real estate was not champertous, where insureds were not strangers to litigation and had asserted interest in action separate and distinct from interest of mortgagee. *Stephen R. Ward, Inc. v. United States Fid. & Guar. Co.*, 681 F. Supp. 389 (S.D. Miss. 1988).

Holder of mortgage on property destroyed by fire could properly assign its interest in any claims and/or causes of action against insurance company arising out of loss to the property owner, with property owner remaining fully liable to mortgagee for amount still owed on mortgage, and such assignment is not champertous, as property owners who obtain assignment from mortgage company are not strangers to litigation against insur-

ance company and have asserted interest separate and distinct from interest of mortgagee; in issues of propriety of assignment and claims of champerty, analysis is not focused on relationship between assignee and assignor but rather relationships between assignor and insurance company and assignees and insurance company. *Stephen R. Ward, Inc. v. United States Fid. & Guar. Co.*, 681 F. Supp. 389 (S.D. Miss. 1988).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nuisance, held to require its dismissal. *State ex rel. Carr v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257 (1963).

Where the evidence wholly failed to sustain the charge that the state attorney general had threatened to enforce as against the plaintiffs and their attorneys the provisions of the champerty and maintenance statutes and that, as a result of such threats, plaintiffs and their attorneys suffered irreparable injury, there being no controversy between the parties with respect to these statutes, plaintiffs could not maintain portion of their action attacking the constitutionality thereof. *Darby v. Daniel*, 168 F. Supp. 170 (S.D. Miss. 1958).

RESEARCH REFERENCES

ALR. Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts. 77 A.L.R.2d 411.

Construction of contingent fee contract as regards compensation for services after judgment or on appeal. 13 A.L.R.3d 673.

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship. 13 A.L.R.3d 701.

Modern status of law regarding solicitation of business by or for attorney. 5 A.L.R.4th 866.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney. 9 A.L.R.4th 191.

Contracts by organizations in business of providing evidence, witness, or research assistance to legal counsel in specific litigation. 15 A.L.R.4th 1255.

Validity and construction of contracts by organizations in business of providing expert witnesses, research assistance, and consultation services to attorneys in specific litigation. 70 A.L.R.5th 513.

Am Jur. 14 Am. Jur. 2d, Champerty and Maintenance § 18.

5A Am. Jur. Pl & Pr Forms (Rev), Champerty and Maintenance, Forms 1 et seq. (actions to recover for champerty or maintenance).

CJS. 14 C.J.S., Champerty and Maintenance; Barratry and Related Matters §§ 25, 26.

§ 97-9-13. Champerty and maintenance; penalty.

Any person violating any of the provisions of Section 97-9-11 shall be guilty of maintenance and, upon conviction thereof, shall be punished by imprisonment for one year in the state penitentiary.

SOURCES: Codes, 1942, § 2049-02; Laws, 1956, ch. 253, § 2.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-9-15. Champerty and maintenance; affidavit of party.

Every person who commences or prosecutes or assists in the commencement or prosecution of any proceeding in any court or before any administrative agency in the State of Mississippi, or who may take an appeal from any such rule, order, or judgment thereof, shall, on motion made by any of the parties of such proceedings, or by the court or agency in which such proceeding is pending, file with such court or agency, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (_____), petitioner (or complainant, plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that I have neither received, nor conspired to receive, any valuable consideration or assistance whatever as an inducement to the commencement or further prosecution of the proceedings in this matter.

(Signature of Affiant)

Affiant

Sworn to and subscribed before me on this, the (_____) day of (_____), 2(____).

(Signature of Official)

(Title of Official)

In the case of any firm, corporation, group, organization, or association required to make the above affidavit, such affidavit shall be made by the person having custody and control of the books and records of such firm, corporation, group, organization, or association.

SOURCES: Codes, 1942, § 2049-03; Laws, 1956, ch. 253, § 3.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their attorneys were not required to execute the statutory champerty affidavits. *Sneed v.*

Ford Motor Co., 735 So. 2d 306 (Miss. 1999).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nuisance, held to require its dismissal. *State ex rel. Carr v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257 (1963).

§ 97-9-17. Champerty and maintenance; affidavit of attorney representing party.

Every attorney representing any person, firm, partnership, corporation, group, organization, or association in any proceeding in any court or before any administrative agency in the State of Mississippi, or who may take an appeal from any rule, order, or judgment thereof, shall, on motion made by any of the parties to such proceeding, or by the court or agency in which such proceeding is pending, file, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (_____), attorney representing (_____), petitioner (or complainant, plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that neither I nor, to the best of my knowledge and belief, any other person, firm, partnership, corporation, group, organization, or association has promised, given, or offered, or conspired to promise, give, or offer, or solicited, received, or accepted any valuable consideration or any assistance whatever to said (_____) as an inducement to said (_____) to the commencement or further prosecution of the proceedings herein.

(Signature of Affiant)

Affiant

Sworn to and subscribed before me on this, the (_____) day of (_____), 2(____).

(Signature of Official)

(Title of Official)

Provided, however, that if, on motion made, such affidavits are promptly filed, the failure in the first instance to have filed same shall not constitute grounds for a continuance of such proceedings.

SOURCES: Codes, 1942, § 2049-04; Laws, 1956, ch. 253, § 4.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-9-19. Champerty and maintenance; penalty for false affidavit.

Every person or attorney who shall file a false affidavit shall be guilty of perjury and shall be punished as provided by law. Every attorney who shall file a false affidavit, or who shall violate any other provision of Sections 97-9-11 through 97-9-23, upon final conviction thereof shall also be disbarred, by order of the court in which convicted. Any attorney who shall file a false affidavit, or violate any other provision of Sections 97-9-11 through 97-9-23, and who is not a member of the Mississippi Bar shall, in addition to the other penalties provided by Sections 97-9-11 through 97-9-23, be forever barred from practicing before any court or administrative agency of this state.

SOURCES: Codes, 1942, § 2049-05; Laws, 1956, ch. 253, § 5.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-9-21. Champerty and maintenance; immunity granted witnesses compelled to testify concerning violations; penalty for failure to testify.

No person shall be excused from attending or testifying or producing evidence of any kind before a grand jury, or before any court, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the provisions of Sections 97-9-11 through 97-9-23 on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter, or thing, concerning which he may be required to testify or produce evidence, documentary or otherwise, before the grand jury or court or in any cause or proceeding; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment for not more than one hundred eighty (180) days, or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2049-06; Laws, 1956, ch. 253, § 6.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Lawyers' Edition. Adequacy, under granted in lieu of privilege against self-Federal Constitution, of immunity incrimination. 32 L. Ed. 2d 869.

§ 97-9-23. Champerty and maintenance; exceptions; legislative intent.

The provisions of Sections 97-9-11 through 97-9-23 shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not pay or protect the client from payment of the costs and expenses of litigation, nor shall said sections apply to suits pertaining to or affecting possession of or title to real or personal property, nor shall said sections apply to suits involving the legality of assessment or collection of taxes, nor shall said sections apply to suits involving rates or charges by common carriers or public utilities, nor shall said sections apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Mississippi State Bar.

Nothing in Sections 97-9-11 through 97-9-23 is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy. The intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry, and the solicitation or stirring up of litigation, whether the same be committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation.

SOURCES: Codes, 1942, § 2049-07; Laws, 1956, ch. 253, § 7.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A settlement agreement in which insurers paid their liability limit of \$5 million and the plaintiffs agreed to sue the defendant automobile manufacturer was not a champertous contract; it was a valid assignment of a chose in action and, therefore, the plaintiffs, the insurers, and their

attorneys were not required to execute the statutory champerty affidavits. *Sneed v. Ford Motor Co.*, 735 So. 2d 306 (Miss. 1999).

Failure to file affidavit as to absence of receipt of valuable consideration as an inducement to the prosecution of a citizen's suit to abate an alleged liquor nui-

sance, held to require its dismissal. State ex rel. Carr v. Cabana Terrace, Inc., 247 Miss. 26, 153 So. 2d 257 (1963).

RESEARCH REFERENCES

ALR. Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause. 92 A.L.R.3d 690.

§ 97-9-25. Escape of inmates of state institutions; aiding, abetting, etc.

It shall be unlawful for any person, firm, copartnership, corporation or association to knowingly entice, harbor, employ, or aid, assist or abet in the escape, enticing, harboring or employment of any delinquent, insane, feeble minded or incorrigible person committed to, or confined in any institution maintained by the state for the treatment, education or welfare of delinquent or feeble minded, incorrigible or insane person. Any person violating the provisions of this section upon conviction, shall be punished by a fine of not less than \$25.00 nor more than \$500.00, or imprisonment in the county jail for not less than thirty days, nor more than ninety days, or both.

SOURCES: Codes, 1930, § 901; Laws, 1942, § 2130; Laws, 1930, ch. 25.

Cross References — Escape from private correctional facilities, penalties, see § 47-4-7.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape from public employee or institution other than correctional or law enforcement employee or institution as criminal offense. 69 A.L.R.3d 625.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-27. Escape of prisoners; conveying articles useful for escape to felons.

Every person who shall convey into the penitentiary, jail, or other place of confinement any disguise, instrument, arms, or other things useful to any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner lawfully committed to or detained in such prison, jail, or place for any felony whatever, whether such escape be effected or attempted or not, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(13); 1857, ch. 64, art. 86; 1871, § 2551; 1880, § 2791; 1892, § 1069; Laws, 1906, § 1149; Hemingway's 1917, § 876; Laws, 1930, § 902; Laws, 1942, § 2131.

Cross References — Convicts not being credited with wages during time of escape, see § 47-1-17.

Use of prisoners as servants, see § 47-5-137.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Arrest procedure, see §§ 99-3-13 et seq.

Arrest of fugitives from justice from other states, see §§ 99-21-1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy to escape, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. *Farris v. State*, 906 So. 2d 113 (Miss. Ct. App. 2004).

A defendant, indicted for violation of this section [Code 1942, § 2131], could not be convicted where the proof showed that the prisoner he was alleged to be aiding had been released from jail six days prior to the date on which the offense was charged, and there was no evidence that there was at the time any other prisoner in the jail who had been committed for a felony. *Vickers v. State*, 215 So. 2d 432 (Miss. 1968).

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432 (Miss. 1968).

This section [Code 1942, § 2131] does not require that the prisoner whose escape is intended to be aided must be guilty of felony, or that the person who extends the aid must know or believe him to be; it makes guilt consist of the effort to aid an escape by one lawfully in prison on a charge of felony. *Holland v. State*, 60 Miss. 939 (1883).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed. 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-29. Escape of prisoners; aiding escape of felons generally; rescuing prisoners from custody.

Every person who shall, by any means whatever, aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement for any felony, in an attempt to escape therefrom, whether such escape be effective or not, or who shall forcibly rescue any prisoner held in legal custody upon any criminal charge, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(14); 1857, ch. 64, art. 87; 1871, § 2552; 1880, § 2792; 1892, § 1070; Laws, 1906, § 1150; Hemingway's 1917, § 877, 1930, § 903; Laws, 1942, § 2132.

Cross References — Escaped convict not being credited with wages, see § 47-1-17.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Evidence was sufficient to convict defendant of crime of aiding escape of felon where prosecution proved that defendant drove get-a-way car, despite contention that there was no evidence that she had assisted escapee in scaling prison walls, nor that she smuggled into escapee's place of confinement any weapon or instrumentality of escape. *Suan v. State*, 511 So. 2d 144 (Miss. 1987).

In a prosecution on charges of aiding the attempted escape of a person confined for a felony offense, testimony that an affidavit was sworn out charging such person with burglary of a dwelling, that such person was bound over to await grand jury action on that charge, and that such person was present in jail at the time of the attempted escape, constituted sufficient evidence from which a jury could reasonably conclude that such person was confined for a felony within the meaning of this section. *Pryor v. State*, 349 So. 2d 1063 (Miss. 1977).

Constitution secures to one charged with violation of this section [Code 1942, § 2132] only right to be advised of nature of charge against him, and not right to have set forth facts relied on to sustain charge. *State v. Needham*, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100 (1938).

Indictment held sufficient to charge crime of accessory after the fact to crime of murder, although it did not allege specific acts committed by defendant. *State v. Needham*, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100 (1938).

A verdict rendered on an indictment under this section [Code 1942, § 2132] in these words, "We, the jury, on our oaths do find defendant guilty of negligently permitting the escape of the convict named in the indictment, but not guilty of feloniously aiding or assisting him to escape," amounts to an acquittal. The indictment did not charge that the accused was jailer. *Westbrook v. State*, 52 Miss. 777 (1876).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-31. Escape of prisoners; aiding prisoners other than felons generally; conveying article useful for escape.

Every person who, by any means whatever, shall aid or assist any prisoner lawfully committed to any jail or place of confinement, in execution of any conviction for any criminal offense other than felony, to escape, whether such escape be effective or not, or who shall convey into such jail or place of confinement any disguise, instrument, arm, or other things useful to facilitate the escape of any prisoner so committed, whether such escape be effective or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(15); 1857, ch. 64, art. 88; 1871, § 2553; 1880, § 2793; 1892, § 1071; Laws, 1906, § 1151; Hemingway's 1917, § 878; Laws, 1930, § 904; Laws, 1942, § 2133.

Cross References — When a convict is not credited with wages, see § 47-1-17.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Although the proof may have been sufficient to sustain a verdict of guilty of aiding the escape of a nonfelon under Code 1942, § 2133, a defendant indicted for violating Code 1942, § 2131 and charged with aiding the escape of a felon

should not have been convicted for violating Code 1942, § 2133 where the trial judge failed to order the indictment, record, and proceedings amended to conform with the proof. *Vickers v. State*, 215 So. 2d 432 (Miss. 1968).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-33. Escape of prisoners; aiding escapes from officers.

Every person who shall aid or assist any prisoner in escaping or attempting to escape from the custody of any sheriff, marshal, constable, or other officer or person who shall have the lawful charge of such prisoner upon any criminal charge, shall, upon conviction, be punished by imprisonment in the

county jail not exceeding one (1) year, or by fine not exceeding Five Hundred Dollars (\$500.00), or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(17); 1857, ch. 64, art. 90; 1871, § 2555; 1880, § 2795; 1892, § 1072; Laws, 1906, § 1152; Hemingway's 1917, § 879; Laws, 1930, § 905; Laws, 1942, § 2134; Laws, 1986, ch. 459, § 38, eff from and after July 1, 1986.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-35. Escape of prisoners; permitting escape.

If any officer, or guard of the penitentiary, or any other person, shall, while any convict is under his keeping or charge, wilfully or negligently permit such convict to escape from custody, the person so offending shall be subject to indictment therefor, and, on conviction, shall be fined not more than one thousand dollars and be imprisoned in the penitentiary not less than one year nor more than two years, or in the county jail not less than six months, or shall be punished by both such fine and imprisonment.

SOURCES: Codes, 1857, ch. 64, art. 98; 1871, § 2563; 1880, § 2803; 1892, § 1080; Laws, 1906, § 1160; Hemingway's 1917, § 887; Laws, 1930, § 913; Laws, 1942, § 2142.

Cross References — Use of prisoners as servants, see § 47-5-137.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Liability of public officer or body for harm done by prisoner permitted to escape. 44 A.L.R.3d 899.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape § 5.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 2 et seq.

§ 97-9-37. Escape of prisoners; private persons having custody of prisoner arrested on suspicion.

If any private person having a prisoner in his keeping, arrested on suspicion of felony or other offense, and the prisoner who is so arrested escape

by the wilful act or negligence of the person having him in custody, then the person from whom such prisoner so escaped shall, upon conviction, be fined not more than one thousand dollars or imprisoned in the county jail not longer than one year, or both.

SOURCES: Codes, 1857, ch. 64, art. 91; 1871, § 2556; 1880, § 2796; 1892, § 1073; Laws, 1906, § 1153; Hemingway's 1917, § 880; Laws, 1930, § 906; Laws, 1942, § 2135.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape from custody of private person as criminal offense. 69 A.L.R.3d 664.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 19 et seq.

§ 97-9-39. Escape of prisoners; refusal of officer, jailer, etc., to arrest or confine; refusal to receive prisoners at jail; suffering an escape; accepting bribe to permit escape.

If any sheriff, jailer, constable, marshal, or other officer, shall wilfully and corruptly refuse to execute any lawful process directed to him or any of them, requiring the apprehension or confinement of any person charged with a criminal offense; or shall corruptly and wilfully omit to execute such process, by which such person shall escape; or shall wilfully refuse to receive in any jail under his charge any offender lawfully committed to such jail and ordered to be confined therein on any criminal charge or conviction, or any lawful process whatever; or shall suffer any person lawfully committed to his custody to escape and go at large, either wilfully or negligently; or shall receive any gratuity or reward, or any security or engagement for the same, to procure, assist, or connive at, or permit any prisoner in his custody on any criminal charge or conviction to escape, whether such escape be attempted or effected or not, he shall, upon conviction, be punished by imprisonment in the county jail not exceeding one (1) year, or by fine not exceeding One Thousand Dollars (\$1,000.00), or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(18); 1857, ch. 64, art. 92; 1871, § 2557; 1880, § 2797; 1892, § 1074; Laws, 1906, § 1154; Hemingway's 1917, § 881; Laws, 1930, § 907; Laws, 1942, § 2136; Laws, 1986, ch. 459, § 39, eff from and after July 1, 1986.

Cross References — Remedy against officer in reference to fines, see § 11-7-219. Penalty for constable's neglect of duty, see § 19-19-15.

Liability for failure to return execution, see § 19-25-41.

Failure of officers to return offenders, see § 97-11-35.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A sheriff's duties with respect to operating a jail and keeping prisoners confined were discretionary in nature and, therefore, the sheriff was entitled to the protection of qualified immunity in a suit to recover for the wrongful death of a victim who was murdered by escaped inmates. *McQueen v. Williams*, 587 So. 2d 918 (Miss. 1991).

Whenever an escape is shown, the law implies negligence on the part of the sher-

iff into whose custody the prisoner has been placed, and it is not necessary for the state to prove negligence to procure conviction. If the escape be shown, such officer must show, to avoid conviction, that it was caused by the act of God, or other irresistible force. The insecurity of the jail does not constitute a defense. *Shattuck v. State*, 51 Miss. 575 (1875).

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Escape §§ 1 et seq.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 2 et seq.

§ 97-9-41. Escape of prisoners; concealing or harboring escaped prisoner.

Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the penitentiary for a term not to exceed five (5) years.

SOURCES: Codes, 1942, § 2142.5; Laws, 1952, ch. 258.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The statute [Code 1942, § 2142.5] is a felony statute notwithstanding its provision for a fine as an alternative to imprisonment in the penitentiary. *Bellew v. Dedeaux*, 240 Miss. 79, 126 So. 2d 249 (1961).

This statute [Code 1942, § 2142.5] is not unconstitutional as containing two

subject matters in that the punishment prescribed may be either imprisonment in the penitentiary or fine and commitment to the county jail. *Bellew v. State*, 238 Miss. 734, 106 So. 2d 146 (1958), appeal dismissed, cert. denied, 360 U.S. 473, 79 S. Ct. 1430, 3 L. Ed. 2d 1531 (1959), reh'g denied, 361 U.S. 858, 80 S. Ct. 43, 4 L. Ed. 2d 96 (1959).

Indictment under this provision need not set forth means by which escaped prisoner was harbored. *Bellew v. State*, 238 Miss. 734, 106 So. 2d 146 (1958),

appeal dismissed, cert. denied, 360 U.S. 473, 79 S. Ct. 1430, 3 L. Ed. 2d 1531 (1959), reh'g denied, 361 U.S. 858, 80 S. Ct. 43, 4 L. Ed. 2d 96 (1959).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Harboring or concealing federal prisoner after his escape, under 18 USCS § 1072. 49 A.L.R. Fed. 814.

Sufficiency of evidence of instigating or assisting escape from federal custody, under 18 USCS § 752(a). 74 A.L.R. Fed. 816.

Am Jur. 27A Am. Jur. 2d, Escape § 6.

§ 97-9-43. Escape of prisoners; escapee may be retaken after term expires and imprisoned until tried.

If any convict, confined in any jail or in the penitentiary for a criminal offense, shall escape therefrom he may be pursued, retaken and imprisoned again, notwithstanding the term for which he was sentenced to be imprisoned may have expired at the time he shall be retaken, and shall remain so imprisoned until he shall have served as a convict the entire length of time which he would have been required to so serve had he not escaped, and until tried for such escape, or until discharged on a failure to prosecute therefor.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 5(20); 1857, ch. 64, art. 93; 1871, § 2558; 1880, § 2798; 1892, § 1075; Laws, 1906, § 1155; *Hemingway's* 1917, § 882; Laws, 1930, § 908; Laws, 1942, § 2137; Laws, 1978, ch. 414, § 1, eff from and after July 1, 1978.

Cross References — Governor's duties in delivering fugitives from justice, see §§ 7-1-25 et seq.

When convict is not credited with wages, see § 47-1-17.

Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Officer pursuing offender into other counties, see § 99-3-13.

Retaking escaped offenders anywhere, see § 99-3-15.

JUDICIAL DECISIONS

1. In general.

A prisoner who was convicted of unlawful possession of liquors and who was released by the sheriff to allow the prisoner to seek private hospital care, was an

escapee and he was not entitled to credit upon his sentence or fine and costs for the time spent away from the jail. *Hegwood v. State*, 213 Miss. 693, 57 So. 2d 500 (1952).

RESEARCH REFERENCES

ALR. Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Am Jur. 27A Am. Jur. 2d, Escape § 19.

§ 97-9-45. Escape of prisoners; penalty; willful failure to return to jail after being entrusted to leave.

If any person sentenced to the Mississippi Department of Corrections for any term shall escape or attempt to escape from his particular unit or camp of confinement or the boundaries of the penitentiary as a whole, or shall escape or attempt to escape from custody before confinement therein, he shall, upon conviction, be punished by imprisonment in such prison for a term not exceeding five (5) years, to commence from and after the expiration of the original term of his imprisonment as extended in consequence of such escape or attempted escape.

Any convict who is entrusted to leave the boundaries of confinement by authorities of the Mississippi Department of Corrections or by the Governor, and who willfully fails to return within the stipulated time, or after the accomplishment of the purpose for which he was entrusted to leave, shall be an escapee and, upon conviction, shall be subject to the penalties provided under this section.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(21); 1857, ch. 64, art. 94; 1871, § 2559; 1880, § 2799; 1892, § 1076; Laws, 1906, § 1156; Hemingway's 1917, § 883; Laws, 1930, § 909; Laws, 1942, § 2138; Laws, 1966, ch. 357, § 1; Laws, 1972, ch. 312, § 1; Laws, 1984, ch. 428; Laws, 2002, ch. 328, § 1, eff from and after July 1, 2002.

Cross References — Use of prisoners as servants, see § 47-5-137.

Forfeiture of meritorious earned time as penalty for escape, see § 47-5-142.

Escape of state of county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.

1. In general.

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45 and entered a plea of guilty to the escape, and the sentence of three years was well within the maximum prescribed by the

statute, which referred to prisoners sentenced to the Mississippi Department of Corrections and allowed a maximum sentence of five years, and thus the inmate was not entitled to post-conviction relief; although the inmate was in custody and on a work program for a county at the time of the escape, the inmate was considered under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence re-

quired imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. *Gardner v. State*, 848 So. 2d 900 (Miss. Ct. App. 2003).

A defendant's conviction for escape under this section constituted a "felony" and, therefore, he was properly sentenced as a habitual offender under § 99-19-83. *Beckham v. State*, 556 So. 2d 342 (Miss. 1990).

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of 2 statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under this section, which simply takes away earned time towards parole, rather than § 97-9-49, which provides for a possible sentence of up to 2 years, where the indictment was silent as to the applicable statute. *Beckham v. State*, 556 So. 2d 342 (Miss. 1990).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. *Brown v. State*, 552 So. 2d 109 (Miss. 1989).

Where it is the threats of prison or jail officials which precipitate a prisoner's escape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are nu-

merous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived the defense of necessity. *Corley v. State*, 536 So. 2d 1314 (Miss. 1988).

Prisoner convicted of escape from county jail, where prisoner is being held pending results of appeal of conviction for which prisoner has been sentenced to life imprisonment in state penitentiary, may be sentenced under this section, but not under § 97-9-49, where indictment for jail escape does not specify which statute has been violated. *Cunningham v. State*, 478 So. 2d 308 (Miss. 1985).

Where a prisoner escaped from the county jail, the trial court erred in sentencing him under this section instead of § 97-9-49, which governs escape from a county jail). *Moore v. State*, 461 So. 2d 768 (Miss. 1984).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under § 97-9-49, where the correct sentence for defendant under this section, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. *Carleton v. State*, 438 So. 2d 278 (Miss. 1983).

Generally, when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment must be applied. Accordingly, where a prisoner who was entrusted to leave the jail for designated purposes, including errands, and was entrusted to do this alone, wilfully failed to return to the jail, § 97-9-49 providing for an additional sentence not exceeding 6 months of the original sentence for wilfully failing to return to the jail within the stipulated time applied rather than this section providing for a maximum sentence of 5 years for a pris-

oner escaped from the Department of Corrections. *Bourdeaux v. State*, 412 So. 2d 241 (Miss. 1982).

Defendant should be required to serve term for offense of escaping from jail independent of original sentence. *Jones v. State*, 158 Miss. 366, 130 So. 506 (1930).

That robbery case was afterward reversed on appeal could not affect or diminish defendant's crime of escaping from jail while under penitentiary sentence. *Jones v. State*, 158 Miss. 366, 130 So. 506 (1930).

Penalty for attempt to escape from county jail limited to a year's imprison-

ment. *Floyd v. State*, 140 Miss. 884, 105 So. 765 (1925).

2. Indictment.

Defendant was adequately informed by the indictment of the nature of the escape charge against him and the supporting facts, where the State offered proof that defendant had been convicted of vehicular homicide and sentenced to the custody of the Mississippi Department of Corrections, that pending transportation, he was housed at the county jail, and that he escaped from the jail. *Jenkins v. State*, 881 So. 2d 870 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR. Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

Conviction for escape where prisoner fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Am Jur. 27A Am. Jur. 2d, Escape § 22.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 17 et seq. (proof of duress excusing defendant's escape from prison).

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 12 et seq.

§ 97-9-47. Escape of prisoners; penalty for penitentiary convicts serving less than life term; attempt by force or violence.

Every person lawfully imprisoned in the penitentiary for any term less than life, who shall attempt, by force or violence to any person, to escape from such prison, whether such escape be effected or not, shall, upon conviction, be adjudged to imprisonment in the penitentiary for a term not less than five years, to commence after the termination of the imprisonment to which such person shall have been sentenced at the time of such attempt.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(23); 1857, ch. 64, art. 96; 1871, § 2561; 1880, § 2801; 1892, § 1078; Laws, 1906, § 1158; Hemingway's 1917, § 885; Laws, 1930, § 911; Laws, 1942, § 2140.

Cross References — Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment contained in defendant's "pen pack" was relevant and admissible during penalty phase of capital murder case to show that defendant's previous escape was crime of violence for purposes of statutory aggravating factor. *Russell v. State*, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. *Brown v. State*, 552 So. 2d 109 (Miss. 1989).

Where it is the threats of prison or jail officials which precipitate a prisoner's es-

cape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are numerous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived the defense of necessity. *Corley v. State*, 536 So. 2d 1314 (Miss. 1988).

Defendant's demurrer to an indictment charging him with attempt to escape from the Mississippi Department of Corrections should have been sustained, since the indictment did not state a violation of § 97-9-47, making it unlawful for convicts imprisoned in a penitentiary to attempt to escape from such prison, nor did it state a violation of § 97-9-51[Repealed], which covers those persons attempting escape from the county jail. *Stinson v. State*, 443 So. 2d 869 (Miss. 1983), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Escape or prison breach as affected by means employed. 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Conviction for escape where prisoner

fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 A.L.R.5th 141.

Am Jur. 27A Am. Jur. 2d, Escape § 22.

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 12 et seq.

§ 97-9-49. Escape of prisoners; penalties for convicts in jail and persons under arrest or custody; willful failure to return to jail after being entrusted to leave.

(1)(a) Whoever escapes or attempts by force or violence to escape from any jail in which he is confined, or from any custody under or by virtue of any process issued under the laws of the State of Mississippi by any court or judge, or from the custody of a sheriff or other peace officer pursuant to lawful arrest, shall, upon conviction, if the confinement or custody is by virtue of an arrest on a charge of felony, or conviction of a felony, be punished

by imprisonment in the penitentiary not exceeding five (5) years to commence at the expiration of his former sentence, or, if the confinement or custody is by virtue of an arrest of or charge for or conviction of a misdemeanor, be punished by imprisonment in the county jail not exceeding one (1) year to commence at the expiration of the sentence which the court has imposed or which may be imposed for the crime for which he is charged.

(b) Whoever escapes or attempts by force or violence to escape from any confinement for contempt of court, shall, upon conviction, be found guilty of a misdemeanor and sentenced to imprisonment not to exceed six (6) months in the county jail.

(2) Anyone confined in any jail who is entrusted by any authorized person to leave the jail for any purpose and who willfully fails to return to the jail within the stipulated time, or after the accomplishment of the purpose for which he was entrusted to leave, shall be an escapee and shall be subject to the penalties provided in subsection (1).

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(22); 1857, ch. 64, art. 95; 1871, § 2560; 1880, § 2800; 1892, § 1077; Laws, 1906, § 1157; Hemingway's 1917, § 884; Laws, 1930, § 910; Laws, 1942, § 2139; Laws, 1972, ch. 323, § 1; Laws, 1978, ch. 414, § 2; Laws, 1983, ch. 387, § 1; Laws, 2002, ch. 328, § 2; Laws, 2006, ch. 358, § 1, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment added (1)(b) and designated the existing provisions of (1) as (1)(a).

Cross References — Escape of state or county inmate participating in joint state-county public service work program, see § 47-5-409.

Escape of inmate participating in joint state-county work program, see § 47-5-457.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. "Force or violence".
3. Defense of necessity.
4. Failure to specify statute.
5. Authority to release from jail.
6. Evidence.

1. In general.

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. *Shaw v. State*, 915 So. 2d 442 (Miss. 2005).

Trial court did not commit error when it imposed upon defendant a two-year sentence for escape under Miss. Code Ann. 97-9-49(1) where defendant was in jail

awaiting trial for armed robbery when defendant escaped, force or violence was not required for the section to apply to an escape, as opposed to an "attempted escape", and it was within the discretion of the trial judge to impose consecutive sentences when defendant pled guilty to both crimes. *Smith v. State*, 868 So. 2d 1041 (Miss. Ct. App. 2004).

Defendant stated in his petition to enter a plea that he knew the sentence for escape, Miss. Code Ann. § 97-9-49(1), would be consecutive to the sentences for aggravated assault and kidnapping; the statute also provided that if a prisoner was being held on felony charges, whether he had been convicted or not, then an escape could be punished by a term not to exceed five years in the penitentiary. *Cof-*

fey v. State, 856 So. 2d 635 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Trial judge sentenced defendant within the boundaries of Miss. Code Ann. § 97-9-49(1); the sentence of five years did not exceed the maximum allowed by law and was not contrary to public policy. Coffey v. State, 856 So. 2d 635 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

State was required to prove that defendant was held due to his arrest on felony charges, which made his leaving the jail an escape; lawful custody was required to sustain a conviction for escape. Smith v. State, 800 So. 2d 535 (Miss. Ct. App. 2001).

Miss. Code Ann. § 97-9-49(1) is applicable to escapees who have not yet been convicted and sentenced. Edget v. State, 791 So. 2d 311 (Miss. Ct. App. 2001).

The defendant committed felony escape, rather than misdemeanor escape where, at the time of his escape, he was being held on pending felony charges. Cressionnie v. State, 797 So. 2d 289 (Miss. Ct. App. 2001).

Public policy supports the requirement that a prisoner use legal methods, rather than escape, to vindicate his or her rights. Thus, where a defendant was imprisoned under color of law but alleged that he had not been afforded a hearing since his incarceration and had not been given the opportunity to post bond or to be represented by counsel, any attempt at redress should have been and should always be through regular legal channels and not via a self-help escape process. Brown v. State, 552 So. 2d 109 (Miss. 1989).

A deputy sheriff who was in charge of a jail based on orders given by the sheriff was an "authorized person" within the meaning of subsection (2) of this section. Brown v. State, 552 So. 2d 109 (Miss. 1989).

Subsection (1) of this section covers 2 separate and distinct offenses; escape and attempted escape. Miller v. State, 492 So. 2d 978 (Miss. 1986).

In a prosecution for murder the defendant was improperly sentenced under this section, where defendant escaped prior to his sentencing, and where inasmuch as

the defendant was not subject to any "former sentence" at the time he escaped his escape was not within the purview of this section providing that a sentence upon conviction would "commence from the expiration of his former sentence." Williams v. State, 420 So. 2d 562 (Miss. 1982).

Penalty for attempt to escape from county jail limited to a year's imprisonment. Floyd v. State, 140 Miss. 884, 105 So. 765 (1925).

2. "Force or violence".

Hole used by defendant, a two-foot wide opening in a chain-link roof over the recreational yard, was not intended as an exit. The photographs of the hole established that the chain link roof was pulled, pried, or twisted from the wire which held it in place; thus, the record clearly proved the use of force as to defendant's conviction for attempted felony escape. Herrington v. State, 911 So. 2d 545 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

The "force or violence" wording of subsection (1) of this section refers only to attempted escape and not to the separate and distinct offense of escape. Miller v. State, 492 So. 2d 978 (Miss. 1986).

Evidence that accused used force or violence is not necessary to prove the offense of escape which consists of (a) the knowing and voluntary departure of a person (b) from lawful custody and (c) with intent to evade the due course of justice. Miller v. State, 492 So. 2d 978 (Miss. 1986).

3. Defense of necessity.

Where it is the threats of prison or jail officials which precipitate a prisoner's escape, the prisoner is not required to return to the custody of the official making the threats in order to preserve the defense of necessity. However, there are numerous law enforcement or other governmental agencies to whom a prisoner might safely report and from whom he could receive assistance in resolving his dangerous situation. Thus, an escaped prisoner who made no effort whatsoever to communicate with anyone in authority about his alleged predicament, even though he had ample opportunity to do so, waived

the defense of necessity. *Corley v. State*, 536 So. 2d 1314 (Miss. 1988).

4. Failure to specify statute.

Defendant's counsel had stipulated that defendant was in custody on a felony charge. Thus, there was not due process violation because the indictment failed to distinguish between a felony and a misdemeanor charge of attempted escape. *Herrington v. State*, 911 So. 2d 545 (Miss. Ct. App. 2005), cert. denied, 920 So. 2d 1008 (Miss. 2005).

Defendant's conviction for escape was affirmed but his sentence of five years in the custody of the Mississippi Department of Corrections was reversed and remanded for resentencing where, because defendant's indictment specified no particular statute to have been violated, he should have been sentenced to no more than six months for escape. *Jenkins v. State*, 888 So. 2d 1171 (Miss. 2004).

While the State is not required to prosecute a criminal defendant under the statute with a lesser penalty when the facts which constitute a criminal offense may fall under either of 2 statutes, if the indictment is ambiguous, the accused can only be punished under the statute with the lesser penalty. Thus, a defendant who was indicted for escape was required to be prosecuted under § 97-9-45, which simply takes away earned time towards parole, rather than this section, which provides for a possible sentence of up to 2 years, where the indictment was silent as to the applicable statute. *Beckham v. State*, 556 So. 2d 342 (Miss. 1990).

An inmate's failure to return to jail from an authorized departure to work at the sheriff's office gas station constituted an escape pursuant to subsection (2) of this section and, therefore, the inmate was properly sentenced under subsection (2) of this section, which provides for a maximum sentence of 6 months for failure to return from an authorized leave, as opposed to subsection (1) of this section, which provides for a maximum sentence of 5 years for escape from jail. *State v. Bradford*, 522 So. 2d 227 (Miss. 1988).

Prisoner convicted of escape from county jail, where prisoner is being held pending results of appeal of conviction for which prisoner has been sentenced to life

imprisonment in state penitentiary, may be sentenced under § 97-9-45, but not under this section, where indictment for jail escape does not specify which statute has been violated. *Cunningham v. State*, 478 So. 2d 308 (Miss. 1985).

Where a prisoner escaped from the county jail, the trial court erred in sentencing him under § 97-9-45 instead of this section, which governs escape from a county jail). *Moore v. State*, 461 So. 2d 768 (Miss. 1984).

In a prosecution for attempted escape, the trial court erred in sentencing defendant, who was under a sentence of life imprisonment for a murder conviction, to a term of two years under this section, where the correct sentence for defendant under § 97-9-45, which specifically covers persons convicted of escape from custody after being sentenced to the penitentiary for life, would be forfeiture of all earned time toward a parole. *Carleton v. State*, 438 So. 2d 278 (Miss. 1983).

Generally, when facts constituting a criminal offense may fall within either of two or more statutes or there is substantial doubt as to which applies, the statute imposing the lesser punishment must be applied. Accordingly, where a prisoner who was entrusted to leave the jail for designated purposes, including errands, and was entrusted to do this alone, wilfully failed to return to the jail, this section providing for an additional sentence not exceeding 6 months of the original sentence for wilfully failing to return to the jail within the stipulated time applied rather than § 97-9-45 providing for a maximum sentence of 5 years for a prisoner escaped from the Department of Corrections. *Bourdeaux v. State*, 412 So. 2d 241 (Miss. 1982).

5. Authority to release from jail.

Where the record evidence clearly indicated that the defendant was pleading guilty to escape from an officially arranged jail release, rather than forcible or violent escape, the maximum sentence was 6 months; thus, it was error for the court to impose a five year sentence. *Ward v. State*, 708 So. 2d 11 (Miss. 1998).

Sheriff has no authority to release from jail prisoner who has been placed in custody of sheriff by court order without

procuring court order allowing release; sheriff who releases prisoner, without court order, on basis of alleged mental and physical problems requiring hospitalization of prisoner, may be held in contempt of court. *Coleman v. State*, 482 So. 2d 221 (Miss. 1986).

Sheriff who has previously obeyed court orders in releasing prisoners and recording ordered releases on jail docket but who subsequently allows convicted murderer and person convicted of possession with intent to sell controlled substances to leave jail on weekends, without court order and without making jail docket entry to document absence of prisoners, has overstepped bounds of authority and is guilty of criminal contempt. *Coleman v. State*, 482 So. 2d 219 (Miss. 1986).

6. Evidence.

The evidence supported a conviction under subsection (2) of this section, but not under subsection (1) of this section, where (1) at the time of the defendant's escape, he was a trustee at the county jail and was authorized by an officer to refuel a patrol car located on some adjacent property 100 to 200 feet away from the sheriff's department, but (2) it was not established whether the defendant's assignment did or did not necessitate the removal of his person from the jail's premises. *King v. State*, 739 So. 2d 1055 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. What justifies escape or attempt to escape, or assistance in that regard. 70 A.L.R.2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison. 69 A.L.R.3d 678.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

Temporary unauthorized absence of prisoner as escape or attempted escape. 76 A.L.R.3d 695.

Conviction for escape where prisoner fails to leave confines of prison or institution. 79 A.L.R.4th 1060.

Am Jur. 27A Am. Jur. 2d, Escape § 22.

4 Am. Jur. Proof of Facts 2d, Criminal Acts Committed under Duress, §§ 17 et seq. (proof of duress excusing defendant's escape from prison).

CJS. 30A C.J.S., Escape and Related Offenses; Rescue §§ 12 et seq.

Law Reviews. 1989 Mississippi Supreme Court Review: Criminal law; statutes. 59 Miss. L. J. 876, Winter, 1989.

§ 97-9-51. Repealed.

Repealed by Laws, 1983, ch. 387, § 2, eff from and after July 1, 1983.

[Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(24); 1857, ch. 64, art. 97; 1871, § 2562; 1880, § 2802; 1892, § 1079; 1906, § 1159; Hemingway's 1917, § 886; 1930, § 912; 1942, § 2141; Laws, 1978, ch. 414, § 3]

Editor's Note — Former § 97-9-51 was entitled: Escape of prisoners; penalties for prisoners in county jail; attempt by force or violence.

§ 97-9-53. Indictments; penalty for disclosing facts relating to indictment.

If a grand juror, witness, district attorney, clerk, sheriff, or any other officer of the court, disclose the fact of an indictment being found or returned into court against a defendant, or disclose any action or proceeding had in relation thereto, before the finding of the indictment, or in six months

thereafter, or until after the defendant shall have been arrested or given bail or recognizance to answer thereto, he shall be fined not more than two hundred dollars.

SOURCES: Codes, 1857, ch. 64, art. 260; 1871, § 2797; 1880, § 3008; 1892, § 1349; Laws, 1906, § 1421; Hemingway's 1917, § 1177; Laws, 1930, § 1201; Laws, 1942, § 2444.

Cross References — Prohibition against grand juror disclosing secrets of jury room, see § 13-5-61.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Indictments, generally, see §§ 99-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

The general rules of grand jury secrecy have no application to testimony given by witnesses who are to be used by the State at a pretrial hearing or at trial with respect to charges lodged by an indictment rendered and served as a result of such testimony. *Addikson v. State*, 608 So. 2d 304 (Miss. 1992).

This section, which prohibits any grand jury witness from disclosing "any action or proceeding had" before the grand jury, does not allow a witness to reveal what he

or she said before the grand jury but does not prevent a witness from being questioned in a separate proceeding and being required to answer where the questions overlap or even duplicate what the witness was asked before the grand jury. *In re Knapp*, 536 So. 2d 1330 (Miss. 1988).

It is not permissible to inquire on the trial of the defendant what evidence the grand jury had when it indicted him. *Baldwyn v. State*, 125 Miss. 561, 88 So. 162 (1921).

ATTORNEY GENERAL OPINIONS

A district attorney (as a "person in charge of a law enforcement agency") or circuit court clerk (as an officer of the court) may comply with Section 45-27-9 by providing to the Mississippi Justice Information Center the information on a capias that either cannot or has not been served within a reasonable time period; if for

some reason the sheriff cannot serve the capias on the defendant and returns the capias unserved, the information on the capias may be provided to the Mississippi Justice Information Center without violation of Sections 97-9-53 or 99-7-15. *Kitchens, Jr.*, April 17, 2000, A.G. Op. #2000-0192.

RESEARCH REFERENCES

ALR. Relief, remedy, or sanction for violation of Rule 6(e) of Federal Rules of Criminal Procedure, prohibiting disclo-

sure of matters occurring before grand jury. 73 A.L.R. Fed. 112.

§ 97-9-55. Intimidating judge, juror, witness, attorney, etc., or otherwise obstructing justice.

If any person or persons by threats, force or abuse, attempt to intimidate or otherwise influence a judge, justice of the peace, juror, or one whose name has been drawn for jury service, witness, prosecuting or defense attorney or

any other officer in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment not less than one (1) month in the county jail nor more than two (2) years in the state penitentiary or by a fine not exceeding five hundred dollars (\$500.00), or both such fine and imprisonment.

SOURCES: Codes, 1880, § 2976; 1892, § 1222; Laws, 1906, § 1298; Hemingway's 1917, § 1031; Laws, 1930, § 1062; Laws, 1942, § 2294; Laws, 1926, ch. 149; Laws, 1964, ch. 352, eff from and after passage (approved March 12, 1964).

Editor's Note — Pursuant to Miss. Constn., § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Power of courts to punish for contempt, see § 9-1-17.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Examination of witnesses, see Miss. Rules of Evidence, Rule 611.

Conduct of attorneys, see Miss. Uniform Rules of Circuit and County Court Practice, Rule 3.02.

JUDICIAL DECISIONS

1. In general.
2. Particular applications.

1. In general.

The phrase "or otherwise" refers to acts or stratagem of the same general nature as the preceding "threats, force or otherwise" within the section, and indicates acts common to or characteristic of the preceding group of words or an approximation thereof. *Wilbourn v. State*, 249 Miss. 835, 164 So. 2d 424 (1964).

The offense defined in this section [Code 1942, § 2294], requires the state to show an attempt to intimidate or impede an officer in the discharge of his duties by threats, force, abuse, or otherwise. *Wilbourn v. State*, 249 Miss. 835, 164 So. 2d 424 (1964).

That state's witnesses refused to talk to counsel for accused before being placed on the stand is not ground for reversal; the remedy is by full cross-examination. *Mattox v. State*, 240 Miss. 544, 128 So. 2d 368 (1961).

The phrase "or otherwise" in this section [Code 1942, § 2294] refers to acts or stratagems of the same general nature as the preceding "threats, force or abuse". *Gaston v. State*, 239 Miss. 420, 123 So. 2d 546 (1960).

Constructive contempt, or any act calculated to impede, embarrass, obstruct,

defeat, or corrupt the administration of courts of justice, when the act is done beyond the presence of the court, is indictable under this section [Code 1942, § 2294]. *Sullens v. State*, 191 Miss. 856, 4 So. 2d 356 (1941).

Before court can punish for constructive contempt the offense must be judicially stated; proper course taken by citing accused and having his answer charged by information of attempted bribery, and investigating it by taking testimony thereon. *Durham v. State*, 97 Miss. 549, 52 So. 627 (1910).

Under this section [Code 1942, § 2294] it is not necessary to aver in what case the defendant was a witness. *Wilson v. State*, 80 Miss. 388, 31 So. 787 (1902).

Example of proper averments in an indictment under this section [Code 1942, § 2294]. *Wilson v. State*, 80 Miss. 388, 31 So. 787 (1902).

2. Particular applications.

The evidence was insufficient to support a conviction for attempting to intimidate a witness at the defendant's second burglary trial, where the evidence did not support a finding that the defendant knew that the witness was a witness at the first trial, which ended in a mistrial, or that the witness would be a witness at the

second trial; although it was possible that the defendant could have seen the witness at the courthouse during the defendant's first trial, this was insufficient to show that the defendant could thereby have concluded that the witness would testify against him at his second trial. *Corley v. State*, 584 So. 2d 769 (Miss. 1991).

A defendant's acquittal of a drug charge at his second trial was irrelevant in a prosecution stemming from attempts to influence jurors in the defendant's first drug trial. *King v. State*, 580 So. 2d 1182 (Miss. 1991).

There was no violation of this section [Code 1942, § 2294] where the accused gave to the sheriff investigating a crime a false statement which was calculated to mislead the officer, but which was not

accompanied by force, threats, or abuse. *Wilbourn v. State*, 249 Miss. 835, 164 So. 2d 424 (1964).

No violation of this statute [Code 1942, § 2294] is committed by ordering off premises officers in pursuit of one not shown to have committed a felony, or an offense in the presence of the officers and for whom they had no warrant of arrest. *King v. State*, 246 Miss. 86, 149 So. 2d 482 (1963).

Merely protesting to the arresting officer that another should not be arrested as he had done nothing, without threats, show of force, or abuse, does not violate this section [Code 1942, § 2294]. *Gaston v. State*, 239 Miss. 420, 123 So. 2d 546 (1960).

RESEARCH REFERENCES

ALR. Assaulting, threatening, or intimidating witness as contempt of court. 52 A.L.R.2d 1297.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 A.L.R.4th 829.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 A.L.R.4th 800.

Criminal liability of attorney for tampering with evidence. 49 A.L.R.5th 619.

Defenses to State Obstruction of Justice Charge Relating to Interfering with Criminal Investigation or Judicial Proceeding. 87 A.L.R.5th 597.

Venue of prosecution for unlawfully influencing, intimidating, or impeding a federal officer, witness, or juror, under 18 U.S.C. § 1503. 64 A.L.R. Fed. 678.

Validity, construction, and application of federal witness tampering statute, 18 U.S.C. § 1512(b). 183 A.L.R. Fed. 611.

Construction and application of federal witness tampering statute, § 18 U.S.C. 1512(b). 185 A.L.R. Fed. 1.

Am Jur. 58 Am. Jur. 2d, Obstructing Justice § 7.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS. 67 C.J.S., Obstructing Justice or Governmental Administration §§ 1 et seq.

Law Reviews. 1982 Mississippi Supreme Court Review: Criminal Law and Procedure: No Right to Hold Public Office After Conviction. 53 Miss. L. J. 155, March 1983.

§ 97-9-57. Officer not to converse with juror; penalty.

The sheriff, bailiff, or other officer, shall not be in the room or converse with a juror after the jury has retired from the bar, save by order of the court. A violation of this section shall subject the offender to a fine of fifty dollars and one week's imprisonment for a contempt.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 1(137); 1857, ch. 61, art. 156; 1871, § 638; 1880, § 1711; 1892, § 729; Laws, 1906, § 790; Hemingway's 1917, § 574; Laws, 1930, § 583; Laws, 1942, § 1527.

Cross References — Another section derived from same 1942 code section, see § 11-7-149.

Control of court over jury, see § 13-5-83.

View by jury, see § 13-5-91.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Although this section makes it a misdemeanor for a bailiff to go into the jury room after the jury has retired, defendant's motion for a mistrial was properly denied, where the bailiff merely walked into the jury room to see how warm it was, after the jury complained of discomfort due to heat, and where there was no evidence of any impropriety occurring in the jury room. *Leflore v. State*, 439 So. 2d 675 (Miss. 1983).

No new trial was warranted on grounds that a deputy sheriff without court authorization drove a bus and ate in the same room with the jurors where the deputy did not testify as a witness in the case on its merits, he did not even appear in the courtroom at any time in the course of the trial, his function was to assist in the process of making it possible for the jurors to eat, his only activity was to respond to

the sheriff's direction that he drive the members of the jury, together with the two bailiffs, to the restaurant in the bus, and at all times complained of the jurors were in the protective custody of the bailiff; however, it would have been better policy for the bus driver to receive in open court detailed instructions from the trial judge in the presence of jurors, bailiffs, counsel, and the defendant. *Bickcom v. State*, 286 So. 2d 823 (Miss. 1973).

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. *Horn v. State*, 216 Miss. 439, 62 So. 2d 560 (1953).

RESEARCH REFERENCES

ALR. Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 30 A.L.R.3d 1012.

Am Jur. 75A Am. Jur. 2d, Trial § 1003.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS. 88 C.J.S., Trial § 782, 784, 786-789.

Practice References. Young, Trial Handbook for Mississippi Lawyers §§ 35:3, 35:12.

§ 97-9-59. Perjury; definition.

Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of

any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(1); 1857, ch. 64, art. 204; 1871, § 2660; 1880, § 2921; 1892, § 1243; Laws, 1906, § 1318; Hemingway's 1917, § 1051; Laws, 1930, § 1082; Laws, 1942, § 2315.

Cross References — False testimony in legislature as perjury, see § 5-1-27.

Conviction of perjury or subornation of perjury as disqualification of witness, see § 13-1-11.

False income tax returns and reports, see § 27-7-87.

False oath in application for homestead exemption as perjury, see § 27-33-57.

Perjury on application for tax credit where motor vehicle is destroyed, see § 27-51-27.

False swearing before railroad commission as perjury, see § 77-1-35.

False testimony under oath in hearing on license for legal expense insurance as constituting perjury, see § 83-49-11.

False declaration of identity of a father, see § 93-9-37.

Crime of false statements as to denial of constitutional rights, see §§ 97-7-33 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Procedure when witness commits perjury, see §§ 99-3-29 et seq.

Requisites of indictment for perjury, see § 99-7-39.

No variance between "sworn" and "affirmed" in perjury prosecutions, see § 99-17-33.

JUDICIAL DECISIONS

1. Essentials of offense.
2. How committed.
3. Materiality of testimony.
4. Defenses.
5. Indictment.
6. Proof, generally.
7. —Sufficiency.
8. Need for record or transcript.
9. —Of conflicting statements.
10. Materiality.
11. Variance.
12. Instructions.
13. Perjurer as witness in subsequent cause.

was merely mistaken. *Russell v. Bailey*, 197 So. 2d 469 (Miss. 1967).

Conviction of perjury, though creating a general disqualification to testify at common law and in Mississippi, goes only to the convict's credit in the federal court, at least when the conviction was under the federal perjury statute. *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359 (5th Cir. 1945).

To constitute perjury, the false swearing must be not only wilful but corrupt or intentionally false. *Cothran v. State*, 39 Miss. 541 (1860).

1. Essentials of offense.

In order to show that a person has corruptly sworn to a material fact, it is necessary that the person charged with the offense knows the fact to be untrue and corruptly and intentionally, and in a manner that is morally and wilfully false, makes the affidavit or commits the perjury, and it is not sufficient to show that he

2. How committed.

Affidavit submitted by convicted burglar, recanting earlier testimony for prosecution leading to burglary conviction of alleged accomplice, was proof of perjury and lower court should hear accomplice's petition for error coram nobis and hold evidentiary hearing. *Tobias v. State*, 505 So. 2d 1014 (Miss. 1987).

Where a person knowingly swears to a false statement in order to obtain money to which he is not legally entitled and such oath is necessary to the obtaining of the money, he is guilty of perjury. Whether intentional false swearing to a legal claim for money is perjury, *quaere*. *Vance v. State*, 62 Miss. 137 (1884).

3. Materiality of testimony.

A defendant's allegedly false statement in front of the grand jury that he had not returned to his apartment after the discovery of the death of an infant who was at the apartment, was material to the grand jury's investigation of the death of the infant, and could therefore constitute perjury, since the grant jury's deliberations could conceivably have been affected, especially concerning the credibility of the defendant, had it known of the defendant's visit to the apartment and his request that his presence there not be revealed to the authorities. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

Where on a prosecution for an unlawful sale of liquor, defendant pleaded guilty, testimony of the alleged purchaser that he did not purchase the liquor was not material and no predicate for perjury. *Long v. State*, 100 Miss. 7, 56 So. 185 (1911); *McNeice v. State*, 101 Miss. 366, 58 So. 3 (1912).

Where the record of the cause in which the false swearing is committed is produced before the court trying the perjury, the materiality of the falsehood to the issue in that cause is a question of law. *Cothran v. State*, 39 Miss. 541 (1860).

4. Defenses.

It is no defense to an indictment for perjury to show that the accused testified under fear engendered by the threats of others, the threatened danger not being imminent, impending and unavoidable. *Bain v. State*, 67 Miss. 557, 7 So. 408 (1890).

5. Indictment.

An indictment for perjury must specifically allege the true facts; thus, an indictment for perjury was fatally defective and should have been quashed where it did not attempt to set out the truth as to the allegation that the defendant had "testi-

fied falsely that he had not been court-martialed in the military and that he had an honorable discharge and a general discharge under honorable conditions from the United States Army." *Ford v. State*, 610 So. 2d 370 (Miss. 1992).

An indictment charging the defendant with the crimes of perjury and conspiracy to commit perjury would not be quashed based upon the fact that the same grand jurors who heard the defendant testify, and were therefore witnesses to his alleged perjury, were the same grand jurors who returned the indictment against him, even though it would have been the better practice not to have sought the perjury and conspiracy indictments from the same grand jury who heard the alleged perjury, where there was no evidence of any fraud or wrongdoing on the part of the grand jurors. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

The rule requiring that the guilt of a defendant indicted for the crime of perjury be proved by the testimony of two witnesses, or the testimony of one witness in corroborating circumstances, applies to the false swearing charge in the indictments. *Clanton v. State*, 210 Miss. 700, 50 So. 2d 567 (1951).

Indictment charging defendant swore falsely in making report to auditor of public accounts, is sufficient to charge that report was made to auditor. *State v. Kelly*, 113 Miss. 461, 74 So. 325 (1917).

Indictment stating perjury committed on wrong day may be amended to conform to proof. *Saucier v. State*, 95 Miss. 226, 48 So. 840, 21 Am. Ann. Cas. 1155 (1909).

Indictment must charge perjury committed as to material matter and set out facts. *Moore v. State*, 91 Miss. 250, 44 So. 817, 124 Am. St. R. 652 (1907).

It is sufficient for the indictment to charge generally that the matter sworn to in the false oath was material to the issue or point of inquiry, without showing how. *Lea v. State*, 64 Miss. 278, 1 So. 235 (1887).

An averment in an indictment that the accused knew that his statement was false is necessary only when the oath is as to the witness' belief, and if the swearing were absolute, the averment is surplusage. *Brown v. State*, 57 Miss. 424 (1879).

6. Proof, generally.

In perjury case, corpus delicti must be established by State and in ordinary case where accused has made only single statement under oath, in order to prove that he lied, it is incumbent upon State to first prove actual truth. *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

To convict person of perjury alleged to have been committed on trial of case in court of record, evidence must show beyond reasonable doubt that defendant was duly sworn in the formal proceeding. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761 (1948).

Sufficiency of proof of falsity of oath stated. *Johnson v. State*, 122 Miss. 16, 84 So. 140 (1920).

Conviction of perjury not sustained by uncorroborated evidence of single witness. *Lee v. State*, 105 Miss. 539, 62 So. 360 (1913).

7. —Sufficiency.

Evidence was insufficient to establish perjury based on the defendant's statements relating to his having consumed gin and marijuana during a lunch recess in his trial for domestic violence where both an intoxilyzer test and a blood test showed no discernable alcohol in the defendant's system, but no proof that he had not ingested marijuana was offered, and the state failed to present any witness who was with the defendant throughout the lunch recess. *Hammett v. State*, 797 So. 2d 258 (Miss. Ct. App. 2001).

The prosecution failed to prove the falsity of the defendant's statement that he had consumed a pint of gin over the lunch recess by a minimum of two witnesses or by one witness and corroborating circumstances where the state showed that an intoxilyzer test and a blood test showed no trace of alcohol in the defendant's system; the tests together satisfied only the requirement of corroboration, and there was no state witness who was with or otherwise saw the defendant during the relevant lunch break, or a witness who stated that the defendant admitted that what he said was false. *Hammett v. State*, — So. 2d —, 2000 Miss. App. LEXIS 403 (Miss. Ct. App. Sept. 5, 2000).

Evidence was insufficient to establish that the defendant committed perjury in a

murder trial when she gave alibi testimony for the defendant in that trial, who was her significant other, where not one witness gave evidence to support the assertion that the defendant committed perjury and the only direct evidence in support of that contention was found in her daily and weekly employment records, which were inconsistent at best. *Hall v. State*, 751 So. 2d 1161 (Miss. Ct. App. 1999).

The evidence was insufficient to support a conviction of perjury, which allegedly occurred before the grand jury, where the testimony was tentative and uncertain, it concerned an incident which occurred more than one year earlier, and it was contradictory as to whether the defendant may have told the literal truth to the grand jury. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

Conviction of defendant for perjury was upheld over objection that alleged perjury was not proved by testimony of 2 witnesses or by one witness and corroborating circumstances; common-law rule requiring one witness and corroborating circumstances to sustain perjury conviction refers only to proof of falsity of accused's statement, but does not extend to proof of other elements of crime; testimony of defendant's mother satisfied requirement that one witness testify to falsity of defendant's testimony at trial where perjury was allegedly committed, and her testimony was consistent with defendant's 2 prior sworn statements; to sustain conviction, both of contradictory statements must be under oath. *McFee v. State*, 510 So. 2d 790 (Miss. 1987).

The testimony of a handwriting expert that a list of items, admittedly made by the defendant, was written by the same person who wrote a questioned document which the defendant had claimed in a previous trial that he had never seen, and the transcript of the evidence of all of the witnesses in the previous trial, including evidence given by the defendant's wife in his defense, were sufficient to meet the requirement of two witnesses, or one witness and corroborating circumstances, necessary for a conviction for perjury. *Brewer v. State*, 233 So. 2d 779 (Miss. 1970).

Although further allegations of the indictment may be proved by a single witness, the falsity of the allegedly perjured statement must be established by the testimony of at least two witnesses or by one witness and corroborating circumstances. *Nash v. State*, 244 Miss. 857, 147 So. 2d 499 (1962).

Where a witness by affidavit made before murder trial stated that the accused had fired the shot and at the trial witness testified he did not know who fired the shot, this was not enough proof to establish perjury. *Tribble v. State*, 210 Miss. 604, 50 So. 2d 148 (1951).

Ordinarily perjury must be proven by the testimony of two witnesses or one witness and corroborating circumstances; where the accused has made conflicting sworn statements, one witness to the falsity of the statement with which he is charged is sufficient. *Horn v. State*, 186 Miss. 455, 191 So. 282 (1939), criticized, *Hogan v. State*, 516 So. 2d 474 (Miss. 1987); *Tribble v. State*, 210 Miss. 604, 50 So. 2d 148 (1951).

If conviction of perjury be sought only on the ground that defendant knew nothing of and was not present at the scene of the transaction about which he gave testimony, it is essential to his conviction that the state should prove by two witnesses or one witness and corroborating circumstances beyond a reasonable doubt arising from the evidence that the defendant was not present at the scene. *Whittle v. State*, 79 Miss. 327, 30 So. 722 (1901).

Where the accused swore that he had not sold liquors to either of several persons named, proof of separate sales to different persons each by a separate witness is not sufficient. Some one sale must be proved by two witnesses or one witness and corroborating circumstances and proof of one sale is not corroborative evidence of another. *Lea v. State*, 64 Miss. 278, 1 So. 235 (1887).

It is sufficient if the falsity be shown by one witness and by the defendant's evidence in his own behalf. *Vance v. State*, 62 Miss. 137 (1884).

8. Need for record or transcript.

A prosecution for perjury without any kind of transcript or verbatim record of the proceedings in question is not per se

flawed or reversible. However, in such a situation, the district attorney must make an effort to preserve in some manner the questions asked and the answers given by the defendant. *Smallwood v. State*, 584 So. 2d 733 (Miss. 1991).

To convict person of perjury alleged to have been committed on trial of case in court of record, production of record in that case, or of duly authenticated transcript thereof, is essential, unless formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761 (1948).

That alleged perjured testimony was given in duly constituted court cannot be proven by testimony of circuit clerk and court reporter showing organization of court at the term at which the indictment charged that the perjury was committed. *Polk v. State*, 204 Miss. 538, 37 So. 2d 761 (1948).

Under an indictment for perjury, the trial of the cause in which the false swearing is charged to have been committed must be proved by the record if it be in existence. *Whittle v. State*, 79 Miss. 327, 30 So. 722 (1901).

9. —Of conflicting statements.

Proof that accused knowingly and willfully made two mutually contradictory statements on material matter under oath, without more, can support conviction of perjury, but only in certain factual scenarios. *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

Even where accused has made statements under oath which are at variance with or contradict one another, State in usual case is in position to designate on which date he lied, and make proof by showing true facts on that date, because as general rule, it is fact that State is easily capable of showing truth that makes perjury blatant and so deserving of punishment; contradictory statements made by accused in such instances are strong corroborating evidence of perjury. *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

Where State has evidence upon which to allege and prove on which date accused lied in perjury prosecution, it should be specified and charged in indictment and

such evidence presented to jury; mutually contradictory statements by accused in such instances serve only as corroboration of state's case; however, where state is unable to offer such evidence, it should be able to proceed on basic question with proof it has, namely, two mutually contradictory statements made under oath. Adoption of this rule necessarily carries with it limitation that it can only be used when state is unable to offer additional proof as to precise date accused lied, and evidence aliunde as to truth of matter about which accused testified. *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

Where there was no evidence as to the falsity of the statement with which a defendant was charged other than his own conflicting statement as to the identity of one accused of selling intoxicating liquors made on the two trials of such accused, defendant could not be convicted of perjury. *Horn v. State*, 186 Miss. 455, 191 So. 282 (1939), criticized, *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

Where a witness testified on the trial of one for selling intoxicating liquors that she was the person who sold the liquor, and on a second trial testified that he could not swear that she was the person, such witness could not be convicted of perjury since there was no evidence as to the falsity of the statement with which the witness was charged other than his own conflicting statement. *Horn v. State*, 186 Miss. 455, 191 So. 282 (1939), criticized, *Hogan v. State*, 516 So. 2d 474 (Miss. 1987).

10. Materiality.

The defendant's statements relating to his having consumed gin during a lunch recess in his trial for domestic violence were material to the proceeding to the extent that they were part of the story that he was under the influence of something that would impair his ability to testify as such assertion, whether true or not, had the potential to delay the jury's investigation of whether he was guilty of the domestic violence charges brought against him. *Hammett v. State*, 797 So. 2d 258 (Miss. Ct. App. 2001).

The defendant's statements relating to his having consumed gin during the lunch recess were material to the proceeding

against him as the truth or falsity of his statements regarding whether he had consumed gin had the effect of impeding the jury's investigation of whether he was guilty of the charges brought against him and it made no difference whether the statements in question actually impeded the investigation. *Hammett v. State*, — So. 2d —, 2000 Miss. App. LEXIS 403 (Miss. Ct. App. Sept. 5, 2000).

Ordinarily, materiality in a perjury case may be shown by offering that portion of the prior proceeding necessary to identify matters there at issue. The trial judge may then consider the alleged perjured testimony in light of the issues and resolve the materiality question. The trial judge in a perjury trial should be sensitive to the possibilities that the presence of and identification of another judge and the district attorney on the side of the prosecution may substantially prejudice the defendant in the eyes of the jury. Nevertheless, such evidence is not, per se, inadmissible. Where the prosecution offers witnesses to prove materiality, reversal is not ordinarily warranted. *Gullett v. State*, 523 So. 2d 296 (Miss. 1988).

11. Variance.

Fatal variance where indictment charges person with having sworn that "he did not buy certain things," where evidence showed he testified "that he didn't remember whether he bought or not—that he couldn't recollect." *Willoughby v. State*, 101 Miss. 60, 57 So. 361 (1912).

If the indictment charge that the perjury was committed in giving evidence in a cause, proof that a party made a false affidavit will not do unless it be shown that the affidavit was allowed to be used in evidence. *Copeland v. State*, 23 Miss. 257 (1852).

12. Instructions.

In an appeal from a conviction of perjury, the fact that the jury's guilty verdict can be supported by the evidence does not automatically excuse the trial court's failure to give an instruction on the "two witness" rule required in perjury cases. *Hale v. State*, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).

In a prosecution for perjury, the "two witness" instruction should be given even

if the defendant fails to request it. *Hale v. State*, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).

In a prosecution for perjury, the trial court's failure to instruct the jury in accordance with the "two witness" rule as required in perjury cases constituted reversible error where one specific witness or piece of documentary evidence could not be singled out as having been sufficient to convict the defendant of perjury. *Hale v. State*, 648 So. 2d 531, 41 A.L.R.5th 801 (Miss. 1994).

The failure of the court to instruct, either in instructions for the state or in instructions for defendant, as to the quantitative evidence rule in perjury cases constituted reversible error. *Nash v. State*, 244 Miss. 857, 147 So. 2d 499 (1962).

It is unnecessary for an instruction requiring the swearing to be wilfully false to state that it must have been corruptly so since the former implies the latter. *Morgan v. State*, 63 Miss. 162 (1885).

It is unnecessary for an instruction requiring the swearing to be willfully false to state that it must have been corruptly so since the former implies the latter. *Brown v. State*, 57 Miss. 424 (1879).

The jury should be informed by instruction that before it can convict the fact that the swearing was false must be shown to its satisfaction by the testimony of two witnesses or by one witness and corroborating circumstances. *Brown v. State*, 57 Miss. 424 (1879).

13. Perjurer as witness in subsequent cause.

The incompetency of a perjurer to become a witness is based upon a verdict of guilty, and since the presumption of innocence extends to an accused in all criminal cases until disproved on a fair and impartial trial, until alleged perjurer is convicted it is not error to permit him to testify as a witness. *Isonhood v. State*, 274 So. 2d 685 (Miss. 1973).

RESEARCH REFERENCES

ALR. Procuring perjury as contempt. 29 A.L.R.2d 1157.

Recantation as defense in perjury prosecution. 64 A.L.R.2d 276.

Statement of belief or opinion as perjury. 66 A.L.R.2d 791.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence. 88 A.L.R.2d 852.

Actionability of conspiracy to give or to procure false testimony or other evidence. 31 A.L.R.3d 1423.

Invalidity of statute or ordinance giving rise to proceeding in which false testimony was received as defense to prosecution for perjury. 34 A.L.R.3d 413.

Offense of perjury as affected by lack of jurisdiction by court or governmental body before which false testimony was given. 36 A.L.R.3d 1038.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 A.L.R.3d 385.

Incomplete, misleading, or unresponsive but literally true statement as perjury. 69 A.L.R.3d 993.

Perjury conviction as affected by notary's nonobservance of formalities for administration of oath to affiant. 80 A.L.R.3d 278.

Acquittal as bar to prosecution of accused for perjury committed at trial. 89 A.L.R.3d 1098.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 A.L.R.4th 948.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury-state cases. 41 A.L.R.5th 1.

Two-witness rule in perjury prosecutions under 18 USCA § 1621. 49 A.L.R. Fed. 185.

Am Jur. 60A Am. Jur. 2d, Perjury §§ 1 et seq.

CJS. 70 C.J.S., Perjury §§ 2 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Perjury. 57 Miss. L. J. 518, August, 1987.

§ 97-9-61. Perjury; penalty.

Persons convicted of perjury shall be punished by imprisonment in the penitentiary as follows: For perjury committed on the trial of any indictment for a capital offense or for any other felony, for a term not less than ten years; for perjury committed on any other judicial trial or inquiry, or in any other case, for a term not exceeding ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(2); 1857, ch. 64, art. 205; 1871, § 2661; 1880, § 2922; 1892, § 1244; Laws, 1906, § 1319; Hemingway's 1917, § 1052; Laws, 1930, § 1083; Laws, 1942, § 2316.

Cross References — Registering to vote by mail-in application, see § 23-15-47.

Sanctions under this section for failure to furnish State Tax Commission with correct, true, and complete information to the best of one's knowledge and belief regarding realty transfers, see § 27-3-51.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 A.L.R.4th 888.

Am Jur. 60A Am. Jur. 2d, Perjury § 103.

CJS. 70 C.J.S., Perjury § 73.

§ 97-9-63. Perjury; subornation of.

Every person who shall unlawfully or corruptly procure any witness, by any means whatever, to commit wilful and corrupt perjury in any case, matter, or proceedings, in or concerning which such witness shall be legally sworn and examined, shall be guilty of subornation of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed, and shall be punished by imprisonment in the penitentiary not exceeding ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(3); 1857, ch. 64, art. 206; 1871, § 2662; 1880, § 2923; 1892, § 1245; Laws, 1906, § 1320; Hemingway's 1917, § 1053; Laws, 1930, § 1084; Laws, 1942, § 2317.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Requisites of indictment for subornation of perjury, see § 99-7-41.

JUDICIAL DECISIONS

1. In general.

Indictment for subornation of perjury must state circumstances of issue or point of inquiry in which perjury was committed;

simple statement in indictment that defendant procured someone to perjure himself is not sufficient; indictment should state name of crime, to make clear

materiality of testimony given; and, indictment should allege what facts constitute truth, as well as allegation of falsity of testimony. *Hentz v. State*, 510 So. 2d 515 (Miss. 1987).

In prosecution for subornation of perjury in attempting to procure a witness to testify that one Cox, accused of selling cocaine, did not sell him cocaine, state must show that Cox made the sale to the witness and that accused knew of that fact

when he attempted to influence the witness. *Smith v. State*, 107 Miss. 404, 65 So. 642 (1914).

There is a fatal variance between the charge that accused suborned false testimony that witness had not bought liquors from a certain person within two years, and proof that the witness testified that he could not remember when the purchase was made. *Harris v. State*, 103 Miss. 739, 60 So. 769 (1913).

RESEARCH REFERENCES

ALR. Procuring perjury as contempt. 29 A.L.R.2d 1157.

Admissibility, in subornation of perjury prosecution, of evidence of alleged perjurer's plea of guilty to charge of perjury. 63 A.L.R.2d 825.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 A.L.R.3d 385.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a wit-

ness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Criminal liability of attorney for tampering with evidence. 49 A.L.R.5th 619.

Am Jur. 60A Am. Jur. 2d, Perjury §§ 107 et seq.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 11:5.

§ 97-9-65. Perjury; bribery to procure.

Every person who shall, by the offer of any valuable consideration, attempt, unlawfully and corruptly, to procure any other person to commit wilful and corrupt perjury as a witness in any cause, matter, or proceeding in or concerning which such other person might by law be examined as a witness, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(8); 1857, ch. 64, art. 210; 1871, § 2663; 1880, § 2927; 1892, § 1246; Laws, 1906, § 1321; Hemingway's 1917, § 1954; Laws, 1930, § 1085; Laws, 1942, § 2318.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

An essential element of this offense is that both the accused and the witness knew that the testimony which the accused wanted the witness to give was false, which element must be charged in

the indictment as a fact unless it is a necessary or inescapable inference from other facts charged. *Neeley v. State*, 202 Miss. 736, 32 So. 2d 449 (1947).

An indictment under this section [Code 1942, § 2318] is demurrable if it fail to

show the materiality of the testimony corruptly sought. *State v. Booker*, 84 Miss. 187, 36 So. 241 (1904).

RESEARCH REFERENCES

ALR. Procuring perjury as contempt. 29 A.L.R.2d 1157.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 A.L.R.3d 1156.

Validity, construction, and application

of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 A.L.R.4th 769.

Am Jur. 60A Am. Jur. 2d, Perjury §§ 107 et seq.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 11:5.

§ 97-9-67. Picketing or demonstrating in or near courthouse or residence of judge, juror, witness, or court officer.

(1) Whoever, with intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the State of Mississippi, or in or near a building or residence occupied or used by such judge, juror, witness or court officer, or which such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned not more than six months, or both.

(2) Nothing in this section shall interfere with or prevent the exercise by any court of the State of Mississippi of its power to punish for contempt.

SOURCES: Codes, 1942, § 2318.7; Laws, 1965, Ex Sess, ch. 6, §§ 1, 2, eff from and after passage (approved June 18, 1965).

Cross References — Picketing interfering with ingress or egress to and from public buildings, etc., see § 97-7-63.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Picketing court or judge as contempt. 58 A.L.R.3d 1297.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 A.L.R.4th 659.

Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities-state cases. 85 A.L.R.4th 979.

Validity, construction, and application

of state or local enactments regulating parades. 80 A.L.R.5th 255.

Validity, construction, and operation of statute or regulation forbidding, regulating, or limiting peaceful residential picketing. 113 A.L.R.5th 1.

Am Jur. 48A Am. Jur. 2d, Labor and Labor Relations § 1483.

24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

Lawyers' Edition. Governmental reg-

ulation of nonlabor picketing as violating freedom of speech or press under Federal Constitution's First Amendment — Supreme Court cases. 101 L. Ed. 2d 1052.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 11:5.

§ 97-9-69. Property levied on; removing without authority.

Any person who shall, without authority of law, remove property of his own or of any other person which he knows has been levied on by virtue of any legal process, upon conviction, shall be punishable by fine, not exceeding five hundred dollars, and by imprisonment, not exceeding six months, in the county jail.

SOURCES: Codes, 1880, § 2982; 1892, § 1224; Laws, 1906, § 1300; Hemingway's 1917, § 1033; Laws, 1930, § 1064; Laws, 1942, § 2296.

Cross References — Lien of executions, see § 13-3-139.

Removal of property subject to lien as larceny, see §§ 97-17-73 et seq.

Selling property previously sold or on which there is a lien, see § 97-19-51.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Crime of obstructing justice is not constituent part of crime of removing property subject to lien, and they are not same offense. McGraw v. State, 157 Miss. 675, 128 So. 875 (1930).

Indictment charging defendants with fraudulently moving out of state truck in sheriff's hands under levy made in landlord's lien proceeding held bad for duplicity. McGraw v. State, 157 Miss. 675, 128 So. 875 (1930).

RESEARCH REFERENCES

ALR. What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Intentional spoliation of evidence, interfering with prospective civil action, as actionable. 70 A.L.R.4th 984.

Am Jur. 58 Am. Jur. 2d, Obstructing Justice §§ 9 et seq.

CJS. 67 C.J.S., Obstructing Justice or Governmental Administration §§ 1, 3, 5-9.

§ 97-9-71. Property subject to seizure; refusing or failing to point out to officers.

If any person shall have in his possession or under his control personal property of any kind subject to seizure by virtue of any legal process in the hands of any state or federal law enforcement officer, as the property of another or as subject to such process, and shall refuse or omit to point out such property to such officer on his demanding it, and to permit him to take possession of it, he shall, upon conviction, be subject to a fine of not less than the value of such property, nor more than double such value, or to imprisonment in the county

jail not less than one (1) month nor more than six (6) months, or to both such fine and imprisonment.

SOURCES: Codes, 1880, § 2981; 1892, § 1223; Laws, 1906, § 1299; Hemingway's 1917, § 1032; Laws, 1930, § 1063; Laws, 1942, § 2295; Laws, 1993, ch. 547, § 3, eff from and after passage (approved April 15, 1993).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Evidence held sufficient to support conviction of refusing to assist officer serving

writ of replevin. *Cantwell v. State*, 117 Miss. 152, 77 So. 960 (1918).

RESEARCH REFERENCES

ALR. What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Am Jur. 58 Am. Jur. 2d, Obstructing Justice §§ 9 et seq.

CJS. 67 C.J.S., Obstructing Justice or Governmental Administration § 4-6, 8.

§ 97-9-72. Fleeing or eluding a law enforcement officer in a motor vehicle; felonies; sanctions; defenses.

(1) The driver of a motor vehicle who is given a visible or audible signal by a law enforcement officer by hand, voice, emergency light or siren directing the driver to bring his motor vehicle to a stop when such signal is given by a law enforcement officer acting in the lawful performance of duty who has a reasonable suspicion to believe that the driver in question has committed a crime, and who willfully fails to obey such direction shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(2) Any person who is guilty of violating subsection (1) of this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00), or by commitment to the custody of the Mississippi Department of Corrections for not more than five (5) years, or both.

(3) Any person who is guilty of violating subsection (1) of this section, which violation results in serious bodily injury of another, upon conviction shall be committed to the custody of the Department of Corrections for not less than three (3) nor more than twenty (20) years of imprisonment.

(4) Any person who is guilty of violating subsection (1) of this section, which violation results in the death of another, upon conviction shall be

committed to the custody of the Department of Corrections for not less than five (5) nor more than forty (40) years.

(5) It is a defense to prosecution under this section:

(a) That the law enforcement officer was not in uniform or that no law enforcement vehicle used in the attempted stop was clearly marked as a law enforcement vehicle; or

(b) That the driver proceeded in a safe manner to a reasonably near well-lit public place before stopping.

SOURCES: Laws, 2004, ch. 487, § 1, eff from and after July 1, 2004.

Editor's Note — Laws, 2004, ch. 487, § 2 provides:

"SECTION 2. On or after January 1, 2005, each state, county and local law enforcement agency that conducts emergency response and vehicular pursuits shall adopt written policies and training procedures that set forth the manner in which these operations shall be conducted. Each law enforcement agency may create their own such policies or adopt an existing model. All pursuit policies created or adopted by any law enforcement agency must address situations in which police pursuits cross over into other jurisdictions. Law enforcement agencies which do not comply with the requirements of this provision are subject to the withholding of any state funding or state administered federal funding."

§ 97-9-73. Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.

It shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person by any state, local or federal law enforcement officer, and any person or persons so doing shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail not more than six (6) months, or both.

SOURCES: Codes, 1942, § 2292.5; Laws, 1960, ch. 261, § 1; Laws, 1993, ch. 547, § 4; Laws, 1994, ch. 592, § 5; Laws, 2003, ch. 536, § 1, eff from and after July 1, 2003.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Arrests, generally, see §§ 99-3-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Although the maximum sentence for a conviction of resisting arrest under this section is incarceration for six months, the court's imposition of the five-year probationary period was legal under a reading

of § 99-19-25 and *Wilson v. State*, 735 So. 2d 290, 292 (Miss. 1999). *Conner v. State*, 750 So. 2d 1258 (Miss. 2000).

A defendant did not have the right to resist an unlawful arrest where the arresting officers were acting in good faith

on an unlawful warrant erroneously issued by a judge. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

The concept of “self-help” in resisting an arrest should be limited to those situations where the arrest is in fact illegal and the arrestee has reason to know that it is, or where the arrest is accompanied by excessive force; there is no right to resist an arrest based upon good faith reliance on a duly issued arrest warrant where the arrestee has no reasonable basis to conclude that the warrant was issued in bad faith. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

In a prosecution for simple assault upon a law enforcement officer, the trial court erred in failing to give an instruction on the lesser included offense of resisting

arrest where a reasonable fact-finder could have concluded, based on the evidence presented, that the defendant resisted arrest, but had a reasonable doubt as to whether he “injured” the officer within the meaning of § 97-3-7. *Murrell v. State*, 655 So. 2d 881 (Miss. 1995).

Defendant's conviction for aggravated assault on a law enforcement officer, pursuant to Miss. Code Ann. § 97-3-7(2)(b) was not obtained in violation of the Double Jeopardy Clause as conviction on that charge required proof of at least one element not present in the resisting arrest charge, Miss. Code Ann. § 97-9-73, on which defendant had earlier been convicted. *Powell v. State*, 806 So. 2d 1069 (Miss. 2001).

ATTORNEY GENERAL OPINIONS

All law enforcement officers of State and its political subdivisions are embraced within generic term “state law en-

forcement officers” contained in this section. Ditto, March 15, 1994, A.G. Op. #94-0088.

RESEARCH REFERENCES

ALR. What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Modern status of rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

When does police officer's use of force during arrest become so excessive as to

constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983). 60 A.L.R. Fed. 204.

Am Jur. 5 Am. Jur. 2d, Arrest §§ 105 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Arrest, Form 81 (complaint, petition, or declaration — injury to police officer — resistance by arrestee to lawful arrest).

2A Am. Jur. Pl & Pr Forms, Rev, Arrest, Form 81.

CJS. 67 C.J.S., Obstructing Justice or Governmental Administration § 1.

§ 97-9-75. Resisting service of process.

Any person who knowingly and wilfully opposes or resists any officer or other authorized person in serving or attempting to serve or execute any legal writ or process, shall be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 2975; 1892, § 1221; Laws, 1906, § 1297; Hemingway's 1917, § 1030; Laws, 1930, § 1061; Laws, 1942, § 2293.

Cross References — Prevention of sheriff from serving process, see § 13-3-73.

Levy of executions, see §§ 13-3-113 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where an officer made an arrest for a misdemeanor not committed in his presence and without having a warrant in his possession, the charge that the defendant resisted arrest cannot stand for he had a right to resist in a reasonable manner the unlawful arrest. *Smith v. State*, 208 So. 2d 746 (Miss. 1968).

Where two officers went upon the premises of the defendant without a search warrant and purchased intoxicating liquor, this evidence was not obtained by illegal search and was not excludable on the ground of unlawful search and seizure because no search was involved. *Peebles v. State*, 57 So. 2d 263 (Miss. 1952).

An owner who uses reasonable force in resisting an officer who is attempting to

search the premises without a valid warrant is not guilty of resisting an officer attempting to execute legal writ of process in violation of this section [Code 1942, § 2293]. *Pettis v. State*, 209 Miss. 726, 48 So. 2d 355 (1950).

Where the sheriff and deputy sheriff were unlawful in arresting a person without a warrant for an alleged misdemeanor not committed in their presence and also were unlawful in invading the home of the owner, the acts of the owner in resisting entry were not unlawful. *Pettis v. State*, 209 Miss. 726, 48 So. 2d 355 (1950).

Owner may use reasonable force to resist officer attempting to search premises without valid warrant. *Deaton v. State*, 137 Miss. 164, 102 So. 175 (1924).

ATTORNEY GENERAL OPINIONS

Whether or not employer who refuses process server access to employee would be guilty of misdemeanor depends on particular facts of each case; deputy is required by law to serve civil summons but is not, absent lawful court order to con-

trary, required to serve such summons at individual's place of employment. *Smith*, Sept. 2, 1992, A.G. Op. #92-0571.

No authority is known that exempts school personnel from this provision. *Sherrell*, Feb. 13, 2004, A.G. Op. 04-0047.

RESEARCH REFERENCES

ALR. Criminal liability for obstructing process as affected by invalidity or irregularity of the process. 10 A.L.R.3d 1146.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 A.L.R.3d 1018.

Propriety of state or local government health officer's warrantless search-post-camera cases. 53 A.L.R.4th 1168.

Intentional spoliation of evidence, interfering with prospective civil action, as actionable. 70 A.L.R.4th 984.

Am Jur. 58 Am. Jur. 2d, Obstructing Justice §§ 12 et seq.

CJS. 67 C.J.S., Obstructing Justice or Governmental Administration § 1.

§ 97-9-77. Wills; alteration, destruction or secretion.

If any person shall wilfully alter or destroy any will or codicil without the consent of the party making the same, or shall wilfully secrete the same after the death of the testator shall be known to him, the person so offending, on conviction, shall be fined, or imprisoned in the county jail, or both; or shall be imprisoned in the penitentiary not exceeding two years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 239; 1871, § 2700; 1880, § 2973; 1892, § 1327; Laws, 1906, § 1399; Hemingway's 1917, § 1142; Laws, 1930, § 1174; Laws, 1942, § 2417.

Cross References — Wills and testaments, generally, see §§ 91-5-1 et seq.

Will contests, see §§ 91-7-21 et seq.

Penalty for alteration of records, generally, see § 97-11-1.

Malicious mischief, see § 97-17-67.

Falsifying record of will, deed, or other recordable instrument, or judgment, decree, or enrollment thereof, see § 97-21-45.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where a will has been executed in duplicate, the destruction by testator of that copy which he retains in his possession, with intent to revoke the will, creates a presumption that the testator intends thereby to revoke the will. *Phinizee v. Alexander*, 210 Miss. 196, 49 So. 2d 250 (1950).

Where there are two copies of a will, both in possession of deceased, the presumption of law would be that by the preservation of one duplicate entire the testator did not intend a revocation of these particular devises, otherwise he would have mutilated both duplicates. *Phinizee v. Alexander*, 210 Miss. 196, 49 So. 2d 250 (1950).

RESEARCH REFERENCES

ALR. Destruction or cancelation of one copy of will executed in duplicate, as revocation of other copy. 17 A.L.R.2d 805.

What constitutes fraud within statute

relating to proof of will "fraudulently" destroyed during testator's lifetime. 23 A.L.R.2d 382.

§ 97-9-79. Misdemeanor; false information.

Any person who shall make or cause to be made any false statement or representation as to his or another person's identity, social security account number or other identifying information to a law enforcement officer in the course of the officer's duties with the intent to mislead the officer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed one (1) year, or both.

SOURCES: Laws, 1996, ch. 513, § 8, eff from and after July 1, 1996.

ARTICLE 3.

OBSTRUCTION OF JUSTICE.

SEC.

97-9-101. Definitions.

97-9-103. Hindering prosecution or apprehension; definition of "criminal assistance."

97-9-105. Hindering prosecution in the first degree.

97-9-107.	Hindering prosecution in the second degree.
97-9-109.	Bribing a witness.
97-9-111.	Bribe receiving by a witness.
97-9-113.	Intimidating a witness.
97-9-115.	Tampering with a witness.
97-9-117.	Bribing a juror.
97-9-119.	Bribe receiving by a juror.
97-9-121.	Intimidating a juror.
97-9-123.	Jury tampering.
97-9-125.	Tampering with physical evidence.
97-9-127.	Retaliation against a public servant or witness.
97-9-129.	Sentencing.

§ 97-9-101. Definitions.

The following words and phrases shall have the meanings ascribed unless the context clearly requires otherwise:

(a) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(b) "Government" means the state, county, municipality or other political subdivision, agency, branch or department of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

(c) "Governmental function" means any activity which a public servant is legally authorized to undertake on behalf of a government.

(d) "Harm" means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(e) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term juror also includes any person who has been summoned or whose name has been drawn to attend as a prospective juror.

(f) "Official proceeding" means any proceeding heard before any legislative, judicial, administrative or other government agency or official authorized to hear evidence under oath.

(g) "Physical evidence" means any article, object, document, record or other thing of physical substance.

(h) "Property" means any real or personal property, including books, records and documents.

(i) "Public servant" means any officer or employee of government, including legislators and judges and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses. This term includes persons who have been elected, appointed or designated to become a public servant although not yet occupying that position.

(j) "Testimony" means oral or written statements, documents or any other material that may be offered as evidence in an official proceeding.

(k) "Threat" means any menace, however communicated, to: (i) cause

bodily injury to the person threatened or another or commit any other criminal offense; (ii) cause damage to property or cause anyone to part with property; (iii) accuse anyone of a criminal offense; (iv) expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule; (v) impair the credit or business repute of any person; or (vi) take or withhold action as a public servant or cause a public servant to take or withhold action.

SOURCES: Laws, 2006, ch. 387, § 1, eff from and after July 1, 2006.

Editor's Note — Laws, 2006, ch. 387, § 16 provides:

“SECTION 16. This act shall be codified under Chapter 9, Title 97, Mississippi Code of 1972, as a separate Article 3 to be entitled “Obstruction of Justice,” and shall begin with Section 97-9-101.”

§ 97-9-103. Hindering prosecution or apprehension; definition of “criminal assistance.”

For the purposes of Sections 97-9-105 and 97-9-107, a person “renders criminal assistance” to another if he knowingly:

- (a) Harbors or conceals the other person;
- (b) Warns the other person of impending discovery or apprehension, except that this paragraph (b) does not apply to a warning given in connection with an effort to bring another into compliance with the law;
- (c) Provides or aids in providing the other person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension;
- (d) Prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of the other person; or
- (e) Suppresses, by an act of concealment, alteration or destruction, any physical evidence that might aid in the discovery, apprehension or conviction of the other person.

SOURCES: Laws, 2006, ch. 387, § 2, eff from and after July 1, 2006.

§ 97-9-105. Hindering prosecution in the first degree.

(1) A person commits the crime of hindering prosecution in the first degree if, with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a felony, he renders criminal assistance to the other person.

(2) Hindering prosecution in the first degree is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 3, eff from and after July 1, 2006.

§ 97-9-107. Hindering prosecution in the second degree.

(1) A person commits the crime of hindering prosecution in the second

degree if, with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a misdemeanor, he renders criminal assistance to the other person.

(2) Hindering prosecution in the second degree is a misdemeanor.

SOURCES: Laws, 2006, ch. 387, § 4, eff from and after July 1, 2006.

§ 97-9-109. Bribing a witness.

(1) A person commits the crime of bribing a witness if he intentionally or knowingly offers, confers or agrees to confer any benefit upon a witness or a person he believes will be called as a witness in any official proceeding with intent to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify;

or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) Bribing a witness is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 5, eff from and after July 1, 2006.

§ 97-9-111. Bribe receiving by a witness.

(1) A witness or a person believing he will be called as a witness in any official proceeding commits the crime of bribe receiving by a witness if he intentionally or knowingly solicits, accepts or agrees to accept any benefit upon an agreement or understanding that:

(a) His testimony will thereby be influenced;

(b) He will attempt to avoid legal process summoning him to testify; or

(c) He will absent himself from an official proceeding to which he has been legally summoned.

(2) Bribe receiving by a witness is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 6, eff from and after July 1, 2006.

§ 97-9-113. Intimidating a witness.

(1) A person commits the crime of intimidating a witness if he intentionally or knowingly attempts, by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings, to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify;

or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) Intimidating a witness is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 7, eff from and after July 1, 2006.

§ 97-9-115. Tampering with a witness.

(1) A person commits the crime of tampering with a witness if he intentionally or knowingly attempts to induce a witness or a person he believes will be called as a witness in any official proceeding to:

- (a) Testify falsely or unlawfully withhold testimony; or
- (b) Absent himself from any official proceeding to which he has been legally summoned.

(2) Tampering with a witness is a Class 2 felony.

SOURCES: Laws, 2006, ch. 387, § 8, eff from and after July 1, 2006.

§ 97-9-117. Bribing a juror.

(1) A person commits the crime of bribing a juror if he intentionally or knowingly offers, confers or agrees to confer any benefit upon a juror with the intent that the juror's vote, opinion, decision or other action as a juror will thereby be influenced.

(2) Bribing a juror is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 9, eff from and after July 1, 2006.

§ 97-9-119. Bribe receiving by a juror.

(1) A person commits the crime of bribe receiving by a juror if he intentionally or knowingly solicits, accepts or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, decision or other action as a juror will thereby be influenced.

(2) Bribe receiving by a juror is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 10, eff from and after July 1, 2006.

§ 97-9-121. Intimidating a juror.

(1) A person commits the crime of intimidating a juror if he intentionally or knowingly attempts, by the use of a threat, to influence a juror's vote, opinion, decision or other action as a juror.

(2) Intimidating a juror is a Class 1 felony.

SOURCES: Laws, 2006, ch. 387, § 11, eff from and after July 1, 2006.

§ 97-9-123. Jury tampering.

(1) A person commits the crime of jury tampering if, with intent to influence a juror's vote, opinion, decision or other action in the case, he intentionally or knowingly attempts to communicate directly or indirectly with a juror other than as part of the proceedings in the trial of the case.

(2) Jury tampering is a Class 2 felony.

SOURCES: Laws, 2006, ch. 387, § 12, eff from and after July 1, 2006.

§ 97-9-125. Tampering with physical evidence.

(1) A person commits the crime of tampering with physical evidence if, believing that an official proceeding is pending or may be instituted, and acting without legal right or authority, he:

(a) Intentionally destroys, mutilates, conceals, removes or alters physical evidence with intent to impair its use, verity or availability in the pending or prospective official proceeding;

(b) Knowingly makes, presents or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding; or

(c) Intentionally prevents the production of physical evidence by an act of force, intimidation or deception against any person.

(2) Tampering with physical evidence is a Class 2 felony.

SOURCES: Laws, 2006, ch. 387, § 13, eff from and after July 1, 2006.

§ 97-9-127. Retaliation against a public servant or witness.

(1) A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of public servant, witness, prospective witness or informant.

(2) Retaliation is a Class 2 felony.

SOURCES: Laws, 2006, ch. 387, § 14, eff from and after July 1, 2006.

§ 97-9-129. Sentencing.

(1) A person who has been convicted of any Class 1 felony under this article shall be sentenced to imprisonment for a term of not more than five (5) years or fined not more than Five Thousand Dollars (\$5,000.00), or both.

(2) A person who has been convicted of any Class 2 felony under this article shall be sentenced to imprisonment for a term of not more than two (2) years or fined not more than Three Thousand Dollars (\$3,000.00), or both.

(3) A person who has been convicted of any misdemeanor under this article shall be sentenced to confinement in the county jail for a term of not more than one (1) year or fined not more than One Thousand Dollars (\$1,000.00), or both.

SOURCES: Laws, 2006, ch. 387, § 15, eff from and after July 1, 2006.

CHAPTER 11

Offenses Involving Public Officials

SEC.

- 97-11-1. Alteration of records.
- 97-11-3. Attorney general and district attorney not to advise or defend criminals.
- 97-11-5 and 97-11-7. Repealed.
- 97-11-9. Bond; approving worthless official bond.
- 97-11-11. Bribery; offer, promise or gift of property to candidate, officer, agent or trustee to influence his action.
- 97-11-13. Bribery; penalty when officer, agent or trustee accepts bribe.
- 97-11-15. Circuit clerk; penalty for failure or refusal to send up certificate of appeal.
- 97-11-17. Clerk refusing to give certified copy of papers.
- 97-11-19 and 97-11-21. Repealed
- 97-11-23. Drunkenness in office.
- 97-11-25. Embezzlement; officers, trustees and public employees converting property to own use.
- 97-11-27. Embezzlement; officers and public agents failing to deliver money, records, etc. to successor.
- 97-11-29. Embezzlement; accounts to be kept by all public officers; false entries, false certificates, loan of public funds and fraud on the treasury.
- 97-11-31. Embezzlement; fraud committed in public office.
- 97-11-33. Extortion; collecting unauthorized fees and fees for services not actually rendered.
- 97-11-35. Failure to return known offenders; purposeful avoidance of knowledge of offense.
- 97-11-37. Failure to perform any duty.
- 97-11-39. Military officers; resigning to evade obedience to order prohibited.
- 97-11-41. Oath of office and bond; elected officials not to exercise duties before taking oath or giving bond, as required.
- 97-11-43. Railroad fares; government officials to pay same fare as general passengers; accepting and using free pass.
- 97-11-45. Tax collector and chancery clerk; failure to perform duty in respect to duplicate tax receipts.
- 97-11-47. Tax collector; failure to make settlement.
- 97-11-49. Tax collector; collecting privilege tax without issuing license.
- 97-11-51. Trustees of state institutions not to incur liability in excess of income.
- 97-11-53. Offer of inducements to influence public official's action on award of contracts or accomplishment of official acts.

§ 97-11-1. Alteration of records.

If any clerk of any court, or public officer or any other person, shall wittingly make any false entry, or erase any work or letter, or change any record belonging to any court or public office, whether in his keeping or not, he shall, on conviction thereof, be imprisoned in the penitentiary for a term not exceeding ten years, and be liable to the action of the party aggrieved.

SOURCES: Codes, 1857, ch. 64, art. 10; 1871, § 2489; 1880, § 2703; 1892, § 959; Laws, 1906, § 1035; Hemingway's 1917, § 760; Laws, 1930, § 778; Laws, 1942, § 2004.

Cross References — Duty of clerk of chancery court to keep minutes, see § 9-5-135.

Circuit court dockets, see §§ 9-7-171 et seq.

Penalty for alteration or destruction of public records in a manner not authorized by records control schedule, see § 25-59-23.

Alteration of legislative bills or resolutions, see §§ 97-7-49, 97-7-51.

Alteration, destruction, or secretion of will, see § 97-9-77.

JUDICIAL DECISIONS

1. In general.

“Wittingly,” as used in this statute, relates to the will or understanding, and means “knowingly” or “designedly.” *Harrington v. State*, 54 Miss. 490 (1877).

An indictment must charge that the alteration was “wittingly” done; and if it fail to do so, but simply aver that it was done “willingly”, it is fatally defective; and the indictment must aver that the alteration was made with the intent to injure or benefit someone. *Harrington v. State*, 54 Miss. 490 (1877).

Though, as a general rule, it be sufficient to charge a statutory offense in the words of the statute, yet this rule does not apply where there are, in the language of the statute, no sufficient words to define any offense. *Jesse v. State*, 28 Miss. 100 (1854); *Sarah v. State*, 28 Miss. 267 (1854); *Harrington v. State*, 54 Miss. 490 (1877); *Finch v. State*, 64 Miss. 461, 1 So. 630 (1886).

RESEARCH REFERENCES

CJS. 76 C.J.S., Records §§ 23 et seq.

§ 97-11-3. Attorney general and district attorney not to advise or defend criminals.

If the attorney general or any district attorney shall, in any manner, consult, advise, counsel, or defend, within this state, a person charged with a crime or misdemeanor or the breach of a penal statute, he shall, on conviction, be fined in a sum not exceeding five hundred dollars, be removed from office, and rendered incapable thereafter of filling any office of profit or honor in this state.

SOURCES: Codes, *Hutchinson's* 1848, ch. 21, art. 3(6); 1857, ch. 64, art. 69; 1871, § 2714; 1880, § 2758; 1892, § 1227; Laws, 1906, § 1303; *Hemingway's* 1917, § 1036; Laws, 1930, § 1067; Laws, 1942, § 2299.

Cross References — Election, term of office, and qualifications of attorney general, see § 7-5-1.

Attorney general's representation of state and state officers in suits, see § 7-5-39.

Criminal prosecutions by district attorneys in circuit court, see § 25-31-11.

Prohibition against partner of county attorney defending certain criminal cases, see § 73-3-49.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

A special prosecutor appointed pursuant to court order may represent criminal defendants in counties outside the circuit

court district in which he is specially appointed. Peters, October 9, 1998, A.G. Op. #98-0618.

§§ 97-11-5 and 97-11-7. Repealed.

Repealed by Laws, 1983, ch. 469, § 10, eff from and after July 1, 1983.

§ 97-11.5. [Codes, 1880, § 2184; 1892, § 1235; 1906, § 1311; Hemingway's 1917, § 1044; 1930, § 1076; 1942, § 2309]

§ 97-11-7. [Codes, 1880, § 1825; 1892, § 1239; 1906, § 1315; Hemingway's 1917, § 1048; 1930, § 1080; 1942, § 2313]

Editor's Note — Former § 97-11-5 was entitled: Board of supervisors; member receiving unlawful compensation.

Former § 97-11-7 was entitled: Board of supervisors; member or clerk must pay full value for county warrants, etc.

§ 97-11-9. Bond; approving worthless official bond.

If any officer shall approve any official bond, knowing or having good reason to believe the sureties to be insufficient, he shall, upon conviction, be punished by fine or imprisonment, or both, the fine not to exceed five hundred dollars, and the imprisonment not to exceed six months in the county jail.

SOURCES: Codes, 1880, § 406; 1892, § 1234; Laws, 1906, § 1310; Hemingway's 1917, § 1043; Laws, 1930, § 1075; Laws, 1942, § 2308.

Cross References — Bonds required of state officials, see § 25-1-13.

§ 97-11-11. Bribery; offer, promise or gift of property to candidate, officer, agent or trustee to influence his action.

Every person who shall promise, offer or give to any officer, agent or trustee, either public or private, while holding such office, agency or trust, or after he has become a candidate or applicant for the same, any money, goods, chattels, right in action, or other property, real or personal, with intent to influence his vote, opinion, action or judgment on any question, matter, cause or proceeding which may be then pending, or may be thereafter subject to vote, opinion, action or judgment of such officer, agent or trustee, shall, on conviction, be imprisoned in the penitentiary not more than ten (10) years, or fined not more than Five Thousand Dollars (\$5,000.00), or both, and shall be forever disqualified from holding any public office, trust or appointment, and shall forfeit his office, if any be held.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 5(9); 1857, ch. 64, art. 34; 1871, § 2511; 1880, § 2727; 1892 § 981; Laws, 1906, § 1057; Hemingway's 1917, § 785; Laws, 1930, § 801; Laws, 1942, § 2027; Laws, 1995, ch. 463, § 1, eff from and after July 1, 1995.

Cross References — Bribery as disqualification to hold office of profit or trust, see Miss Const Art. 4, § 44.

White-collar crime investigation, see § 7-5-59.

Bribery offenses in connection with medicaid benefits, see § 43-13-207.

Unlawful gifts to members and employees of alcoholic beverage control division, see § 67-1-33.

Disqualification of persons convicted of certain crimes to hold office in labor organizations, etc., see § 71-1-49.

Influence of meat-hygiene agent, see § 75-33-25.

Bribery of meat inspection officers, see § 75-35-29.

Unlawful gifts to public service commission members, see § 77-1-11.

Prohibition of insurance rebates, see § 83-3-121.

Bribery and influence of legislative power, see §§ 97-7-53 et seq.

Acceptance by officer, agent or trustee of offer, promise or gift of property in violation of this section, see § 97-11-13.

Punishment for offer or acceptance of inducements to influence award of public contracts, see § 97-11-53.

Proof in trial for bribery, see § 99-17-21.

JUDICIAL DECISIONS

1. In general.

2. Indictment.

1. In general.

Because an attorney entered a valid plea of guilty to charges of bribery under Miss. Code Ann. § 97-11-11, pursuant to the requirements of Miss. R. Disc. St. B. 6, the attorney demonstrated evidence of unprofessional and unethical conduct evincing unfitness for the practice of law, which warranted immediate suspension, and while the plea might later be withdrawn, the court found that this provided the attorney no relief from the application of Rule 6; furthermore, the court had the power to render immediate sanctions for admitted felonies under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. B. 6 without a hearing by a complaint tribunal. *Miss. Bar v. Shelton*, 890 So. 2d 827 (Miss. 2003).

Before a defendant can raise the defense of entrapment, he is required to show evidence of government inducement to commit the criminal act and a lack of predisposition to engage in the criminal act prior to contact with government agents; it is now possible for the defendant to deny one or more of the elements of the crime and still be entitled to an entrapment instruction. *Hopson v. State*, 625 So. 2d 395 (Miss. 1993).

Conduct of attorney in scheme to bribe state official is unlawful under state statute proscribing offers of inducements to influence public officials' actions in accomplishment of official acts. *Mississippi State Bar v. Young*, 509 So. 2d 210 (Miss. 1987), petition dismissed, 523 So. 2d 323 (Miss. 1988).

Defendant is estopped from denying his criminal intent to commit bribery because at trial he invoked entrapment defense, and by invoking that defense it was necessarily assumed that act charged as offense was committed. *Howard v. State*, 507 So. 2d 58 (Miss. 1987), overruled on other grounds, *Hopson v. State*, 625 So. 2d 395 (Miss. 1993).

To constitute a violation of this section [Code 1942, § 2027] it is not necessary that the bribery should be completed, or that there be a mutual intent on the part of the offeror and the person to whom the offer is made, or that there should have been an actual tender of the bribe. *McLemore v. State*, 241 Miss. 664, 125 So. 2d 86 (1960), error overruled, 241 Miss. 676, 126 So. 2d 236 (1961), appeal dismissed, cert. denied, 368 U.S. 70, 82 S. Ct. 197, 7 L. Ed. 2d 133 (1961).

The offense may be committed by making an offer communicated through an intermediary. *McLemore v. State*, 241 Miss. 664, 125 So. 2d 86 (1960), error overruled, 241 Miss. 676, 126 So. 2d 236

(1961), appeal dismissed, cert. denied, 368 U.S. 70, 82 S. Ct. 197, 7 L. Ed. 2d 133 (1961).

The matter with respect to which it is sought to influence a district attorney may be a charge which he is to present to a grand jury. *McLemore v. State*, 241 Miss. 664, 125 So. 2d 86 (1960), error overruled, 241 Miss. 676, 126 So. 2d 236 (1961), appeal dismissed, cert. denied, 368 U.S. 70, 82 S. Ct. 197, 7 L. Ed. 2d 133 (1961).

2. Indictment.

An indictment need not aver that the offer was made corruptly or with a corrupt intent. *McLemore v. State*, 241 Miss. 664, 125 So. 2d 86 (1960), error overruled, 241 Miss. 676, 126 So. 2d 236 (1961), appeal dismissed, cert. denied, 368 U.S. 70, 82 S. Ct. 197, 7 L. Ed. 2d 133 (1961).

RESEARCH REFERENCES

ALR. Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe. 20 A.L.R.2d 1012.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 A.L.R.2d 1137.

Recovery of money paid, or property transferred, as a bribe. 60 A.L.R.2d 1273.

Entrapment to commit bribery or offer to bribe. 69 A.L.R.2d 1397.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery. 67 A.L.R.3d 1231.

Criminal offense of bribery as affected by lack of authority of state public officer or employee. 73 A.L.R.3d 374.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee. 7 A.L.R.4th 1202.

Venue in bribery cases where crime is committed partly in one county and partly in another. 11 A.L.R.4th 704.

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-11-13. Bribery; penalty when officer, agent or trustee accepts bribe.

If any officer, agent or trustee shall accept any gift, offer or promise, prohibited by Section 97-11-11, he shall, on conviction, be forever disqualified from holding any public office, trust or appointment, and shall forfeit his office, if any be held, and be imprisoned in the penitentiary not more than ten (10) years, or be fined not more than Five Thousand Dollars (\$5,000.00), or both.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 5(10); 1857, ch. 64, art. 35; 1871, § 2512; 1880, § 2728; 1892, § 982; Laws, 1906, § 1058; *Hemingway's* 1917, § 786; Laws, 1930, § 802; Laws, 1942, § 2028; Laws, 1995, ch. 463, § 2, eff from and after July 1, 1995.

Cross References — Bribery as disqualification to hold office of profit or trust, see Miss Const Art. 4, § 44.

White-collar crime investigation, see § 7-5-59.

Removal of corrupt public officers, see § 25-5-1.

Bribery offenses in connection with medicaid benefits, see § 43-13-207.

Member of legislature accepting or agreeing to accept bribes, see § 97-7-55.

Offer or acceptance of inducements to influence award of public contract, see § 97-11-53.

Bribery within state highway commission, see § 97-15-3.

RESEARCH REFERENCES

ALR. Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 A.L.R.2d 1137.

Recovery of money paid, or property transferred, as a bribe. 60 A.L.R.2d 1273.

Criminal offense of bribery as affected by lack of authority of state public officer or employee. 73 A.L.R.3d 374.

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-11-15. Circuit clerk; penalty for failure or refusal to send up certificate of appeal.

Any clerk of a circuit court who shall wilfully or negligently fail or refuse to send up the certificate of appeal, as provided in Section 99-35-121, Mississippi Code of 1972, within the time required, shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine of not more than two hundred dollars (\$200.00), or by imprisonment in the county jail for not more than three months, or both.

SOURCES: Codes, Hemingway's 1921 Supp. § 50a; Laws, 1930, § 49; Laws, 1942, § 1183; Laws, 1920, ch. 147.

Editor's Note — Section 99-35-121 referred to in the section was repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-11-17. Clerk refusing to give certified copy of papers.

If any clerk shall neglect or refuse to make out and deliver within a reasonable time to the person having demanded and paid in advance the statutory charge for a certified copy of any paper, record, judgment, decree or entry on file, which is lodged or remaining in his office, such clerk shall be guilty of a misdemeanor in office.

SOURCES: Codes, 1880, § 2395; 1892, § 1232; Laws, 1906, § 1308; Hemingway's 1917, § 1041; Laws, 1930, § 1073; Laws, 1942, § 2306; Laws, 1971, ch. 487, § 1, eff from and after passage (approved March 31, 1971).

Cross References — Withdrawal of court exhibits, see § 9-13-29.

Furnishing copies of books, papers, or documents, see § 11-1-51.

JUDICIAL DECISIONS

1. In general.

This section was not applicable to an indigent state prisoner seeking a writ of mandamus from a federal district court directing a state court to provide the pris-

oner with certified copies of all records and papers pertaining to his trial where the prisoner had failed to perfect an appeal. *Ladd v. State*, 434 F. Supp. 11 (N.D. Miss. 1977).

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

CJS. 67 C.J.S., Officers and Public Employees §§ 165, 166.

§§ 97-11-19 and 97-11-21. Repealed.

Repealed by Laws, 1983, ch. 469, § 10, eff from and after July 1, 1983.

§ 97-11-19. [Codes, 1892, § 1229; 1906, § 1305; Hemingway's 1917, § 1038; 1930, §§ 1069, 1070; 1942, §§ 2301, 2302; Laws, 1922, ch. 230; 1924, ch. 238; 1934, ch. 293; 1975, ch. 388]

§ 97-11-23. [Codes, 1880, § 2759; 1892, § 1228; 1906, § 1304; Hemingway's 1917, § 1037; 1930, § 1068; 1942, § 2300.]

Editor's Note — Former § 97-11-19 was entitled: Contracts; officers, etc. not to have interest in government contracts; civil proceeding authorized.

Former § 97-11-21 was entitled: County officers or deputies not to buy claims against the county or certificates issued witnesses.

§ 97-11-23. Drunkenness in office.

Any officer who shall be guilty of habitual drunkenness, or who shall be drunk while in the actual discharge of the duties of his office, or when called on to perform them, may be indicted therefor, and, upon conviction, shall be removed from office.

SOURCES: Codes, 1880, § 424; 1892, § 1233; Laws, 1906, § 1309; Hemingway's 1917, § 1042; Laws, 1930, § 1074; Laws, 1942, § 2307.

Cross References — Intoxicated juror, see § 13-5-83.
Removals from office, see §§ 25-5-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment must set out the particular duty which the officer is called upon to perform, and an indictment in the words of the statute is insufficient. *Pruitt v. State*, 116 Miss. 33, 76 So. 761 (1917).

If the term of office expire pending the prosecution, the indictment must be dis-

missed. *Stubbs v. State*, 53 Miss. 437 (1876).

The indictment must charge that the accused was at the time the lawful incumbent of a specific office. *Shanks v. State*, 51 Miss. 464 (1875).

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

CJS. 67 C.J.S., Officers and Public Employee § 79.

§ 97-11-25. Embezzlement; officers, trustees and public employees converting property to own use.

If any state officer or any county officer, or an officer in any district or subdivision of a county, or an officer of any city, town or village, or a notary public, or any other person holding any public office or employment, or any executor, administrator or guardian, or any trustee of an express trust, any master or commissioner or receiver, or any attorney at law or solicitor, or any bank or collecting agent, or other person engaged in like public employment, or any other person undertaking to act for others and intrusted by them with business of any kind, or with money, shall unlawfully convert to his own use any money or other valuable thing which comes to his hands or possession by virtue of his office or employment, or shall not, when lawfully required to turn over such money or deliver such thing, immediately do so according to his legal obligation, he shall, on conviction, be committed to the department of corrections for not more than twenty (20) years, or be fined not more than five thousand dollars (\$5,000.00).

SOURCES: Codes, 1880, § 2787; 1892, § 1063; Laws, 1906, § 1141; Hemingway's 1917, § 869; Laws, 1930, § 894; Laws, 1942, § 2120; Laws, 1979, ch. 508, § 13, eff from and after November 15, 1979 (the United States Attorney General interposed no objection to this amendment on July 6, 1979).

Editor's Note — Laws, 1979, ch. 508, §§ 18, 19, provide as follows:

"SECTION 18. The Attorney General of the State of Mississippi is hereby directed to submit this act, immediately upon enactment to the Attorney General of the United States or to the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended."

"SECTION 19. This act shall take effect and be in force as follows:

(a) Section 18 shall be effective from and after its passage.

(b) Sections 1 through 17 of this act shall be effective from and after November 15, 1979, if effectuated under the provisions of the Voting Rights Act of 1965, as amended and extended.

(c) Sections 1 through 12 of this act shall stand repealed from and after February 1, 1983."

Cross References — Disqualification to hold office of one liable for public moneys unaccounted for, see Miss Const Art. 4, § 43.

White-collar crime investigations, see § 7-5-59.

Suit on state treasurer's bond for embezzlement, see § 7-9-51.

Failure of constable or other officer to pay money received from execution, see § 19-19-11.

Failure of sheriff to pay over money collected and omission to execute process, see § 19-25-45.

Duties and liabilities as to public funds, see §§ 25-1-67 et seq.

Removal of public officers for peculation, see § 25-5-1.

Application of this section to one converting to his personal use any sample or specimen textbook and additional penalty therefor, see § 37-43-59.

Additional penalties on certain officers using public moneys for gambling, see § 97-33-3.

Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.

1. In general.

Earlier case is overruled inasmuch as the distinction drawn by the majority was an unnecessary one, and one which has made the embezzlement statute, for all practical purposes, a dead letter. *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).

If a state official uses a power given to him by law to obtain monies wrongfully, it is the corruption of power that causes those monies to be obtained "by virtue of office" since the state official would never have had the means to misallocate funds had he not held an office which conferred that power upon him. *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).

In Mississippi, embezzlement is wrongful conversion of property lawfully possessed by person charged, and where defendant lawfully came into possession of money orders/guilty pleas by "virtue of his office" and converted such to his own use, he could be charged with and convicted of embezzlement. Argument that money came into possession of defendant by "color of office" and not by "virtue of his office" so that any breach of trust occurred only between defendant and makers of money orders, and not between defendant and state and county, was unsound where funds converted represented payment of fines, and defendant was justice court judge. *Lambert v. State*, 518 So. 2d 621 (Miss. 1987).

County tax collector's guilty plea in state court to crimes of "willful neglect of duties" and "embezzlement" (§§ 97-11-25 through 97-11-31 and § 97-11-37) established that he committed active or deliberate dishonesty or fraud, which prevented tax collector from recovering on county's fidelity insurance policy, where policy did not cover losses due to "active or deliberate dishonesty or fraud", such that insurance company owed tax collector no

funds that county could obtain by garnishment. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

A particular statute, § 9-11-19, concerning the duties of a justice to account for fines and making its violation a misdemeanor, does not control the general statute, this section, concerning unlawful conversion of public funds by a state officer and making its violation a felony, since there are substantive differences between the two, violation of the method of performing a duty on the one hand as opposed to unlawful conversion of public funds on the other. *Hannah v. State*, 336 So. 2d 1317 (Miss. 1976), cert. denied, 429 U.S. 1101, 97 S. Ct. 1125, 51 L. Ed. 2d 551 (1977).

The phrase, "by virtue of his office," as appearing in Code 1942 § 2120 [Code 1972 § 97-11-25], means that the official charged with embezzlement has the legal right to receive the property or money he is accused of embezzling. *Interior Contractors v. Western Waterproofing Co.*, 233 So. 2d 829 (Miss. 1970).

Under Code 1942 § 2120 [Code 1972 § 97-11-25], an official is not guilty of embezzlement where the money or property which he is accused of embezzling is received under the color of his office. *Interior Contractors v. Western Waterproofing Co.*, 233 So. 2d 829 (Miss. 1970).

Single member may embezzle property coming into possession of board. *State v. Yeates*, 140 Miss. 224, 105 So. 498 (1925).

Property bought for road purpose is in possession of county board of supervisors. *State v. Yeates*, 140 Miss. 224, 105 So. 498 (1925).

Embezzlement is a statutory and not a common-law crime. *McInnis v. State*, 97 Miss. 280, 52 So. 634 (1910).

This section [Code 1942, § 2120] creates but one offense of misappropriating funds and a tax collector convicted of embezzlement of funds may not be prosecuted for converting such funds to his own

use. *McInnis v. State*, 97 Miss. 280, 52 So. 634 (1910).

The section [Code 1942, § 2120] does not apply to a refusal by an executor to pay a debt due from the estate on its reduction to judgment. *State v. Pannell*, 34 So. 388 (Miss. 1903).

This section [Code 1942, § 2120] is prospective only, and therefore constitutional. *State v. Gillis*, 75 Miss. 331, 24 So. 25 (1898).

Where the conversion to one's use, and failure to pay over, conjointly, constitute the crime under the old law (§ 2787 of the Code of 1880), and by the new law (§ 1063 of the Code of 1892), the conversion is one crime and the failure to pay over another, and the conversion is before the Code of 1892 became operative, and the failure to pay over occurred afterwards, the case is not within the saving of § 5 of the Code of 1892, that section relating only to completed offenses. *State v. Gillis*, 75 Miss. 331, 24 So. 25 (1898).

If in such a case the indictment charges the defendant with having the money after the new law became operative, and with the failure to pay over thereafter, it is good, although the money was received before. The new law is not *ex post facto* as applied to a case where the money was in defendant's possession after the new law became operative, and he thereafter failed to pay it over. *State v. Gillis*, 75 Miss. 331, 24 So. 25 (1898).

2. Indictment.

Since a bond received by a justice of the peace would be received under color of his office rather than by virtue of his office, an indictment charging the officer with embezzlement of the bond would be defective under Code 1942 § 2120 [Code 1972 § 97-11-25]. *Barlow v. State*, 233 So. 2d 829 (Miss. 1970).

Indictment charging embezzlement by schoolteacher of money belonging to trustees of school without charging names of the trustees or alleging that their names were unknown, is defective. *Voss v. State*, 208 Miss. 303, 44 So. 2d 402 (1950).

Under an indictment for failing to account for and pay over to his superior certain license fees collected by one designated as chief clerk, it is material as to who actually made away with the money

where numerous field men had equal access to the cigar box in which duplicate permits, cash and checks were kept, and where neither statute nor departmental regulations prescribed the duties or modus operandi of the chief clerk. *Murphree v. State*, 201 Miss. 34, 28 So. 2d 238 (1946).

Indictment for embezzlement not required to charge that conversion of public funds was made with intent to cheat and defraud. *Sanders v. State*, 141 Miss. 289, 105 So. 523 (1925).

Indictment for embezzlement of public funds need not set out extrinsic facts constituting offense. *Sanders v. State*, 141 Miss. 289, 105 So. 523 (1925).

Indictment charging accused had possession, by virtue of office, of money to an amount named in the indictment, property of the county, was sufficient without setting out the particular funds embezzled. *Sanders v. State*, 141 Miss. 289, 105 So. 523 (1925).

Failure to charge that conversion of funds involved was done with intent to cheat and defraud held not error. *Sanders v. State*, 141 Miss. 289, 105 So. 523 (1925).

Embezzlement held sufficiently charged against member of board of supervisors. *State v. Yeates*, 140 Miss. 224, 105 So. 498 (1925).

Indictment against member of county board of supervisors not bad in describing him as supervisor. *State v. Yeates*, 140 Miss. 224, 105 So. 498 (1925).

Indictment for embezzlement by chancery clerk held not subject to demurrer. *State v. Murphy*, 124 Miss. 440, 86 So. 868 (1921).

Conflicting averments do not establish fiduciary relationship to county where such does not exist in fact. *State v. Jones*, 102 Miss. 89, 58 So. 782 (1912).

3. Evidence.

Lower court did not err when it allowed state to cross-examine defendant about prior improper actions concerning "ticket fixing", despite allegation that such cross-examination amounted to questioning that was meant solely to bring out acts of misconduct reflecting on defendant's character and prejudice jury, where defendant had asserted throughout trial that state troopers had requested that citations in

question be dismissed and numerous witnesses, including defendant, testified at various times concerning manner in which traffic citations could be dismissed. *Lambert v. State*, 518 So. 2d 621 (Miss. 1987).

In a prosecution of a justice of the peace under this section evidence was sufficient to support the verdict of guilty where there were numerous incidents in which the defendant had received a certain amount in payment of a fine and had remitted a lesser amount to the county. *Hannah v. State*, 336 So. 2d 1317 (Miss.

1976), cert. denied, 429 U.S. 1101, 97 S. Ct. 1125, 51 L. Ed. 2d 551 (1977).

In a prosecution for embezzlement where defendant converted accounts due to another to his own use, testimony of a witness who had never been in the office and who knew no one who worked in the office and who had never seen the defendant until the day of trial that he had made phone calls to defendant's office and had been told that money had been collected was not admissible in evidence. *Acosta v. State*, 222 Miss. 426, 76 So. 2d 211 (1954).

RESEARCH REFERENCES

ALR. Imposition of constructive trust in property bought with stolen or embezzled funds. 38 A.L.R.3d 1354.

Liability of bank or safe-deposit company for its employee's theft or misappropriation of contents of safe-deposit box. 39 A.L.R.4th 543.

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 33 et seq.

7 Am. Jur. Pl & Pr Forms (Rev), Conversion, Form 73.6 (Complaint, petition,

or declaration—For conversion—By employer against employee and spouse).

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A C.J.S., Embezzlement §§ 13 et seq.

Law Reviews. 1989 Mississippi Supreme Court Review: Statutory Interpretation. 59 Miss. L. J. 876, Winter, 1989.

§ 97-11-27. Embezzlement; officers and public agents failing to deliver money, records, etc. to successor.

If any officer or agent of this state, or of any county or subdivision of a county, or of any city, town, or village therein, in whose hands money, books, records, papers, or anything else required by law to be delivered by him to his successor in office or other person authorized by law to receive or have charge of the same, may be, shall wilfully and not in good faith refuse or neglect, on demand, to so deliver the same, he shall, on conviction, be imprisoned in the penitentiary not more than ten years, or be fined not more than one thousand dollars and be imprisoned in the county jail not more than one year.

SOURCES: Codes, 1880, § 2788; 1892, § 1064; Laws, 1906, § 1142; Hemingway's 1917, § 870; Laws, 1930, § 895; Laws, 1942, § 2121.

Cross References — White-collar crime investigations, see § 7-5-59.

Suit on state treasurer's bond for embezzlement, see § 7-9-51.

Failure of sheriff to pay over money collected and omission to execute process, see § 19-25-45.

Duties and liabilities as to public funds, see §§ 25-1-67 et seq.

Additional penalties on certain officers using public moneys for gambling, see § 97-33-3.

Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.

County tax collector's guilty plea in state court to crimes of "willful neglect of duties" and "embezzlement" (§§ 97-11-25 through 97-11-31 and § 97-11-37) established that he committed active or deliberate dishonesty or fraud, which prevented tax collector from recovering on

county's fidelity insurance policy, where policy did not cover losses due to "active or deliberate dishonesty or fraud", such that insurance company owed tax collector no funds that county could obtain by garnishment. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

RESEARCH REFERENCES

Am Jur. 26 *Am. Jur. 2d*, Embezzlement § 33 et seq.

2 *Am. Jur. Trials*, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A *C.J.S.*, Embezzlement §§ 13 et seq.

§ 97-11-29. Embezzlement; accounts to be kept by all public officers; false entries, false certificates, loan of public funds and fraud on the treasury.

The state treasurer, auditor of public accounts, assessors and collectors of taxes, and all other state and county officers, and officers of cities, towns and villages, shall make and keep in their offices, subject to inspection at all times, an accurate entry of each and every sum of public money, securities, stocks, or other public money whatever, by them received, transferred, or disbursed; and if any of said officers, either municipal, county or state, or a clerk, agent or employee of such officers, shall willfully and fraudulently make any false entry therein or make any certificate or endorsement of any warrant on the treasury that the same is genuine, when the same is in fact not a genuine warrant, or shall loan any portion of the public moneys, securities, stocks, or other public property intrusted to him, for any purpose whatever, or shall, by willful act or omission of duty whatever, defraud, or attempt to defraud, the state, or any county, city, town or village, of any moneys, security, or property, he shall, on conviction thereof, be guilty of embezzlement, and fined not less than double the amount or value of the moneys, security, stock or other property so embezzled, or committed to the department of corrections for not more than ten (10) years, or both.

SOURCES: Codes, 1857, ch. 64, art. 85; 1871, § 2550; 1880, § 2789; 1892, § 1065; Laws, 1906, § 1143; Hemingway's 1917, § 871; Laws, 1930, § 896; Laws, 1942, § 2122; Laws, 1979, ch. 508, § 14, eff from and after November 15, 1979 (the United States Attorney General interposed no objection to this amendment on July 6, 1979).

Editor's Note — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state

fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — White-collar crime investigations, see § 7-5-59.

County budget, see §§ 19-11-1 et seq.

Failure of sheriff to pay over money collected and omission to execute process, see § 19-25-45.

Municipal budget, see §§ 21-35-1 et seq.

Duties and liabilities as to public funds, see §§ 25-1-67 et seq.

Conspiracy to defraud state, see §§ 97-7-11 et seq.

Additional penalties on certain officers using public moneys for gambling, see § 97-33-3.

Viability of this section being dependent upon the approval of Chapter 508 of the Laws of 1979 pursuant to the Voting Rights Act of 1965, see Editor's Note to § 97-11-25.

Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Questions for jury.
5. Instructions.

1. In general.

County tax collector's guilty plea in state court to crimes of "willful neglect of duties" and "embezzlement" (§§ 97-11-25 through 97-11-31 and § 97-11-37) established that he committed active or deliberate dishonesty or fraud, which prevented tax collector from recovering on county's fidelity insurance policy, where policy did not cover losses due to "active or deliberate dishonesty or fraud", such that insurance company owed tax collector no funds that county could obtain by garnishment. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

Chancery clerk who uses county funds, rather than chancery clerk monies, to pay chancery clerk employee's and matching employer contributions to state retirement fund is guilty of embezzlement. *Schilling v. State*, 473 So. 2d 975 (Miss. 1985).

This section [Code 1942, § 2122] was inapplicable, or, at least not exclusively applicable, to an indictment, which im-

properly failed to specify the code section under which it was drawn, charging that a county superintendent of education, aided and abetted by two others who were not public officials, issued a false warrant knowing at the time no money was owing to the payee, and converted the proceeds thereof to his own use, thereby embezzling the school money of the county. *Autry v. State*, 230 Miss. 421, 92 So. 2d 856 (1957).

In prosecution against member of county board of supervisors for attempting to defraud county by inducing it to pay money to named persons to whom member knew county was not indebted, refusal to require state to elect to proceed only on inducement as to one of named persons held not error. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

In prosecution against member of county board of supervisors for attempting to defraud county by submitting third persons' claims for 1,899 loads of gravel sold county, with knowledge that such amount of gravel was not sold to county, district attorney's argument that no one testified to hauling 1,899 loads held not error as comment on member's failure to testify. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

2. Indictment.

Indictment against member of county board of supervisors for attempting to defraud county by inducing it to pay money to named persons to whom member knew county was not indebted held not to charge more than one offense, notwithstanding that money was to be paid to more than one person. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

3. Evidence.

The crime of attempted embezzlement is not established where the evidence fails to show an overt act on the part of the defendant to commit the crime charged before he abandoned his alleged purpose. *Kern v. Noble*, 206 So. 2d 200 (Miss. 1968).

In prosecution against member of county board of supervisors for attempting to defraud county by inducing it to pay money to sellers of gravel whom member knew county was not indebted to in amount indicated on "pay roll" submitted by him, admission of second pay roll omitting some of names included on first pay roll held not error, since second pay roll was admission by member that first pay roll was not correct. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

Member of county board of supervisors who submitted gravel claims of third persons in greater amount than was actually owing thereon would be presumed, in absence of evidence to contrary, to have intended to thereby defraud county, as respects whether member was guilty of embezzlement under statute. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

4. Questions for jury.

Whether member of county board of supervisors had knowledge that gravel claims of third persons submitted by him were not owing in amounts submitted by him, so as to be guilty of embezzlement under statute, held for jury. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

5. Instructions.

In prosecution against member of county board of supervisors for wilfully attempting to defraud county, instruction that jury could presume that member of county board of supervisors filed third persons' gravel claims against county in greater amounts than were due thereon, with intent to defraud county, held not error. *Heard v. State*, 177 Miss. 661, 171 So. 775 (1937).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 33 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A C.J.S., Embezzlement § 22.

§ 97-11-31. Embezzlement; fraud committed in public office.

If any officer, or other person employed in any public office, shall commit any fraud or embezzlement therein, he shall be committed to the department of corrections for not more than ten (10) years, or be fined not more than five thousand dollars (\$5,000.00), or both.

SOURCES: Codes, 1880, § 2790; 1892, § 1066; Laws, 1906, § 1144; Hemingway's 1917, § 872; Laws, 1930, § 897; Laws, 1942, § 2123; Laws, 1979, ch. 508, § 15, eff from and after November 15, 1979 (the United States Attorney General interposed no objection to this amendment on July 6, 1979).

Cross References — White-collar crime investigations, see § 7-5-59.

Failure of sheriff to pay over money collected or omission to execute process, see § 19-25-45.

Additional penalties on certain officers using public funds for gambling, see § 97-33-3.

Viability of this section being dependent upon the approval of Chapter 508 of the Laws of 1979 pursuant to the Voting Rights Act of 1965, see Editor's note to § 97-11-25. Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Instructions.
5. Miscellaneous.

1. In general.

This section [Code 1942, § 2123] was applicable to an offense charged in an indictment, which improperly failed to specify the code section under which it was drawn, charging that the county superintendent of education aided and abetted by two others who were not public officials, issued a false warrant knowing at the time no money was owing to the payee, and converted the proceeds thereof to his own use, thereby embezzling school money of the county. *Autry v. State*, 230 Miss. 421, 92 So. 2d 856 (1957).

Code 1942, § 2437, was not applicable in prosecution of a supervisor on a charge of employing a relative to work on the public roads and who instead employed him on his private farm and paid him out of public moneys, and was prosecuted under Code 1942, § 2123. *Blakeney v. State*, 228 Miss. 162, 87 So. 2d 472 (1956).

Fraud involves a breach of duty, trust and confidence, and includes all acts, omissions or concealments by which another is injured, or an undue and unscientific advantage is taken. *Smith v. State*, 107 Miss. 574, 65 So. 498 (1914).

The section [Code 1942, § 2123] is a general law, covering all cases of fraud and embezzlement not specially provided for in the other sections. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

A circuit clerk who issued a false and fraudulent witness pay-certificate, on its face good in substance, but defective in form, is guilty under the section [Code 1942, § 2123]. *Bracey v. State*, 64 Miss. 17, 8 So. 163 (1886).

2. Indictment.

In an indictment charging a county official and county employee with knowingly and feloniously defrauding the

county under this section, the term "fraud committed in a public office" was not so vague as to fail constitutional muster since the indictment gave the statute under which the defendants were charged and followed its language, the language of the indictment was plain, and the defendants were therefore fully informed of the nature of the offense. *Cumbest v. State*, 456 So. 2d 209 (Miss. 1984).

An indictment charging that defendant mayor's hotel bill was paid by a third party, and consequently this was not out of pocket expense to which he was entitled to reimbursement by the city, and that by making a claim for reimbursement and accepting the money knowing it was not due him, he did cheat and defraud the city of public funds, was sufficient under this section [Code 1942 § 2123]. *State v. Grady*, 281 So. 2d 678 (Miss. 1973).

An indictment charging a county supervisor with the embezzlement of tractor parts was properly subject to demurrer where ownership of the property taken was not shown, the property taken was not described in language sufficiently definite as to identify it, and the value of the various parts was not alleged. *Sisk v. State*, 260 So. 2d 485 (Miss. 1972).

An indictment charging that accused while acting as supervisor employed a distant relative to work upon public roads at the rate of \$5 a day and ordered the relative to perform 7 ½ days work on his private farm and paid his relative by means of regular road and bridge fund warrants of said district, was sufficient under this section [Code 1942, § 2123]. *Blakeney v. State*, 228 Miss. 162, 87 So. 2d 472 (1956).

An indictment charging that a trustee of the state penitentiary, fraudulently, etc., caused to be bought and participated in buying an automobile from himself and a third party held sufficient. *Smith v. State*, 107 Miss. 574, 65 So. 498 (1914).

3. Evidence.

Evidence of defendant's intent to commit fraud in public office was sufficient to

convict, as it was shown that defendant told a city mechanic and the owner of a supply shop different stories regarding defendant's need for auto parts and, subsequently, asked the supply shop owner to mislead investigators. *Johnson v. State*, 831 So. 2d 1171 (Miss. Ct. App. 2002).

Where supervisor who had employed a relative to work on public roads who instead worked on his private farm and was paid out of public moneys, and supervisor was convicted under this section [Code 1942, § 2123] and after the trial an unexplained receipt which had been signed by the relative for the sum of \$24 for eight days labor was found, the supervisor should have been given a new trial on the ground of newly discovered evidence. *Blakeney v. State*, 228 Miss. 162, 87 So. 2d 472 (1956).

Under an indictment for failing to account for and pay over to his superior certain license fees collected by one designated as chief clerk, it is material as to who actually made away with the money where numerous field men had equal access to the cigar box in which duplicate permits, cash and checks were kept, and where neither statute nor departmental regulations prescribed the duties or modus operandi of the chief clerk. *Murphree v. State*, 201 Miss. 34, 28 So. 2d 238 (1946).

When the books of account, required to be kept by the auditor and the treasurer, agreed in showing a shortage in the accounts of the latter, the burden is on the latter to show errors in his account if he rely upon that as a defense. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

Though, an indictment for embezzlement, which charges an officer with failure to pay over money to his successor, allege that the money was in his hands when his successor qualified, this allegation is immaterial and need not be proved. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

To charge an officer with the receipt of money as shown by his books and report, it is not necessary for the state to prove beyond a reasonable doubt that he made the entries, or, caused them to be made. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

In prosecution against a public officer who is required to keep correct accounts, where a balance due the state is shown by his own books, proof that the books show such balance, together with the failure to pay, unexplained, will alone warrant a conviction. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

In a prosecution for embezzlement against the state treasurer it is sufficient if the testimony proves that the defendant has made way with the money or gotten rid of it wilfully and fraudulently in any manner not allowed by law; and if all the evidence furnished no reasonable explanation of what became of the money and raises no reasonable doubt of his guilt the jury should convict. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

4. Instructions.

Where the defendant, and the county superintendent of education, were charged in the indictment with embezzlement of county school funds, a warrant for \$1,629.00, an instruction which by its language relieved the prosecution of the burden of proving any particular act of embezzlement was erroneous. *Mills v. State*, 231 Miss. 687, 97 So. 2d 517 (1957).

An instruction that if they believed that the accused and the county school superintendent were guilty of embezzling school funds, the jury might find the accused guilty regardless of whether he received any or all the money, was prejudicially erroneous, where there was no evidence upon which it could have been predicated, and since the accused had admitted that he had received the money, and there was no evidence that the county school superintendent received any part of the funds, the instruction left to the jury to conjecture that defendant might have been the instrumentality through which the county superintendent of education received all or some part of the allegedly embezzled funds, without there being any evidence to support such conjecture. *Mills v. State*, 231 Miss. 687, 97 So. 2d 517 (1957).

Instruction held correct. *Hemingway v. State*, 68 Miss. 371, 8 So. 317 (1890).

5. Miscellaneous.

Earlier case is overruled inasmuch as the distinction drawn by the majority was

an unnecessary one, and one which has made the embezzlement statute, for all practical purposes, a dead letter. *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).

If a state official uses a power given to him by law to obtain monies wrongfully, it is the corruption of power that causes those monies to be obtained "by virtue of office" since the state official would never have had the means to misallocate funds had he not held an office which conferred that power upon him. *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993).

County tax collector's guilty plea in state court to crimes of "willful neglect of duties" and "embezzlement" (§§ 97-11-25 through 97-11-31 and § 97-11-37) established that he committed active or deliberate dishonesty or fraud, which prevented tax collector from recovering on county's fidelity insurance policy, where policy did not cover losses due to "active or deliberate dishonesty or fraud", such that insurance company owed tax collector no funds that county could obtain by garnish-

ment. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

Where defendant in a prosecution for embezzlement pleaded guilty in 1978 to two of ten indictments, the trial court erred in sentencing him to two concurrent terms of three years in prison, suspended, and \$10,000 in fines since this section provides for either fine or imprisonment, but not both. *Salter v. State*, 387 So. 2d 81 (Miss. 1980).

In an embezzlement prosecution, it was error for the special prosecutor to advise the jury as to what the district attorney had testified to, out of jury's presence, in regard to defendant's statement regarding the offense charged, but in view of defendant's failure to preserve the point by moving to strike from the record and asking that the jury be instructed to disregard it, or to secure a ruling to his objection to the special prosecutor's statement, the defendant was not in a position to complain as to the error upon an appeal from a conviction. *O'Harrell v. State*, 97 So. 2d 517 (Miss. 1957).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 33 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A C.J.S., Embezzlement §§ 21, 22.

§ 97-11-33. Extortion; collecting unauthorized fees and fees for services not actually rendered.

If any judge, justice court judge, sheriff, deputy sheriff, sheriff's employee, constable, assessor, collector, clerk, county medical examiner, county medical examiner investigator, employee of the Mississippi Department of Corrections, employee of any contractor providing incarceration services or any other officer, shall knowingly demand, take or collect, under color of his office, any money fee or reward whatever, not authorized by law, or shall demand and receive, knowingly, any fee for service not actually performed, such officer, so offending, shall be guilty of extortion, and, on conviction, shall be punished by fine not exceeding Five Thousand Dollars (\$5,000.00), or imprisonment for not more than five (5) years, or both, and shall be removed from office.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 2(5); 1857, ch. 64, art. 99; 1871, § 2712; 1880, § 2805; 1892, § 1081; *Laws*, 1906, § 1161; *Hemingway's* 1917, § 888; *Laws*, 1930, § 914; *Laws*, 1942, § 2144; *Laws*, 1979, ch. 508, § 16; *Laws*, 1986, ch. 459, § 40; *Laws*, 1997, ch. 431, § 1; *Laws*, 1997, ch. 462, § 1, eff from and after July 1, 1997.

Joint Legislative Committee Note — Section 1 of ch. 431, Laws, 1997, amended this section, effective July 1, 1997 (approved March 25, 1997). Section 1 of ch. 462, Laws, 1997, effective July 1, 1997 (approved March 26, 1997), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 462, Laws, 1997, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — White-collar crime investigations, see § 7-5-59.

Specific fees of officers, see §§ 25-7-1, 25-7-3.

Effect of conviction of certain crimes as disqualification to hold office in labor organization or to participate in labor management functions, see § 71-1-49.

JUDICIAL DECISIONS

1. In general.
2. Indictment.

1. In general.

Under § 1081, Code 1892, the tax collector is not entitled to exact from the purchaser of land at a tax sale the prepayment of fees given by the act of 1898 (laws of 1898 p. 52) for services to be rendered for two years thereafter. *Baker v. Cox*, 79 Miss. 306, 30 So. 641 (1901).

Under § 1081 Code of 1892, the tax collector is not entitled to exact from the purchaser of land at a tax sale the prepayment of the fees given by the act of 1898 (laws of 1898 p. 52) for services to be rendered nearly two years thereafter in notifying delinquents that the tax sale is about to become absolute. *Baker v. Cox*, 79 Miss. 306, 30 So. 641 (1901).

2. Indictment.

When defendant has been tried for murder and convicted of lesser offense of manslaughter, subsequent indictment for separate felony of shooting into occupied building based on same criminal episode is barred on double jeopardy grounds. *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986).

Extortion, being a common-law offense, may be charged according to the statute or the common law, and by the latter it is sufficient to charge that it was "unlawfully, corruptly, deceitfully, extorsively and by color of office" done, without using the word "knowingly." *State v. Jones*, 71 Miss. 872, 15 So. 237 (1894).

ATTORNEY GENERAL OPINIONS

A court order generally absolves personal liability for actions performed in accordance with the order, except where

the order was based upon intentional misrepresentations or fraud. *Bryant*, Aug. 22, 1997, A.G. Op. #97-0487.

RESEARCH REFERENCES

ALR. Extortion: What constitutes the taking of money or other thing of value under color of office. 70 A.L.R.3d 1153.

When is act of extortion performed "under color of official right" so as to be in violation of Hobbs Act (18 USCS § 1951). 74 A.L.R. Fed. 199.

Am Jur. 31A Am. Jur. 2d, Extortion, Blackmail, and Threats §§ 7-18.

2 Am. Jur. Trials, Investigating Particular Crimes § 66 (extortion).

CJS. 35 C.J.S., Extortion § 9.

§ 97-11-35. Failure to return known offenders; purposeful avoidance of knowledge of offense.

If any judge, justice court judge, constable, member of the board of supervisors, sheriff, or other peace officer, shall wilfully neglect or refuse to return any person committing any offense against the laws, committed in his view or knowledge, or of which he has any notice, or shall wilfully absent himself when such offense is being or is about to be committed, for the purpose of avoiding a knowledge of the same, he shall, on conviction, be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and may, in the discretion of the court, be removed from office.

SOURCES: Codes, 1871, § 2889; 1880, § 2756; 1892, § 1225; Laws, 1906, § 1301; Hemingway's 1917, § 1034; Laws, 1930, § 1065; Laws, 1942, § 2297; Laws, 1986, ch. 459, § 41, eff from and after July 1, 1986.

Cross References — Civil liability of officers for failure to perform duty, see § 25-1-45.

Officer permitting escape of prisoners, see § 97-9-39.

ATTORNEY GENERAL OPINIONS

With regard to judges, word "return" such person in proper court. O'Brien Oct. 13, 1993, A.G. Op. #93-0701.
means to file charges or affidavit against

§ 97-11-37. Failure to perform any duty.

If any person, being sheriff, clerk of any court, constable, assessor, or collector of taxes, or holding any county office whatever, or mayor, marshal, or constable, or any other officer of any city, town, or village, shall knowingly or wilfully fail, neglect, or refuse to perform any of the duties required of him by law, or shall fail or refuse to keep any record required to be kept by law, or shall secrete the same, or shall violate his duty in any respect, he shall, on conviction thereof, be fined not exceeding One Thousand Dollars (\$1,000.00), or be imprisoned in the county jail not exceeding six (6) months, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 33, art. 14(1); 1857, ch. 64, art. 62; 1871, § 2890; 1880, § 2757; 1892, § 1226; Laws, 1906, § 1302; Hemingway's 1917, § 1035; Laws, 1930, § 1066; Laws, 1942, § 2298; Laws, 1986, ch. 459, § 42, eff from and after July 1, 1986.

Cross References — Constitutional requirement that public officer or employee personally devote his time to performance of duties, see Miss Const Art. 14, § 267.

Penalty for constable's neglect of duty, see § 19-19-15.

Liability for failure to return execution, see § 19-25-41.

Penalty for unauthorized municipal appropriation, see § 21-39-15.

Civil liability of officers for failure to perform duties, see § 25-1-45.

Removals from office, see §§ 25-5-1 et seq.

Duties of tax assessors, see § 27-1-5.

Duties of state tax commission, see §§ 27-3-31, 27-3-33.

Liability of tax collector and assessor, see § 27-29-29.

Penalty for violating chapter on public purchases, see § 31-7-55.

Penalty on clerk for failure of duty, as to land and conveyances, see § 89-5-43.

Penalty for demanding and receiving a fee for service not performed, see § 97-11-33.

Punishment of officers for failing in their duties under the vagrancy chapter, see § 97-35-43.

JUDICIAL DECISIONS

1. In general.

County tax collector's guilty plea in state court to crimes of "willful neglect of duties" and "embezzlement" (§§ 97-11-25 through 97-11-31 and § 97-11-37) established that he committed active or deliberate dishonesty or fraud, which prevented tax collector from recovering on county's fidelity insurance policy, where policy did not cover losses due to "active or deliberate dishonesty or fraud", such that insurance company owed tax collector no funds that county could obtain by garnishment. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

Where county taxpayer pleads guilty to crimes of embezzlement and willfully neglecting his duties, it is established that tax collector committed active or deliber-

ate dishonesty or fraud, such that public officials liability insurance policy which excluded coverage for losses due to active or deliberate dishonesty or fraud, did not cover county's losses suffered by reason of tax collector's acts. *Mississippi v. Richardson*, 817 F.2d 1203 (5th Cir. 1987).

Where the mayor and aldermen of a city failed to give notice of an election to determine the question whether there should be an increase in taxation for a specified year, they were subject to indictment. *State v. Glennen*, 93 Miss. 836, 47 So. 550 (1908).

A justice of the peace, on conviction of a sheriff before him for misconduct in office, has no jurisdiction to remove him from office. *Moore v. State*, 45 So. 866 (Miss. 1908).

RESEARCH REFERENCES

ALR. Liability of public officer or body for harm done by prisoner permitted to escape. 44 A.L.R.3d 899.

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees § 371.

CJS. 67 C.J.S., Officers and Public Employees §§ 165, 166.

§ 97-11-39. Military officers; resigning to evade obedience to order prohibited.

Any officer who shall offer to resign in order to evade obedience to a lawful order of his superior officer, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not to exceed one hundred dollars or by imprisonment in the county jail not to exceed sixty days, or by both such fine and imprisonment, at the discretion of the court and in addition thereto, if the conviction be by a military court, he may be dismissed from the service of the state or suffer such punishment as the court martial may decide.

SOURCES: Codes, 1892, § 1231; Laws, 1906, § 1307; Hemingway's 1917, § 1040; Laws, 1930, § 1072; Laws, 1942, § 2305; Laws, 1916, ch. 245.

Cross References — State code of military justice, see §§ 33-13-1 et seq.
Failure to report for active militia duty, see § 97-7-59.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Military and Civil Defense § 51.

§ 97-11-41. Oath of office and bond; elected officials not to exercise duties before taking oath or giving bond, as required.

If any person elected to any office shall undertake to exercise the same or discharge the duties thereof without first having taken the oath of office or given bond as required by law, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than five hundred dollars, or imprisoned in the county jail not longer than one year, or both.

SOURCES: Codes, 1857, ch. 64, art. 81; 1871, § 320; 1880, § 2780; 1892, § 1057; Laws, 1906, § 1135; Hemingway's 1917, § 863; Laws, 1930, § 888; Laws, 1942, § 2114.

Cross References — Constitutional provision for oath of officers, see Miss Const Art. 14, § 268.

Officers' oaths and bonds, see §§ 25-1-9 et seq.

Commission of officer not being necessary, see § 25-1-35.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

A newly elected school board member who casts a vote prior to his being bonded and taking the oath of office violates Section 97-11-41; however, any vote so taken

may be binding as that of a de facto officer under Section 25-1-37. Mabry, Apr. 27, 2001, A.G. Op. #01-0239.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 124 et seq., 130 et seq.

§ 97-11-43. Railroad fares; government officials to pay same fare as general passengers; accepting and using free pass.

If any officer, state, county, district, or municipal, except the Public Service Commissioners when in the actual discharge of official duties, shall travel or ride upon any railroad without paying absolutely and without any guile, trick, subterfuge, or evasion whatsoever, the same fare required of passengers generally, or if any railroad company, or officer or employee of any railroad company, shall permit any such state, county, district, or municipal officer,

except Public Service Commissioners when in the actual discharge of official duties, to so travel or ride, he or it shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than ten days nor more than sixty days, or both.

SOURCES: Codes, 1892, § 1230; Laws, 1906, § 1306; Hemingway's 1917, § 1039; Laws, 1930, § 1071; Laws, 1942, § 2303; Laws, 1884, p. 45.

Cross References — Constitutional prohibition against railroads or other transportation companies granting free passes or transportation to public officers, see Miss. Const. Art. 7, § 188.

Prohibition against carriers granting free transportation, rebates or reduction of charges, see § 77-9-15.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

§ 97-11-45. Tax collector and chancery clerk; failure to perform duty in respect to duplicate tax receipts.

Any tax collector who shall fail to fill up, in case of the payment of taxes to him, the duplicate tax receipt required by law to be filled up by him, or to preserve the book of duplicate receipts filled, or to submit such book or books to the board of supervisors when required, or to deliver such book or books to the clerk of the chancery court shall, upon conviction, be removed from office, and be fined not less than one thousand dollars, and be imprisoned in the county jail not less than six months; and any clerk who shall refuse to receive or receipt for such book or books when delivered or tendered to him, or to preserve the same as a record of his office, shall be fined not more than three hundred dollars, and imprisoned in the county jail not exceeding three months.

SOURCES: Codes, 1880, § 516; 1892, § 1236; Laws, 1906, § 1312; Hemingway's 1917, § 1045; Laws, 1930, § 1077; Laws, 1942, § 2310.

Cross References — Tax receipts, see §§ 27-41-29 et seq.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

§ 97-11-47. Tax collector; failure to make settlement.

Any tax collector who shall wilfully fail or refuse for ten days after the time appointed by law for any monthly payment or final settlement, to make the

same, shall be guilty of a misdemeanor, and, on conviction, he shall be removed from office and fined not exceeding one thousand dollars.

SOURCES: Codes, 1880, § 553; 1892, § 1237; Laws, 1906, § 1313; Hemingway's 1917, § 1046; Laws, 1930, § 1078; Laws, 1942, § 2311.

Cross References — Governor's power to suspend alleged defaulting tax collectors, see Miss Const Art. 5, § 125.

Suspension of alleged defaulting tax collectors, see § 7-1-57.

Debits and credits to tax collector, see §§ 19-17-13 et seq.

Publishing names of defaulting officers, see § 25-1-63.

Monthly reports required of tax collector, see § 27-29-11.

Effect of tax collector's failure to report, see § 27-29-25.

Duties of tax collector about to go out of office, see § 27-29-31.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

County in default to the city to the extent of payments collected and held for over a year. *Smith v. City of Winona*, 222 Miss. 318, 75 So. 2d 903 (1954).

A tax collector, having received tax money although paid under protest, is under a positive duty to pay over the same to the proper authorities on the first day of the month immediately following such collection, or within twenty days thereafter, under the penalty of payment of 30 per cent per annum damages, etc. *Yazoo &*

Miss. V. Ry. v. Conner, 188 Miss. 352, 194 So. 915 (1940).

A tax collector was not liable to a taxpayer for refund of taxes paid under protest, since a tax collector is under a mandatory duty to pay over the money collected to the proper authorities on the first day of the month immediately following such collection or within twenty days thereafter, under the penalty of being subject to suspension and damages. *Yazoo & Miss. V. Ry. v. Conner*, 188 Miss. 352, 194 So. 915 (1940).

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 369 et seq.

§ 97-11-49. Tax collector; collecting privilege tax without issuing license.

If any tax collector, or deputy or agent of any tax collector, shall collect any privilege tax without issuing to the party from whom the tax is collected the auditor's license therefor as provided for by law, he shall, on conviction, be fined not less than double the amount of the tax, and be imprisoned in the county jail not less than one (1) week; and if the failure be wilful, he shall be removed from office.

SOURCES: Codes, 1892, § 1238; Laws, 1906, § 1314; Hemingway's 1917, § 1047; Laws, 1930, § 1079; Laws, 1942, § 2312; Laws, 1884, p. 15; Laws, 1968, ch. 361, § 2, eff from and after January 1, 1972.

Editor's Note — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words “state auditor of public accounts,” “state auditor”, and “auditor” appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words “State Auditor of Public Accounts,” “State Auditor” and “Auditor” appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term “State Fiscal Officer” appears in any law it shall mean “Executive Director of the Department of Finance and Administration”.

Cross References — Removals from office, see §§ 25-5-1 et seq.

Issuance of privilege tax licenses, see §§ 27-15-205, 27-17-455.

§ 97-11-51. Trustees of state institutions not to incur liability in excess of income.

It shall be unlawful for the board of trustees or other authority of any state-owned institution maintained in whole or in part by the state, or any state department, having charge of the disbursement or expenditure of the income provided by legislative appropriation and otherwise for such institution or department to expend, contract for the expenditure, or permit the incurring of any liability in excess of the income so provided, and it shall be and is hereby made the duty of any and all such authorities to keep the expenditures and obligations within the amount of said income, but in cases of extreme emergency arising from acts of Providence, epidemics, fire, storm, or flood, said authorities may, upon the written consent of a majority of the members of the state senate, and a majority of the members of the house of representatives and the approval of the governor, exceed such appropriation by the amounts to be so stipulated and agreed upon.

Any authority or member of a board of trustees violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty (\$50.00) dollars nor more than five hundred (\$500.00) dollars or imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, and in addition thereto shall be personally liable, and liable on his bond, for the amount of the excess thus unlawfully expended, and shall be removed from office or from such employment.

SOURCES: Codes, 1942, § 2304; Laws, 1932, ch. 134.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets. 29 A.L.R.2d 1034.

Am Jur. 6 Am. Jur. Proof of Facts 3d, Act of God, §§ 1 et seq.

§ 97-11-53. Offer of inducements to influence public official's action on award of contracts or accomplishment of official acts.

As used in this section the following words shall have the following meaning:

- (1) Person: individual, firm, corporation, association, partnership or other legal entity.
- (2) Public official:
 - (a) Any elected official of the State of Mississippi or of any political subdivision thereof, or
 - (b) Any officer, director, commissioner, supervisor, chief, head, agent or employee of:
 - (i) The State of Mississippi,
 - (ii) Any agency of the State of Mississippi,
 - (iii) Any political subdivision of the State of Mississippi,
 - (iv) Any body politic of the State of Mississippi, or
 - (v) Any entity created by or under the laws of the State of Mississippi or by executive order of the Governor of the State of Mississippi and which expends public funds.

No person shall directly or indirectly offer, promise, give or agree to give to any public official or his spouse any money, property, or other tangible or intangible thing of value as an inducement or incentive for (a) the awarding or refusal to award a contract by any of the entities referred to in subsections (i) through (v) of subsection 2-b of this section; (b) the purchase, sale or lease of property by any of the entities referred to in subsections (i) through (v) of subsection 2-b of this section; or (c) the accomplishment of any official act or purpose involving public funds or public trust.

Any person who violates the terms of this section shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary not more than ten (10) years, or be fined not more than five thousand dollars (\$5,000.00), or both; and in addition such person and the firm, corporation, partnership, association or other type of business entity which he represents shall be barred for a period of five (5) years from the date of conviction from doing business with the State of Mississippi or any political subdivision thereof or any other public entity referred to in this section.

No public official shall directly or indirectly accept, receive, offer to receive or agree to receive any gift, offer, or promise of any money, property or other tangible or intangible thing of value as an inducement or incentive for (a) the awarding or refusal to award a contract by any of the entities referred to in

subsections (i) through (v) of subsection 2-b of this section; (b) the purchase, sale or lease of property by any of the entities referred to in subsections (i) through (v) of subsection 2-b of this section; or (c) the accomplishment of any official act or purpose involving public funds or public trust.

Any public official who violates the terms of this section or whose spouse does so with his knowledge and consent, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary not more than ten (10) years, or be fined not more than five thousand dollars (\$5,000.00), or both; and in addition, upon conviction such public official shall forfeit his office, if any he hold, and be forever disqualified from holding any public office, trust, appointment or employment with the State of Mississippi or any political subdivision thereof or with any other public entity referred to in this section.

Each violation of the provisions of this section shall constitute a separate offense.

SOURCES: Laws, 1974, ch. 541, § 2, eff from and after passage (approved April 12, 1974).

Cross References — White-collar crime investigation, see § 7-5-59.

Regulations governing public purchases generally, see §§ 31-7-1 et seq.

Illegality of kickbacks in connection with medicaid benefits, see § 43-13-207.

Offering property to officer or his spouse to influence officer's actions, see § 97-11-11.

Penalty for acceptance of bribe by officer or his spouse, see § 97-11-13.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Official act element.

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official, the trial court did not err in denying defendant's motion for judgment notwithstanding the judgment or for a new trial because a videotaped meeting clearly showed that defendant had accepted payment of \$ 5,000, and acknowledged having previously accepted an additional \$ 2,500, in

return for his aid in securing other city council member's approval of a property owner's construction project. Also the "official act" element of the offense was satisfied because in trying to secure the council's approval, defendant, as an official act, called a city council meeting and presented the property owners' documents to show the progress made on the project. *Edmonson v. State*, 906 So. 2d 73 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR. Recovery of money paid, or property transferred, as a bribe. 60 A.L.R.2d 1273.

Bribery: Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of

bribery or attempting to bribe state public employee. 7 A.L.R.4th 1202.

Requirement under defense procurement and general procurement statutes (10 USCS § 2306(b); 41 USCS § 254(a)) and regulations promulgated thereunder (32 CFR §§ 1-1500 et seq.; 41 CFR §§ 1-1.500 et seq.) that government contract for property and services contain war-

ranty against commission or contingent fees. 60 A.L.R. Fed. 263.

Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.S. § 201). 161 A.L.R. Fed. 491.

Am Jur. 12 Am. Jur. 2d, Bribery §§ 15 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS. 11 C.J.S., Bribery §§ 1 et seq.

CHAPTER 13

Election Crimes

SEC.

- 97-13-1. Bribery; influencing electors or election officers.
- 97-13-3. Bribery; hiring canvasser to use unlawful means.
- 97-13-5. Ballot boxes; holding election with box unlocked; reading ballot before putting in box.
- 97-13-7. Ballot boxes; unauthorized disposal of box; giving key.
- 97-13-9. Ballots; false entries on voting lists; stuffing; removing, altering, etc.
- 97-13-11. Repealed.
- 97-13-13. Ballots; removal before close of polls.
- 97-13-15. Limitations on corporate contributions to political party or candidate.
- 97-13-17. Limitations on corporate contributions to political party or candidate; penalty.
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- 97-13-35. Voting; by unqualified person, or at more than one place, or for both parties in same primary.
- 97-13-36. Multiple voting; penalties.
- 97-13-37. Intimidating, boycotting, etc., elector to procure vote.
- 97-13-39. Intimidating elector to prevent voting.

§ 97-13-1. Bribery; influencing electors or election officers.

If any elector, manager, clerk or canvasser at any election, or any executive officer attending the same, shall receive any gift, reward, or promise thereof or if any person shall offer such gift, reward, or promise thereof to influence any elector, clerk, canvasser, or any executive officer attending any election in his vote, opinion, action, or judgment in relation to such election, the person so offending shall, on conviction, be imprisoned in the penitentiary not more than two years or in a county jail not more than one year, or be fined one thousand dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(1); 1857, ch. 64, art. 37; 1871, § 2514; 1880, § 2370; 1892, § 984; Laws, 1906, § 1060; Hemingway's 1917, § 788; Laws, 1930, § 804; Laws, 1942, § 2030.

Cross References — White-collar crime investigation, see § 7-5-59.

Illegal registration and voting, see §§ 97-13-5 et seq.

Intimidating, boycotting, etc., elector to procure vote, see § 97-13-37.

Intimidating elector to prevent vote, see § 97-13-39.

JUDICIAL DECISIONS

1. In general.

Cash drawing sponsored by political candidate does not constitute violation of bribery statutes, candidate gift statute, or lottery statute where scheme sponsored by candidate requires only that voters

who wish to participate in cash drawing participate in election and where scheme expressly disclaims attempt to influence direction of vote. *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.

26 Am. Jur. 2d, Elections §§ 351 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS. 11 C.J.S., Bribery §§ 1 et seq.
29 C.J.S., Elections § 554, 555.

Law Reviews. Mississippi Election Code of 1986, 56 Miss. L. J. 535, December 1986.

§ 97-13-3. Bribery; hiring canvasser to use unlawful means.

If any person shall offer or give a reward to another for the purpose of inducing him, by any unlawful means not amounting to bribery, to procure any person to vote at any election for or against any person, the person so giving or offering such reward shall, upon conviction thereof, be imprisoned in the county jail not more than one year, or fined not more than five hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(3); 1857, ch. 64, art. 38; 1871, § 2515; 1880, § 2731; 1892, § 985; Laws, 1906, § 1061; Hemingway's 1917, § 789; Laws, 1930, § 805; Laws, 1942, § 2031.

Cross References — White-collar crime investigation, see § 7-5-59.

Illegal voting, see §§ 97-13-5 et seq.

Intimidating, boycotting, etc., elector to procure vote, see § 97-13-37.

Intimidating elector to prevent vote, see § 97-13-39.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.

26 Am. Jur. 2d, Elections §§ 351 et seq.

37 Am. Jur. Trials 273, Handling the Defense in a Bribery Prosecution.

CJS. 11 C.J.S., Bribery §§ 1 et seq.
29 C.J.S., Elections § 554, 555.

§ 97-13-5. Ballot boxes; holding election with box unlocked; reading ballot before putting in box.

Any such manager who shall proceed to any election without having the ballot-box locked and secured in the manner directed by law, or who shall open and read or consent to any other person opening and reading any ballot given him to be deposited in the box at such election, before it is put into the box, shall, upon conviction, be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding three hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(6); 1857, ch. 64, art. 75; 1871, § 2539; 1880, § 2774; 1892, § 1046; Laws, 1906, § 1124; Hemingway's 1917, § 850; Laws, 1930, § 875; Laws, 1942, § 2101.

RESEARCH REFERENCES

ALR. Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Actionability, under 42 USCS § 1983, of claim arising out of maladministration of election. 66 A.L.R. Fed. 750.

Am Jur. 26 Am. Jur. 2d, Elections §§ 348 et seq.

CJS. 29 C.J.S., Elections §§ 540 et seq.

§ 97-13-7. Ballot boxes; unauthorized disposal of box; giving key.

Any manager of a general or special election who, before the votes are counted, shall dispose of or deposit the ballot-box in a manner not authorized by law, or shall, at any time after the election has begun and before the ballots are counted, give the key of the ballot-box with which he is intrusted to any other, shall, upon conviction, be punished by imprisonment in the county jail not exceeding three months, or by fine not exceeding three hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(7); 1857, ch. 64, art. 76; 1871, § 2540; 1880, § 2775; 1892, § 1047; Laws, 1906, § 1125; Hemingway's 1917, § 851; Laws, 1930, § 876; Laws, 1942, § 2102.

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections §§ 348 et seq.

CJS. 29 C.J.S., Elections §§ 540 et seq.

§ 97-13-9. Ballots; false entries on voting lists; stuffing; removing, altering, etc.

If any manager or clerk of any general or special election shall knowingly make or consent to any false entry on the list of persons voting, or shall permit to be put in the ballot-box any ballot not given by a voter, or shall take out of such box, or permit to be so taken out, any ballot deposited therein except in the manner prescribed by law, or shall, by any other act or omission, designedly destroy or change the ballots given by the electors, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(5); 1857, ch. 64, art. 74; 1871, § 2538; 1880, § 2773; 1892, § 1045; Laws, 1906, § 1123; Hemingway's 1917, § 849; Laws, 1930, § 874; Laws, 1942, § 2100.

Cross References — Taking or removing ballots from voting place, see § 97-13-13.

JUDICIAL DECISIONS

1. Malice or deliberate design.

In a murder case, a depraved heart murder instruction did not constructively amend the indictment where every murder committed with deliberate design is by

definition done in the commission of an act imminently dangerous to others. *Little v. State*, 883 So. 2d 120 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections §§ 348 et seq.

CJS. 29 C.J.S., Elections §§ 540 et seq.

§ 97-13-11. Repealed.

Repealed by Laws, 1988, ch. 309, § 1, eff from and after December 9, 1988 (the date the United States Attorney General interposed no objection to the repeal of this section).

[Codes, 1892, § 1053; 1906, § 1131; Hemingway's 1917, § 857; 1930, § 882; 1942, § 2108]

Editor's Note — Former § 97-13-11 was entitled: Ballots; failing to keep official ballots secret.

§ 97-13-13. Ballots; removal before close of polls.

If any person shall take or remove any ballot from a voting place before the close of the polls, he shall, on conviction, be fined not less than twenty-five dollars nor more than one hundred and fifty dollars, or be imprisoned in the county jail not less than ten days nor more than ninety days, or both.

SOURCES: Codes, 1892, § 1054; Laws, 1906, § 1132; Hemingway's 1917, § 858; Laws, 1930, § 883; Laws, 1942, § 2109.

RESEARCH REFERENCES

ALR. Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Actionability, under 42 USCS § 1983, of claim arising out of maladministration of election. 66 A.L.R. Fed. 750.

§ 97-13-15. Limitations on corporate contributions to political party or candidate.

It shall be unlawful for any corporation, incorporated company or incorporated association, by whatever name it may be known, incorporated or organized under the laws of this state, or doing business in this state, or for any servant, agent, employee or officer thereof, to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property of said corporation, incorporated company or incorporated association, in excess of One Thousand Dollars (\$1,000.00) per calendar year for the purpose of aiding

any political party or any candidate for any public office, or any candidate for any nomination for any public office of any political party, or to give, donate, appropriate or furnish, directly or indirectly, any money, security, funds or property of said corporation, incorporated company or association in excess of One Thousand Dollars (\$1,000.00) to any committee or person as a contribution to the expense of any political party or any candidate, representative or committee of any political party or candidate for nomination by any political party, or any committee or other person acting in behalf of such candidate. The limit of One Thousand Dollars (\$1,000.00) for contributions to political parties, candidates and committees or other persons acting in behalf of such candidates shall be an annual limitation applicable to each calendar year.

SOURCES: Codes, Hemingway's 1917, § 861; Laws, 1930, § 886; Laws, 1942, § 2112; Laws, 1908, ch. 124; Laws, 1978, ch. 479, § 5; Laws, 1999, ch. 301, § 19, *eff* January 15, 1999 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

Editor's Note — Laws, 1999, ch. 301, was House Bill 1609, 1998 Regular Session, and originally passed both Houses of the Legislature on April 3, 1998. The Governor vetoed House Bill 1609 on April 17, 1998. The veto was overridden by the State Senate and House of Representatives on January 5, 1999.

On January 15, 1999, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws, 1999, ch. 301, § 19.

Cross References — Protection of social, civil, and political rights of employees, see § 79-1-9.

Comparable Laws from other States — Alabama Code, §§ 36-25-6, 17-22A-1 through 17-22A-23.

Arkansas Code Annotated, §§ 7-6-201 through 7-6-218.

Georgia Code Annotated, §§ 21-5-30 through 21-5-44.

Louisiana Revised Statutes Annotated, § 18:1481 *et seq.*

Tennessee Code Annotated, §§ 2-10-101 through 2-10-310.

Texas Election Code, §§ 251.001 *et seq.*, 258.001 *et seq.*

JUDICIAL DECISIONS

1. In general.

Donation by the general manager of \$1,200 of funds of an association to candidates for public office was in complete violation of the statutory prohibition, and

the corporation was entitled to recover that amount plus interest from the date of contribution. *Capital Elec. Power Ass'n v. Phillips*, 240 So. 2d 133 (Miss. 1970).

ATTORNEY GENERAL OPINIONS

This section and § 23-15-807 are specifically directed to candidates seeking public office in which the general electorate will vote. Therefore, these code sections would not apply to elections within the House of Representatives; thus, corporate

contributions to a candidate seeking election as Speaker of the House of Representatives would not be limited and would not be required to be reported. *Ford*, October 4, 1995, A.G. Op. #95-0456.

RESEARCH REFERENCES

ALR. Power of corporation to make political contribution or expenditure under state law. 79 A.L.R.3d 491.

Am Jur. 26 Am. Jur. 2d, Elections §§ 352 et seq., 462 et seq.

§ 97-13-17. Limitations on corporate contributions to political party or candidate; penalty.

Any corporation, incorporated company or incorporated association, or agent, officer or employee violating any of the provisions of section 97-13-15 shall, upon conviction, be fined not less than one thousand dollars (\$1,000.00) nor more than five thousand dollars (\$5,000.00).

SOURCES: Codes, Hemingway's 1917, § 862; Laws, 1930, § 887; Laws, 1942, § 2113; Laws, 1908, ch. 124; Laws, 1978, ch. 479, § 6, eff from and after passage (approved April 14, 1978), (the United States Attorney General interposed no objection to this amendment on May 5, 1978).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Power of corporation to make political contribution or expenditure under state law. 79 A.L.R.3d 491.

§ 97-13-18. Foreign nationals prohibited from contributing to political party or candidate.

(1) It shall be unlawful for a foreign national, directly or through any other person, to make any contribution or any expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure, in connection with an election to any political office or in connection with any primary election, convention or caucus held to select candidates for any political office.

(2) No person shall solicit, accept or receive any such contribution from a foreign national.

(3) The term foreign national means:

(a) A foreign principal as defined in 22 USCS 611(b), except that the term "foreign national" does not include any individual who is a citizen of the United States; or

(b) An individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence.

SOURCES: Laws, 1999, ch. 301, § 20, eff January 15, 1999 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the addition of this section.)

Editor's Note — Laws, 1999, ch. 301, was House Bill 1609, 1998 Regular Session, and originally passed both Houses of the Legislature on April 3, 1998. The Governor vetoed House Bill 1609 on April 17, 1998. The veto was overridden by the State Senate and House of Representatives on January 5, 1999.

On January 15, 1999, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the addition of this section by Laws, 1999, ch. 301, § 20.

§ 97-13-19. Corrupt conduct, etc., by election official.

If any manager, clerk, or any other officer whatever, assisting or engaged in conducting any election, or charged with any duty in reference to any election, shall designedly omit to do any official act required by law, or designedly do any illegal act in relation to any general or special election, by which act or omission the votes taken at any such election in any district shall be lost, or the electors thereof shall be deprived of their suffrage at such election, or shall designedly do any act which shall render such election void, or shall be guilty of any corrupt conduct or partiality in his official capacity at such election, he shall, upon conviction, be imprisoned, in the penitentiary for a term not exceeding two years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(9); 1857, ch. 64, art. 78; 1871, § 2542; 1880, § 3777; 1892, § 1049; Laws, 1906, § 1127; Hemingway's 1917, § 853; Laws, 1930, § 878; Laws, 1942, § 2104.

JUDICIAL DECISIONS

1. In general.

This section applies to primary elections, as well as to general and special elections. *Fanning v. State*, 497 So. 2d 70 (Miss. 1986).

An indictment charging an election officer with reporting a false account of the votes received by candidates at a primary election charged a felony covered by this section, and the state was not required to proceed on a misdemeanor count under former § 23-5-161. *Fanning v. State*, 497 So. 2d 70 (Miss. 1986).

Sentence was neither excessive nor beyond the court's authority which required the defendant, who was convicted of a violation of this section, to serve 30 days in the county jail, perform 60 days of community work, pay costs of special election, and pay costs of trial, as conditions for the suspension of a one year sentence and 2 years of probation. *Fanning v. State*, 497 So. 2d 70 (Miss. 1986).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections **CJS.** 29 C.J.S., Elections §§ 540 et seq.
§§ 348 et seq.

§ 97-13-21. Disturbing election.

If any person shall unlawfully disturb any election for any public office, such person shall be liable to indictment, and, on conviction, may be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both.

SOURCES: Codes, 1857, ch. 64, art. 72; 1871, § 2536; 1880, § 2771; 1892, § 1043; Laws, 1906, § 1121; Hemingway's 1917, § 847; Laws, 1930, § 872; Laws, 1942, § 2098.

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections **CJS.** 29 C.J.S., Elections §§ 540 et seq.
§§ 348 et seq.

§ 97-13-23. Failure or refusal to make return of votes cast.

If any manager or returning officer shall fail or refuse to make return of the votes cast in any election, as required of him, he shall, on conviction, be imprisoned in the penitentiary not exceeding five years.

SOURCES: Codes, 1880, § 2781; 1892, § 1052; Laws, 1906, § 1130; Hemingway's 1917, § 856; Laws, 1930, § 881; Laws, 1942, § 2107.

Cross References — Constitutional provision for returns of all elections, see Miss Const Art. 4, § 114.

§ 97-13-25. Registration; falsely procuring registration.

Any person who shall knowingly procure his registration as a qualified elector, when he is not entitled to be registered as such, or under a false name, or as a qualified elector in any other election district than that in which he resides, shall, on conviction, be imprisoned in the penitentiary for a term not to exceed ten years.

SOURCES: Codes, 1880, § 113; 1892, § 1042; Laws, 1906, § 1120; Hemingway's 1917, § 846; Laws, 1930, § 871; Laws, 1942, § 2097.

Cross References — Constitutional provisions for voter registration, see Miss Const Art. 12, § 242.

Bribery in elections, see §§ 97-13-1, 97-13-3.

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections
§§ 349.

§ 97-13-27. Registration; neglect or misconduct by registrar.

If any registrar appointed by law to register votes shall intentionally refuse or neglect to register any voter entitled to registration, or register any voter not entitled to registration, he shall be punished, on conviction, by imprisonment in the penitentiary not less than one year nor more than three years.

SOURCES: Codes, 1871, § 2546; 1880, § 2977; 1892, § 1056; Laws, 1906, § 1134; Hemingway's 1917, § 860; Laws, 1930, § 885; Laws, 1942, § 2111.

§ 97-13-29. Troops of armed men not to be brought near election place.

It shall not be lawful for any military officer or other persons to order, bring, or keep any troops of armed men at any place within a mile of the place where any general or special election is held, unless it be for the purpose of quelling a riot or insurrection, in the manner provided by law, or for the purpose of defense in time of war; and whoever shall violate the provisions of this section shall, on conviction, be punished by imprisonment in the county jail not exceeding one year, or by fine not less than five hundred dollars, or both; and if the offense shall be committed with intent to influence such election, the person convicted thereof shall be punished by imprisonment in the penitentiary for a term not exceeding two years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(11); 1857, ch. 64, art. 79; 1871, § 2543; 1880, § 2778; 1892, § 1050; Laws, 1906, § 1128; Hemingway's 1917, § 854; Laws, 1930, § 879; Laws, 1942, § 2105.

Cross References — Statutory definition of term "insurrection", see § 1-3-23.

§ 97-13-31. Voting; aid in preparing ballot prohibited.

If any election officer or other person, except as authorized by law, shall aid or assist, or influence, a voter in preparing a ballot, or shall attempt so to do, he shall, on conviction, be fined not less than ten dollars nor more than two hundred dollars.

SOURCES: Codes, 1892, § 1055; Laws, 1906, § 1133; Hemingway's 1917, § 859; Laws, 1930, § 884; Laws, 1942, § 2110.

§ 97-13-33. Voting; dishonest decisions by managers concerning qualifications of voters.

When any one who offers to vote at an election shall be objected to by any challenger as a person unqualified to vote, if the manager of such election shall permit him to vote without honestly considering his qualifications, or if any manager shall refuse the vote of such person without honestly considering his qualifications, or if any manager shall knowingly permit an unqualified person to vote, or shall knowingly refuse the vote of a qualified person, he shall, upon conviction, be punished by imprisonment in the county jail not exceeding three months, or by fine not exceeding two hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6(8); 1857, ch. 64, art. 77; 1871, § 2541; 1880, § 2776; 1892, § 1048; Laws, 1906, § 1126; Hemingway's 1917, § 852; Laws, 1930, § 877; Laws, 1942, § 2103.

JUDICIAL DECISIONS

1. Sufficiency of evidence.

There was sufficient evidence with which to convict defendant of commercial burglary where a police officer saw a black man with the same build as defendant, who, like defendant, was driving a Lexus, wearing a black outfit (including a black

cap), and carrying a black jacket. The man broke and entered a store at night and stole change from the register tills, and defendant was found shortly after the store break-in with more than \$ 25 in change. *Roche v. State*, 913 So. 2d 306 (Miss. 2005).

RESEARCH REFERENCES

Am Jur. 26 **Am. Jur.** 2d, Elections
§§ 340-342, 344, 345 et seq.

§ 97-13-35. Voting; by unqualified person, or at more than one place, or for both parties in same primary.

Any person who shall vote at any election, not being legally qualified, or who shall vote in more than one county, or at more than one place in any county or in any city, town, or village entitled to separate representation, or who shall vote out of the district of his legal domicile, or who shall vote or attempt to vote in the primary election of one party when he shall have voted on the same date in the primary election of another party, shall be guilty of a misdemeanor, and, on conviction, shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both.

SOURCES: Codes, 1857, ch. 64, art. 73; 1871, § 2537; 1880, § 2772; 1892, § 1044; Laws, 1906, § 1122; Hemingway's 1917, § 848; Laws, 1930, § 873; Laws, 1942, § 2099; Laws, 1964, ch. 348, eff from and after passage (approved May 22, 1964).

Cross References — Bribery in elections, see §§ 97-13-1, 97-13-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Residence and domicile under state's election laws are synonymous. *Hubbard v. McKey*, 193 So. 2d 129 (Miss. 1966), overruled on other grounds, *O'Neal v. Simpson*, 350 So. 2d 998 (Miss. 1977).

Phrase, "at any election," includes municipal elections. *Sample v. Town of Verona*, 94 Miss. 264, 48 So. 2 (1909).

ATTORNEY GENERAL OPINIONS

A voter who cast an absentee ballot in one party's primary may not lawfully cast a regular ballot in another party's pri-

mary. *Dill*, July 29, 2003, A.G. Op. 03-0363.

RESEARCH REFERENCES

Am Jur. 26 *Am. Jur. 2d*, Elections §§ 340-342, 344, 355. **CJS.** 29 *C.J.S.*, Elections §§ 540 et seq.

§ 97-13-36. Multiple voting; penalties.

Any person who shall knowingly vote at any election in more than one (1) county or at more than one (1) place in any county, municipality or other political subdivision with the intent to have more than one (1) vote counted in any election shall be guilty of the crime of multiple voting and, upon conviction, shall be sentenced to pay a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00), or by imprisonment in the county jail for no more than one (1) year, or by both fine and imprisonment, or by being sentenced to the State Penitentiary for not less than one (1) year nor more than five (5) years.

SOURCES: Laws, 2002, ch. 590, § 2, eff July 22, 2002 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the addition of this section.)

Editor's Note — The United States Attorney General, by letter dated July 22, 2002, interposed no objection, under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws, 2002, ch. 590, § 2.

§ 97-13-37. Intimidating, boycotting, etc., elector to procure vote.

Whoever shall procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors, at any election, for himself or any candidate, by means of violence, threats of violence, or threats of withdrawing custom, or dealing in business or trade, or of enforcing the payment of a debt, or of bringing a suit or criminal prosecution, or by any other threat or injury to be inflicted by him, or by his means, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6 (4); 1857, ch. 64, art. 39; 1871, § 2516; 1880, § 2732; 1892, § 986; Laws, 1906, § 1062; Hemingway's 1917, § 790; Laws, 1930, § 806; Laws, 1942, § 2032.

Cross References — Bribery in elections, see §§ 97-13-1, 97-13-3.
Intimidating elector to prevent vote, see § 97-13-39.

RESEARCH REFERENCES

Am Jur. 12 *Am. Jur. 2d*, Bribery §§ 1 et seq. **CJS.** 11 *C.J.S.*, Bribery §§ 1 et seq.
26 *Am. Jur. 2d*, Elections § 350. 29 *C.J.S.*, Elections §§ 551, 554 and 555.

§ 97-13-39. Intimidating elector to prevent voting.

If any person shall, by illegal force, or threats of force, prevent, or endeavor to prevent, any elector from giving his vote, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 6 (12); 1857, ch. 64, art. 80; 1871, § 2544; 1880, § 2779; 1892, § 1051; Laws, 1906, § 1129; Hemingway's 1917, § 855; Laws, 1930, § 880; Laws, 1942, § 2106.

Cross References — Intimidating elector to procure vote, see § 97-13-37.

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Elections **CJS.** 29 C.J.S., Elections § 551.
§ 350.

CHAPTER 15

Offenses Affecting Highways, Ferries and Waterways

SEC.

- 97-15-1. Destroying, defacing, etc., milepost, signboard, etc., or bridge, underpass or overpass prohibited; penalties; liability for cost of repair; liability of parents of minor.
- 97-15-3. Highway commission members and employees; bribery.
- 97-15-5. Highway commission members, employees or highway contractors; conspiracy to violate contracts and defraud state.
- 97-15-7 and 97-15-9. Repealed.
- 97-15-11. Highway contractors, materialmen, etc.; collusion to raise prices.
- 97-15-13. Hunting or shooting on or across streets and highways; shooting, etc., at traffic control devices.
- 97-15-15. Keeper of ferry, toll-bridge or causeway; charging excessive toll.
- 97-15-17. Keeper of ferry, toll-bridge or causeway; failure to give bond; suffering bridge, etc. to be out of order.
- 97-15-19. Keeper of ferry, toll-bridge or causeway; unreasonable detention of person.
- 97-15-21. Levees; breaking enclosures; depositing trash, etc., or storing commodities; damaging.
- 97-15-23. Levees; disfiguring, etc., or excavating dirt or sand on levee right-of-way.
- 97-15-25. Levees; maliciously cutting, destroying, etc.
- 97-15-27. Levees; hunting or engaging in target practice upon mainline levee structure or right-of-way.
- 97-15-29. Littering highways and private property with trash or substance likely to cause fire; dumping of dead wildlife, wildlife parts or waste on highways and private property; civil liability; fines; disposition of proceeds.
- 97-15-30. Penalties for unauthorized dumping of solid wastes; "commercial purpose" defined.
- 97-15-31. Littering highways, streets, sidewalks, etc. with tacks, glass or other damaging objects.
- 97-15-33. Obstructing, injuring, destroying bridge, causeway or ferry.
- 97-15-35. Obstructing or injuring plank-road, covered, or other roads.
- 97-15-37. Obstructing public highway.
- 97-15-39. Obstructing waterways; felling tree or bush into stream or canal or obstructing in any way.
- 97-15-41. Obstructing waterways; felling trees in excess of six inches in diameter into running stream.
- 97-15-43. Obstructing waterways; navigable channel.
- 97-15-45. Obstructing waterways; permanently obstructing navigable waters.
- 97-15-47. Road overseers; refusing or neglecting duty.
- 97-15-49. Road overseers; suffering road to remain out of repair.
- 97-15-51. Corporation convicted for failure to keep road, etc., in repair; consequences of failure to pay fine.

§ 97-15-1. Destroying, defacing, etc., milepost, signboard, etc., or bridge, underpass or overpass prohibited; penalties; liability for cost of repair; liability of parents of minor.

(1) Any person who shall willfully destroy, deface, mar, damage, pull down or remove any milepost, signboard, or index board, or road number, or railroad

crossing sign or flasher signal, or other traffic control device shall, on conviction thereof, be liable for the actual cost of replacing or repairing such sign and shall be fined not less than Two Hundred Dollars (\$200.00) nor more than Five Hundred Dollars (\$500.00), or be imprisoned in the county jail not more than six (6) months, or be punished by both such fine and imprisonment. If the offender is a minor, the parents of such minor shall be civilly liable in accordance with Section 93-13-2 for the actual cost of replacing or repairing the sign, signal or device.

(2) The penalties prescribed in subsection (1) of this section shall also be applicable to any person, and to the parents of any minor, who willfully defaces, mars or damages any bridge, underpass or overpass.

SOURCES: Codes, Hutchinson's 1848, ch. 10. art. 7(19); 1857, ch. 64, art. 159; 1871, § 2622; 1880, § 2870; 1892, § 1144; Laws, 1906, § 1222; Hemingway's 1917, § 952; Laws, 1930, § 979; Laws, 1942, § 2209; Laws, 1977, ch. 323, § 2; Laws, 1993, ch 483, § 2, eff from and after July 1, 1993.

Cross References — Protection of road signs, see §§ 65-7-21 et seq.

§ 97-15-3. Highway commission members and employees; bribery.

Whoever being a member of the state highway commission, or any engineer, agent, or other employee, acting for or on behalf of the commission, shall accept, or agree to accept, receive or agree to receive, ask or solicit, either directly or indirectly, and any person who shall give or offer to give, or promise or procure to be promised, offered or given, either directly or indirectly to any member of said commission, or to any engineer, agent, or other employee acting for and on behalf of the commission, any monies, or any contract, promise, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value or of any political appointment or influence, present, or reward of any employment or any other thing of value, with the intent to have his decision or action on any question, matter, cause or proceeding which may at the time be pending, or which may by law be brought before him in his official capacity or in his place of trust or profit, influence thereby, shall be deemed guilty of a felony, and upon conviction, shall be imprisoned in the penitentiary not less than one nor more than five years, and shall forever after be disqualified from holding any office of trust or profit under the constitution or laws of this state.

SOURCES: Codes, 1930, § 5017; Laws, 1942, § 8049; Laws, 1930, ch. 47; Laws, 1948, ch. 332, § 26.

Cross References — White-collar crime investigation, see § 7-5-59.
Bribery of public officers, generally, see §§ 97-11-11, 97-11-13.

RESEARCH REFERENCES

ALR. Criminal offense of bribery as affected by lack of authority of state public officer or employee. 73 A.L.R.3d 374.

Am Jur. 12 Am. Jur. 2d, Bribery §§ 1 et seq.
CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-15-5. Highway commission members, employees or highway contractors; conspiracy to violate contracts and defraud state.

Any member of the state highway commission or any person employed by the state highway commission, in connection with the carrying on of the work outlined in Title 65, Mississippi Code of 1972, who shall knowingly perform any act with intent to injure the state, or any contractor or his agent, or employee, or any other person, who shall conspire with the director or with any member of the state highway commission, or employee thereof or with any state official, to permit a violation of any contract with intent to injure or defraud the state, or any contractor or agent, or employee of any contractor who shall knowingly do any work on any state highway in violation of contract, and with intent to defraud the state, the member of the state highway commission, or employee thereof, state official or contractor, or employee or agent of such contractor, or any other person so conspiring or so doing, shall be guilty of a felony, and, upon conviction thereof shall be confined in the state penitentiary not less than one year, nor more than five years, or be fined not less than one thousand dollars (\$1,000.00) and not more than five thousand dollars (\$5,000.00) or both. In addition, any such person shall be liable to the state highway commission for double the amount the state may have lost by reason thereof, such liability to be covered by any bond that may have been executed by such official, contractor, or employee, the liability hereunder of the bondsmen, however, being limited to the total amount of said bond and not more.

SOURCES: Codes, 1930, § 5016; Laws, 1942, § 8048; Laws, 1930, ch. 47; Laws, 1948, ch. 332, § 25.

Cross References — White-collar crime investigation, see § 7-5-59.

Conspiracy, generally, see § 97-1-1.

Conspiracy to defraud state, see §§ 97-7-11 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Conspiracy §§ 1 et seq.
22 Am. Jur. 2d, Damages §§ 207, 226, 227.

CJS. 15A C.J.S., Conspiracy §§ 96, 97 and 100.

§§ 97-15-7 and 97-15-9. Repealed.

Repealed by Laws, 1990, ch. 306, § 1, eff from and after May 4, 1990 (the date the United States Attorney General interposed no objection to the repeal of this section).

§ 97-15-7. [Codes, 1930, § 5019; 1942, § 8051; Laws, 1930, ch. 47; 1948, ch. 332, § 28]

§ 97-15-9. [Codes, 1930, § 5020; 1942, § 8052; Laws, 1930, ch. 47; 1948, ch. 332, § 29]

Editor's Note — Former § 97-15-7 was entitled: Highway commissioner; candidates for office not to accept campaign contributions, etc. from road builders.

Former § 97-15-9 was entitled: Highway contractors, materialmen, etc; campaign contributions, etc., to candidates for highway commissioner prohibited.

§ 97-15-11. Highway contractors, materialmen, etc.; collusion to raise prices.

It shall be unlawful for any contractors, material dealers, individuals, manufacturers, producers, or corporations, to enter into collusion, private agreement, or secret understanding, to raise the price of construction work or of equipment, supplies or materials for any state highway work. Any contractor, material dealer, manufacturer, producer or their agent or employee, or officer, agent or employee of any corporation, convicted of this offense shall be punishable by a fine of not to exceed five thousand dollars (\$5,000.00) or by imprisonment not exceeding twelve months, or by both such fine and imprisonment, in the discretion of the court.

SOURCES: Codes, 1930, § 5018; Laws, 1942, § 8050; Laws, 1930, ch. 47; Laws, 1948, ch. 332, § 27.

Cross References — Conspiracy to defraud state, see §§ 97-7-11 et seq.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. 2d, Conspiracy **CJS.** 15A C.J.S., Conspiracy § 244-246.
§§ 1 et seq.

§ 97-15-13. Hunting or shooting on or across streets and highways; shooting, etc., at traffic control devices.

(1)(a) The provisions of this subsection shall only be applicable during the calendar days included in the open seasons on deer and turkey.

(b) It shall be prima facie evidence that a person is hunting if such person is in the possession of a firearm that is not unloaded on any street, public road, public highway, or any railroad which is maintained by any railroad corporation, city, county, state or federal entity or the right-of-way of any such street, road, highway or railroad, in an area in which wild game

is or may be present, regardless of whether or not such firearm is within or without the confines of a motorized vehicle.

(c) The provisions of this subsection shall not apply to any person engaged in a lawful action to protect his property or livestock.

(2) For purposes of this section, the following terms shall have the meanings ascribed to them herein:

(a) "Right-of-way" means that part of a street, public road, public highway or railroad maintained by a city, county, state or federal entity or railroad corporation and including that portion up to the adjacent property line or fence line.

(b) "Motorized vehicle" means any vehicle powered by any type of motor, including automobiles, farm vehicles, trucks, construction vehicles and all-terrain vehicles.

(c) "Firearm" means any firearm other than a handgun.

(d) "Hunt" or "hunting" means to hunt or chase or to shoot at or kill or to pursue with the intent to take, kill or wound any wild animal or wild bird with a firearm as defined in this subsection.

(e) "Unloaded" means that a cartridge or shell is not positioned in the barrel or magazine of the firearm or in a clip, magazine or retainer attached to the firearm and all ammunition is located in an enclosed compartment, container, box or garment; or in the case of a caplock muzzle-loading firearm, "unloaded" means that the cap has been removed; or in the case of a flintlock muzzle-loading firearm, "unloaded" means that all powder has been removed from the flashpan.

(3) If any person hunts or discharges any firearm in, on or across any street, public road, public highway, railroad or the right-of-way thereof, such person is guilty of a misdemeanor and, upon conviction, shall be punished by a fine not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not less than sixty (60) days nor more than six (6) months, or by both such fine and imprisonment. This subsection shall not apply to any law enforcement officer while in the performance of his official duty or to any person engaged in a lawful action of self-defense.

(4) If any person shall willfully shoot any firearms or hurl any missile at any street, highway or railroad traffic light; street, highway or railroad marker or other sign for the regulation or designation of street, highway or railroad travel such person, upon conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or be imprisoned not longer than thirty (30) days in the county jail, or both.

(5) It shall be the duty of all sheriffs, deputy sheriffs, constables, conservation officers and peace officers of this state to enforce the provisions of this section.

(6) If any subsection, paragraph, sentence, clause, phrase or any part of this section is hereafter declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining subsections, paragraphs, sentences, clauses, phrases or parts thereof shall be in no manner affected thereby but shall remain in full force and effect.

SOURCES: Codes, 1857, ch. 64, art. 365; 1871, § 2870; 1880, § 2941; 1892, § 1148; Laws, 1906, § 1226; Hemingway's 1917, § 956; Laws, 1930, § 983; Laws, 1942, § 2213; Laws, 1964, ch. 349; Laws, 1971, ch. 443, § 1; Laws, 1974, ch. 569, § 23; Laws, 1982, ch. 454; Laws, 1985, ch. 452, § 17; Laws, 1990, ch. 528, § 1, eff from and after July 1, 1990.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Penalties for conviction of Class II violation, see § 49-7-143.

Rates of travel over bridges, see § 65-7-41.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

That part of this section which reads "unless permission is granted within the county wherein Highway 15 and I20 intersect" is unconstitutional and should be stricken from the act; the remaining portion of the statute is constitutional. The 1974 amendment to the statute limits the violation to streets, public highways and railroads within the boundaries of hunting clubs in the state, and the law previous thereto making it a violation to hunt

or race on, or shoot on or across any street or public highway in the state of Mississippi has been completely changed. *Quinn v. Branning*, 404 So. 2d 1018 (Miss. 1981).

Conviction of shooting in public highways will not be reversed for defects in affidavit, amendable on demurrer. *Evans v. State*, 92 Miss. 34, 45 So. 706 (1908).

An indictment is good which charges that the defendant shot on a public highway. *Woods v. State*, 67 Miss. 575, 7 So. 495 (1890).

ATTORNEY GENERAL OPINIONS

Section 49-7-49 should not be used to replace subsection (1) of this section during closed seasons on deer and turkey; Section 49-7-49 would apply to this section in cases whereby suspect was in pos-

session of dead bodies of wild birds or wild animals while on public highways, at which time it would be prima facie evidence that such person was hunting. *Breland*, June 9, 1993, A.G. Op. #93-0376.

RESEARCH REFERENCES

ALR. Liability of public authority for injury arising out of automobile race conducted on street or highway. 80 A.L.R.3d 1192.

CJS. 40 C.J.S., Highways § 247.

§ 97-15-15. Keeper of ferry, toll-bridge or causeway; charging excessive toll.

Any keeper of any public ferry, toll-bridge, or causeway, who shall demand or receive from any person any rate of toll not allowed by the order of the board of supervisors of the county in which the same may be kept, shall, for each offense, on conviction thereof, be fined not more than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(38); 1857, ch. 64, art. 155; 1871, § 2618; 1880, § 2865; 1892, § 1139; Laws, 1906, § 1217; Hemingway's 1917, § 947; Laws, 1930, § 974; Laws, 1942, § 2204.

Cross References — Keepers of toll bridges and ferries, see §§ 65-21-9, 65-27-5. Displaying tables of rates of tolls, see § 65-27-17.

RESEARCH REFERENCES

<p>Am Jur. 35A Am. Jur. 2d, Ferries § 55, 56. 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 707 et seq., 716.</p>	<p>CJS. 11 C.J.S., Bridges § 70. 36A C.J.S., Ferries § 34.</p>
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§ 97-15-17. Keeper of ferry, toll-bridge or causeway; failure to give bond; suffering bridge, etc. to be out of order.

If any owner or keeper of a public ferry, toll-bridge, or causeway, shall fail to give bond as required by law, or shall suffer said ferry, bridge, or causeway, or any part or appurtenance thereof, to be out of good repair for more than five days at any one time, such owner or keeper, or both, shall, on conviction thereof, be fined not more than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(39); 1857, ch. 64, art. 156; 1871, § 2619; 1880, § 2866; 1892, § 1140; Laws, 1906, § 1218; Hemingway's 1917, § 948; Laws, 1930, § 975; Laws, 1942, § 2205.

Cross References — Bond of keepers of toll bridges and ferries, see §§ 65-21-9, 65-27-5.

Displaying rates of tolls, see § 65-27-17.

RESEARCH REFERENCES

<p>Am Jur. 39 Am. Jur. 2d, Highways, Streets, and Bridges § 85.</p>	<p>CJS. 11 C.J.S., Bridges § 56. 40 C.J.S., Highways § 200.</p>
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§ 97-15-19. Keeper of ferry, toll-bridge or causeway; unreasonable detention of person.

If any person shall be unreasonably detained, at any time, at any public ferry, toll-bridge, or causeway, by the carelessness, negligence, or wilfulness of the owner or keeper thereof, such owner or keeper, upon conviction, shall be fined not more than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(36); 1857, ch. 64, art. 154; 1871, § 2617; 1880, § 2864; 1892, § 1138; Laws, 1906, § 1216; Hemingway's 1917, § 946; Laws, 1930, § 973; Laws, 1942, § 2203.

Cross References — Toll bridges and ferries, see §§ 65-21-7 et seq.

Ferries, generally, see §§ 65-27-1 et seq.

Duties of ferrymen, see § 65-27-15.

RESEARCH REFERENCES

Am Jur. 40 **Am. Jur.** 2d, Highways, CJS. 36A C.J.S., Ferries § 34.
Streets, and Bridges § 716.

§ 97-15-21. Levees; breaking enclosures; depositing trash, etc., or storing commodities; damaging.

If any person shall willfully cut, break down, remove, destroy or damage any cattle gap or any fence or part thereof erected by any board of levee commissioners or the agents or employees of said board of levee commissioners for the purpose of enclosing the public levee right-of-way under the control of said board of levee commissioners or who shall break down, remove or destroy any gate in any such fence, or shall willfully leave unclosed and open any such gate after having opened same, or make said levee or said levee right-of-way a place of deposit or storage for any woodpiles or refuse, garbage or dead animals or any cotton, lumber, bricks or any other commodities, or who shall willfully do any material damage injurious to said levee, such person or persons shall be guilty of a misdemeanor and, on conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) for each offense. In addition to the penalties herein provided for, if any levee board is required to remove any such forbidden objects herein described, the owner or owners of such forbidden objects shall be liable in damages to the levee board for the cost of removing such objects, which damages may be recovered in a court action brought for that purpose; and the said levee board shall have a right of action against any person for any other damage sustained to the levees by reason of a violation of this section.

SOURCES: Codes, Hemingway's 1917, § 1006; Laws, 1930, § 1035; Laws, 1942, § 2267; Laws, 1906, ch. 126; Laws, 1948, ch. 357; Laws, 1968, ch. 353, § 1; Laws, 1999, ch. 433, § 1, eff from and after July 1, 1999.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 50 **Am. Jur.** 2d, Levees and CJS. 52B C.J.S., Levees and Flood Control § 40.
Flood Control §§ 1 et seq.

§ 97-15-23. Levees; disfiguring, etc., or excavating dirt or sand on levee right-of-way.

If any person or persons shall wilfully cut into, mutilate or disfigure any public levee or excavate dirt or sand from the right-of-way owned by any board of levee commissioners or any part thereof, or trespass upon said levee in violation of posted regulations, without being authorized to do so by the said

board of levee commissioners, such person or persons shall be guilty of a misdemeanor, and on conviction shall be fined not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) for each offense, or shall be confined in the county jail for a term not exceeding thirty (30) days, or by both such fine and imprisonment in the discretion of the court.

SOURCES: Codes, Hemingway's 1917, § 1005; Laws, 1930, § 1034; Laws, 1942, § 2266; Laws, 1906, ch. 129; Laws, 1979, ch. 395; Laws, 1999, ch. 433, § 2, eff from and after July 1, 1999.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Levees and Flood Control §§ 1 et seq. **CJS.** 52B C.J.S., Levees and Flood Control § 40.

§ 97-15-25. Levees; maliciously cutting, destroying, etc.

If any person shall wilfully or maliciously cut, break, injure, or destroy any levee constructed by authority of law, he shall, on conviction, be imprisoned in the penitentiary not more than five years.

SOURCES: Codes, 1857, ch. 64, art. 198; 1871, § 2705; 1880, § 2914; 1892, § 1196; Laws, 1906, § 1274; Hemingway's 1917, § 1004; Laws, 1930, § 1033; Laws, 1942, § 2265.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Levees and Flood Control §§ 1 et seq. **CJS.** 52B C.J.S., Levees and Flood Control § 40.

§ 97-15-27. Levees; hunting or engaging in target practice upon mainline levee structure or right-of-way.

If any person shall hunt or engage in target practice upon the mainline levee structure erected by any board of levee commissioners, the entire landside right-of-way of said levee structure or the riverside right-of-way of said levee structure within a distance of two hundred (200) feet from the toe of said levee structure, such person or persons shall be guilty of a misdemeanor and, on conviction, shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00) for each offense.

SOURCES: Codes, 1942, § 2267.1; Laws, 1968, ch. 353, § 2; Laws, 1999, ch. 433, § 3, eff from and after July 1, 1999.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-15-29. Littering highways and private property with trash or substance likely to cause fire; dumping of dead wildlife, wildlife parts or waste on highways and private property; civil liability; fines; disposition of proceeds.

(1)(a) Anyone who shall put, throw, dump or leave on the roads and highways of this state, or within the limits of the rights-of-way of such roads and highways, or upon any private property, any cigarette or cigar stubs, or any other thing or substance likely to ignite the grass or underbrush on a road or highway, in addition to being civilly liable for all damages caused by such act shall, upon conviction, be guilty of a misdemeanor and punished as provided by subsection (3) of this section.

(b) Anyone who puts, throws or dumps on the roads or highways of this state, or within the limits of the rights-of-way of such roads or highways, or upon any private property without permission of the owner of such property, any dead wildlife, wildlife parts or waste, in addition to being civilly liable for all damages caused by such act, upon conviction, shall be guilty of a misdemeanor and punished as provided by subsection (3) of this section.

(2) The Department of Transportation is authorized to erect warning signs along the roads and highways of this state advising the public of the existence of this section and of the penalty for the violation thereof and is further authorized to install receptacles at reasonable intervals along the roads and highways of this state to be used as containers for trash and rubbish and for the convenience of the public using such roads and highways.

(3) Any person found guilty of the violation of this section shall, upon conviction, be fined not less than Fifty Dollars (\$50.00) nor more than Two Hundred Fifty Dollars (\$250.00). The proceeds of such fines shall be expended by the collecting jurisdiction solely for the purpose of funding local litter prevention programs or projects or local or school litter education programs as recommended by the statewide litter prevention program of Keep Mississippi Beautiful, Inc.

(4) As a part of the fine imposed by subsection (3) above, a person convicted for an offense upon which fines are imposed by this section may be required to perform the following, and a person convicted for a second or subsequent offense upon which fines are imposed by this section shall be required to:

(a) Remove or render harmless, in accordance with written direction, as appropriate, from the Department of Environmental Quality or local law enforcement authorities, the unlawfully discarded solid waste;

(b) Repair or restore property damaged by, or pay damages for any damage arising out of the unlawfully discarded solid waste;

(c) Perform community public service relating to the removal of any unlawfully discarded solid waste or to the restoration of any area polluted by unlawfully discarded solid waste; and

(d) Pay all reasonable investigative and prosecutorial expenses and costs to the investigative and/or prosecutorial agency or agencies.

(5) Upon a second or subsequent conviction of an offense upon which fines are imposed by this section, the minimum and maximum fines shall be doubled.

(6) When any litter is thrown or discarded from a motor vehicle, the operator of the motor vehicle shall be deemed in violation of this section.

(7) Assessments collected under subsection (4) of Section 99-19-73 from persons convicted of a violation of this section shall be deposited to the credit of the Statewide Litter Prevention Fund created in Section 65-1-167.

(8) It shall be the duty of all law enforcement officers to enforce the provisions of this section.

(9) This section shall not prohibit the storage of ties and machinery by a railroad on its right-of-way where the highway right-of-way extends to within a few feet of the railroad roadbed.

SOURCES: Codes, 1942, § 2214.5; Laws, 1956, ch. 243; Laws, 1958, ch. 238, §§ 1-8; Laws, 1964, ch. 350, §§ 1, 2 [¶¶ 1, 2]; Laws, 1973, ch. 351, § 1; Laws, 1988, ch. 574, § 3; Laws, 1990, ch. 329, § 13; Laws, 1991, ch. 531, § 24; Laws, 1994, ch. 543, § 3; Laws, 1995, ch. 500, § 1; Laws, 2000, ch. 421, § 1, eff from and after July 1, 2000.

Cross References — Requirement that trucks or other vehicles be covered when hauling solid waste, see §§ 17-17-11, 17-17-29.

Disposal of waste tires and lead acid batteries, and right-to-throw-away program, see §§ 17-17-401 et seq.

Highway safety patrol, see §§ 45-3-1 et seq.

Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Powers and duties of the highway commission, generally, see § 65-1-8.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

A violation of this section may be enforced with either a general affidavit or a citation ticket. Cruber, Mar. 28, 2003, A.G. Op. #03-0130.

RESEARCH REFERENCES

ALR. Liability of highway user for injuries resulting from failure to remove or protect against material spilled from vehicle onto public street or highway. 34 A.L.R.4th 520.

Am Jur. 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 683 et seq., 692.

§ 97-15-30. Penalties for unauthorized dumping of solid wastes; “commercial purpose” defined.

(1) For purposes of this section the term “commercial purpose” means for the purpose of economic gain.

(2)(a) Except as authorized by law or permit, it is unlawful for any person to throw, scatter, spill or place, or cause to be thrown, scattered, spilled, or placed, or otherwise disposed of, any solid waste in any of the following manners or amounts:

(i) In or on any public highway, road, street, alley or thoroughfare, including any portion of the right-of-way thereof, or any other public lands, except in containers or areas lawfully provided therefor. When any solid waste is thrown or discarded from a motor vehicle, the operator or owner of the motor vehicle, or both, shall be deemed in violation of this section;

(ii) In or on any waters of the state. When any solid waste is thrown or discarded from a vessel, the operator or owner of the boat, or both, shall be deemed in violation of this section; or

(iii) In or on any private property, unless prior written consent of the owner has been given and the solid waste will not cause a public nuisance or be in violation of any other state or local law, rule or regulation;

(iv) Raw human waste from any train, aircraft, motor vehicle or vessel upon the public or private lands or waters of the state.

(b) Nothing in this section shall prohibit acts authorized pursuant to Section 17-17-13.

(3)(a) Any person who violates this section in an amount not exceeding fifteen (15) pounds in weight or twenty-seven (27) cubic feet in volume and not for commercial purposes is guilty of littering and subject to a fine as provided in Section 97-15-29.

(b) Any person who violates this section in an amount exceeding fifteen (15) pounds or twenty-seven (27) cubic feet in volume, but not exceeding five hundred (500) pounds in weight or one hundred (100) cubic feet in volume and not for commercial purposes is guilty of a misdemeanor and subject to a fine of not less than One Hundred Dollars (\$100.00), nor more than One Thousand Dollars (\$1,000.00), or to imprisonment for a term of not more than one (1) year, or both.

(c) Any person who violates this section in an amount exceeding five hundred (500) pounds in weight or one hundred (100) cubic feet in volume, or in any amount or volume of solid waste for commercial purposes, or in any amount or volume of hazardous waste is guilty of a felony and subject to a fine of not less than Five Hundred Dollars (\$500.00), nor more than Fifty Thousand Dollars (\$50,000.00) or to imprisonment for a term of not more than five (5) years, or both. For purposes of the fine, each day shall constitute a separate violation.

(d) In addition to any other fines, penalties or injunctive relief prescribed by law, a person convicted under subsections (3)(b) or (3)(c) of this section shall:

- (i) Remove or render harmless, in accordance with written direction from the Department of Environmental Quality, the unlawfully discarded solid waste;
- (ii) Repair or restore property damaged by, or pay damages for any damage arising out of the unlawfully discarded solid waste;
- (iii) Perform community public service relating to the removal of any unlawfully discarded solid waste or to the restoration of an area polluted by unlawfully discarded solid waste; and
- (iv) Pay all reasonable investigative and prosecutorial expenses and costs to the investigative and/or prosecutorial agency or agencies.
- (e) If a conviction under subsection (3) of this section is for a violation committed after a first conviction of that person under this section, the maximum punishment under the respective paragraphs shall be doubled with respect to both fine and imprisonment.
- (4) A court may enjoin a violation of subsection (2) of this section.
- (5) Any motor vehicle, vessel, aircraft, container, crane, winch, or machine used in a felony violation of this section may be seized with process or without process if a law enforcement officer has probable cause to believe that the property was used in violation of that section. The seized property shall be subject to an administrative and/or judicial forfeiture by the same standards and procedures provided under Sections 41-29-176 through 41-29-185.
- (6) In the criminal trial of any person charged with violating subsection (2) of this section, the defendant must affirmatively show that he had authority to discard the solid waste.
- (7) Any person who conspires to commit a violation of this section shall be punished in accordance with the underlying offense set forth in this section.
- (8) It shall be the duty of all law enforcement officers to enforce the provisions of this chapter.
- (9) All prosecutions for felony violations of this section shall be instituted only by the Attorney General, his designee, the district attorney of the district in which the violation occurred or his designee and shall be conducted in the name of the people of the State of Mississippi. In the prosecution of any criminal proceeding under this section by the Attorney General, or his designee, and in any proceeding before a grand jury in connection therewith, the Attorney General or his designee shall exercise all the powers and perform all the duties which the district attorney would otherwise be authorized or required to exercise or perform. The Attorney General shall have the authority to issue and serve subpoenas for any felony violation in the same manner as prescribed under Section 7-5-59.
- (10) Jurisdiction for all felony violations shall be in the circuit court of the county in which the violation occurred.
- (11) Nothing in this section shall limit the authority of the department to enforce the provisions of the Solid Waste Disposal Law or shall limit the authority of any state or local agency to enforce any other laws, rules or ordinances.

(12) The Department of Transportation may erect warning signs along the roads and highways of this state advising the public of the existence of these sections and of the penalty for the violation thereof.

(13) This section shall not prohibit the storage of ties poles, other materials and machinery by a railroad or a public utility on its right-of-way. This section does not apply to any vehicle transporting agricultural products or supplies when the solid waste from that vehicle is a nontoxic, biodegradable agricultural product or supply.

(14) The Attorney General may pay an award, not to exceed Ten Thousand Dollars (\$10,000.00) to any person who furnishes information or services that lead to a felony criminal conviction for any violation of this section. The payment shall be subject to available appropriations for those purposes as provided in annual appropriation acts. Any officer or employee of the United States or any state or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection.

SOURCES: Laws, 1994, ch. 543, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions § 154. 61A Am. Jur. 2d, Pollution Control §§ 591 et seq.

§ 97-15-31. Littering highways, streets, sidewalks, etc. with tacks, glass or other damaging objects.

It shall be unlawful for any person, or corporation acting through any employee or agent, to knowingly or wilfully or carelessly place glass, nails, tacks, or other objects which may damage the property of another, in any public street, highway, alley-way, or sidewalk. If said person or corporation shall not immediately gather up and remove same, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars nor more than one hundred dollars for each offense, and in addition shall be liable to any person injured thereby, or injury to his property, for two times the amount of actual damage sustained.

SOURCES: Codes, Hemingway's 1921 Supp. § 1142i; Laws, 1930, § 984; Laws, 1942, § 2214; Laws, 1920, ch. 204.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Prohibition against obstruction of roads, see § 65-7-7.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Standard of proof as to conduct underlying punitive damage awards — modern status. 58 A.L.R.4th 878. **Am Jur.** 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 683 et seq., 692.

§ 97-15-33. Obstructing, injuring, destroying bridge, causeway or ferry.

If any person shall wilfully obstruct, break, injure, or destroy any bridge, causeway, or ferry, or any appurtenances thereof which shall have been established for the convenience of the public by the proper authority, he shall, on conviction, be fined not more than one hundred dollars, and shall be liable, further, for all damages occasioned by such wrongful act.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 10(1); 1857, ch. 64, art. 157; 1871, § 2620; 1880, § 2867; 1892, § 1141; Laws, 1906, § 1219; Hemingway's 1917, § 949; Laws, 1930, § 976; Laws, 1942, § 2206.

Cross References — Prohibition against obstruction of roads and waterways, see § 65-7-7.

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 693, 694. **CJS.** 11 C.J.S., Bridges § 56. 40 C.J.S., Highways § 230.

§ 97-15-35. Obstructing or injuring plank-road, covered, or other roads.

If any person shall wantonly or negligently obstruct or injure any plank-road, or any covered road, or other roads, on conviction thereof, he shall be fined not more than five hundred dollars, or imprisoned not longer than six months in the county jail, or both.

SOURCES: Codes, 1857, ch. 64, art. 163; 1871, § 2626; 1880, § 2873; 1892, § 1147; Laws, 1906, § 1225; Hemingway's 1917, § 955; Laws, 1930, § 982; Laws, 1942, § 2212.

Cross References — Prohibition against obstruction of roads and waterways, see § 65-7-7.

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 693, 694. **CJS.** 40 C.J.S., Highways § 230.

§ 97-15-37. Obstructing public highway.

If any person shall fell any bush or tree into any public highway, or obstruct the same in any manner whatever, and shall not remove the

obstruction immediately, it shall be deemed a misdemeanor, and, on conviction thereof the offender, in addition to the penalty recoverable by law, shall be fined not more than fifty dollars or be imprisoned not more than one week.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(32); 1857, ch. 64, art. 160; 1871, § 2623; 1880, § 2871; 1892, § 1145; Laws, 1906, § 1223; Hemingway's 1917, § 953; Laws, 1930, § 980; Laws, 1942, § 2210.

Cross References — Prohibition against obstruction of roads and waterways, see § 65-7-7.

Another section derived from same 1942 code section, see § 97-15-39.

Intentional or wilful obstruction, or interference with use, of streets and highways, see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The prerequisites required by Code 1892, § 3892 (Code 1906, § 4400; Hemingway's Code 1927, § 8340), are essential to a valid petition, and a road laid out without them is no road and an obstruction to it no crime under this section [Code 1942, § 2210]. *State v. Morgan*, 79 Miss. 659, 31 So. 338 (1902).

This section [Code 1942, § 2210] has no reference to a street in a municipality

(*Magers v. Okolona, H. & C. C. R. Co.* 174 M 860, 165 So 416) even though the street had, prior to incorporation, been a public road. *Blocker v. State*, 72 Miss. 720, 18 So. 388 (1895).

This section [Code 1942, § 2210] applies where the obstruction is caused by positive use of physical means; mere omission to repair a bridge is not within the section. *Vicksburg & M.R.R. v. State*, 64 Miss. 5, 8 So. 128 (1886).

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Highways, Streets, and Bridges §§ 693, 694.

CJS. 40 C.J.S., Highways § 230.

§ 97-15-39. Obstructing waterways; felling tree or bush into stream or canal or obstructing in any way.

If any person shall fell any bush or tree into a stream or canal not less than one hundred and fifty (150) feet wide, or obstruct the same in any way whatever, and shall not remove the obstruction immediately, it shall be deemed a misdemeanor, and, on conviction thereof, the offender, in addition to the penalty recoverable by law, shall be fined not more than fifty dollars or be imprisoned not more than one week.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(32); 1857, ch. 64, art. 160; 1871, § 2623; 1880, § 2871; 1892, § 1145; Laws, 1906, § 1223; Hemingway's 1917, § 953; Laws, 1930, § 980; Laws, 1942, § 2210.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Obstruction of streams, see § 51-1-7.

Prohibition against obstruction of roads and waterways, see § 65-7-7.

Another section derived from same 1942 code section, see § 97-15-37.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2210] applies where the obstruction is caused by positive use of physical means; mere omis-

sion to repair a bridge is not within the section. *Vicksburg & M.R.R. v. State*, 64 Miss. 5, 8 So. 128 (1886).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Waters § 173.

CJS. 93 C.J.S., Waters §§ 18, 19.

Law Reviews. Ogletree, A primer con-

cerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-15-41. Obstructing waterways; felling trees in excess of six inches in diameter into running stream.

It shall be unlawful and a misdemeanor for any person, firm, corporation, association or organization to push, fell or cut trees, in excess of six (6) inches in diameter, into a running stream, or deposit or leave in a running stream, trees, in excess of six (6) inches in diameter, logs in excess of six (6) inches in diameter or tree tops, without removing the same immediately, in such cases where such will materially impede the flow of or navigation upon such running stream.

Any violation of this section shall be punishable by a fine of not less than twenty-five dollars (\$25.00) and not more than two hundred dollars (\$200.00).

Provided, however, that the provisions of this section shall not apply to the rafting and movement of logs in a running stream in the customary manner and for commercial purposes. Provided, however, the provisions of this section shall not be construed to affect in any way the riparian rights of any person, firm, corporation, association or organization.

SOURCES: Codes, 1942, § 2415.5; Laws, 1966, ch. 394, § 1, eff from and after passage (approved June 3, 1966).

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The evidence was sufficient to support the chancellor's holding that defendants' logging operation, which had left treetops in excess of six inches in diameter in a

drainage canal, was the sole proximate cause of plaintiff's inadequate drainage, in violation of this section, where, notwithstanding the natural erosion of the drainage canal which continued during

the years in question and the activity of beavers, who had been in the area long before the timber cutters, the heaviest rainfall in the two years in question had occurred approximately one month prior

to planting season, and there would normally have been plenty of time for the waters to drain prior to planting. *Georgia Pac. Corp. v. Armstrong*, 451 So. 2d 201 (Miss. 1984).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Waters § 173.
27 Am. Jur. Proof of Facts 2d 639, Failure to Exercise Due Care to Prevent Fall of Tree.

CJS. 93 C.J.S., Waters §§ 18, 19.

Law Reviews. Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-15-43. Obstructing waterways; navigable channel.

If any captain or master of a vessel, or any person, shall obstruct, or cause to be obstructed, any navigable bay, river, creek, or other navigable channel or pass thereof, in any manner whatever, or shall discharge any ballast in any harbor or place other than that designated by the harbor commissioners therefor, on conviction thereof, the offender shall be fined not more than one thousand dollars, or imprisoned not longer than six months, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(41); 1857, ch. 64, art. 161; 1871, § 2624; 1880, § 2872; 1892, § 1146; Laws, 1906, § 1224; Hemingway's 1917, § 954; Laws, 1930, § 981; Laws, 1942, § 2211.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Obstruction of streams, see § 51-1-7.

Prohibition against obstruction of roads and waterways, see § 65-7-7.

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Waters § 173.

CJS. 93 C.J.S., Waters §§ 18, 19.

§ 97-15-45. Obstructing waterways; permanently obstructing navigable waters.

If any person shall, in any manner, permanently obstruct any of the navigable waters, or shall place any obstruction therein and not remove the same within a reasonable time, the person offending shall be guilty of a misdemeanor, and, on conviction shall be punished by a fine of not more than fifty dollars or by imprisonment in the county jail not more than thirty days, or both.

SOURCES: Codes, 1892, § 1326; Laws, 1906, § 1397; Hemingway's 1917, § 1140; Laws, 1930, § 1171; Laws, 1942, § 2414; Laws, 1898, ch. 89; Laws, 1932, ch. 239.

Cross References — Constitutional provision concerning obstruction of navigable waters, see Miss Const Art. 4, § 81.

Statutory definition of navigable waters, see § 1-3-31.

Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Mississippi Air and Water Pollution Control Law, see §§ 49-17-1 et seq.

Obstructions of streams, see §§ 51-1-5, 51-1-7.

Pearl River Water Supply District, see §§ 51-9-121 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Liability for pollution of subterranean waters. 38 A.L.R.2d 1265.

Am Jur. 78 Am. Jur. 2d, Waters § 173.

CJS. 93 C.J.S., Waters §§ 18, 19.

Measure and element of damages for pollution of well, cistern or spring. 76 A.L.R.4th 629.

§ 97-15-47. Road overseers; refusing or neglecting duty.

All overseers of roads who shall refuse or neglect to do their duty, in any respect, as required by law, after notice of their appointment as such, shall, on conviction, for each neglect be fined not more than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(15); 1857, ch. 64, art. 158; 1871, § 2621; 1880, § 2868; 1892, § 1142; Laws, 1906, § 1220; Hemingway's 1917, § 950; Laws, 1930, § 977; Laws, 1942, § 2207.

Cross References — Liability of contractor, overseer, or supervisor for neglect of duty, see § 65-7-119.

RESEARCH REFERENCES

Am Jur. 39 Am. Jur. 2d, Highways, Streets, and Bridges § 85.

CJS. 40 C.J.S., Highways § 200.

§ 97-15-49. Road overseers; suffering road to remain out of repair.

If any person shall suffer any public road of which he is the overseer to remain out of repair for more than ten days at any one time, unless hindered by extreme bad weather, or other unavoidable cause, on conviction thereof he shall be fined not more than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 10, art. 7(15); 1857, ch. 64, art. 162; 1871, § 2625; 1880, § 2869; 1892, § 1143; Laws, 1906, § 1221; Hemingway's 1917, § 951; Laws, 1930, § 978; Laws, 1942, § 2208.

Cross References — Liability of contractor, overseer, or supervisor for neglect of duty, see § 65-7-119.

RESEARCH REFERENCES

Am Jur. 39 **Am. Jur.** 2d, Highways, **CJS.** 40 C.J.S., Highways § 200.
Streets, and Bridges § 85.

§ 97-15-51. Corporation convicted for failure to keep road, etc., in repair; consequences of failure to pay fine.

When a corporation shall be convicted, on indictment for a nuisance, for not repairing or keeping in repair any road, causeway, bridge, or ferry, and shall neglect to pay the fine and costs awarded against it therefor for the space of three months after an execution shall have been issued for the same, then it shall not be lawful for such corporation, its officers, agents, or any other person, to demand or take any toll upon any part of its road, or any causeway, bridge, or ferry not kept in repair, until the fine and costs be paid.

SOURCES: Codes, 1857, ch. 64, art. 272; 1871, § 2772; 1880, § 3022; 1892, § 1371; Laws, 1906, § 1443; Hemingway's 1917, § 1200; Laws, 1930, § 1223; Laws, 1942, § 2466.

Cross References — Keeping toll bridges and ferries in good repair, see § 65-21-9. Maintenance of toll ferries, see §§ 65-27-5, 65-27-13.

CHAPTER 17

Crimes Against Property

In General	97-17-1
Defendant's Liability for Value of Property Damaged, Destroyed, Taken or Converted. [Repealed]	

IN GENERAL

SEC.	
97-17-1.	Arson; first degree; burning dwelling house or outbuilding.
97-17-3.	Arson; first degree; place of worship; failure to report accidental fires; juvenile offenders.
97-17-4.	Forfeiture of property used in commission of arson.
97-17-5.	Arson; second degree; other buildings or structures.
97-17-7.	Arson; third degree; personal property.
97-17-9.	Arson; fourth degree; attempt to burn.
97-17-11.	Arson; insured property.
97-17-13.	Arson; willfully or negligently firing woods, marsh, meadow, etc.; restitution of fire suppression costs.
97-17-14.	Aggravated assault upon fire fighter, law enforcement officer or emergency medical personnel by injury-causing arson.
97-17-15.	Boundary landmarks; altering or destroying.
97-17-17.	Brands of saw-logs; altering or defacing.
97-17-19 and 97-17-21.	Repealed.
97-17-23.	Burglary; breaking and entering inhabited dwelling.
97-17-25.	Burglary; breaking out of dwelling.
97-17-27.	Repealed.
97-17-29.	Burglary; breaking inner door of dwelling by one lawfully in house.
97-17-31.	Burglary; dwelling house defined.
97-17-33.	Burglary; breaking and entering building other than dwelling; railroad car; vessels; automobiles.
97-17-35.	Burglary; possession of burglar's tools.
97-17-37.	Burglary; with explosives.
97-17-39.	Penalties for injuring, destroying or defacing certain cemetery property, public buildings, schools or churches, or property thereof.
97-17-41.	Grand larceny; second or subsequent offense of felonious taking of motor vehicle; penalties.
97-17-42.	Taking possession of or taking away a motor vehicle.
97-17-43.	Petit larceny defined; penalty.
97-17-45.	Larceny; stealing bond, note, bill, securities, etc.; proof of value.
97-17-47.	Larceny; severing crops, or parts of improvements or enclosures.
97-17-49.	Larceny; shearing wool from dead sheep.
97-17-51.	Larceny; stealing dog.
97-17-53.	Larceny; stealing livestock; restitution.
97-17-55.	Larceny; stealing milk from cow.
97-17-57.	Repealed.
97-17-58.	Repealed.
97-17-59.	Larceny; stealing timber; restitution.
97-17-60.	Payment for timber acquired for resale; penalties.
97-17-61.	Larceny; taking and carrying away certain animals or motor vehicles not amounting to larceny.
97-17-63.	Larceny; tenants in common.

- 97-17-64. Larceny; under lease or rental agreement.
- 97-17-65. Looting.
- 97-17-67. Malicious mischief.
- 97-17-68. Coin operated devices; description of offenses and imposition of penalties.
- 97-17-69. Repealed.
- 97-17-70. Receiving stolen property.
- 97-17-71. Receiving stolen property; junk dealers to keep records of purchases of certain materials; content of records; report of purchase to police required; interstate transportation of certain materials; penalties.
- 97-17-73. Removing agricultural products subject to lien from premises where produced.
- 97-17-75. Removing personal property subject to lien from county, or selling same.
- 97-17-77. Removing personal property subject to lien out of state.
- 97-17-79. Trees; boxing pine trees.
- 97-17-81. Trees; cutting or rafting upon lands of another.
- 97-17-83. Trees; injuring or destroying shade or ornamental tree.
- 97-17-84. Penalty for removal of "sea oats" or "uniola paniculata" from shores.
- 97-17-85. Trespass; going upon inclosed land of another.
- 97-17-87. Trespass; willful or malicious; penalty; enhanced penalties for willful trespass upon airport operations area.
- 97-17-89. Trespass; destruction or carrying away of vegetation, etc. not amounting to larceny.
- 97-17-91. Trespass; defacing, altering or destroying notices posted on land.
- 97-17-93. Entering lands of another without permission; enforcement; relation to other statutes; dismissal of prosecution.
- 97-17-95. Trespass; entry on premises where atomic machinery, rockets and other dangerous devices are manufactured, etc.
- 97-17-97. Trespass; going into or upon, or remaining in or upon, buildings, premises or lands of another after being forbidden to do so.
- 97-17-99. Trespass; inciting or soliciting etc., persons to go into or upon, or remain in or upon, buildings, premises or lands of another.
- 97-17-101. Repealed.
- 97-17-103. Prohibition of recovery for injuries sustained during criminal trespass.

§ 97-17-1. Arson; first degree; burning dwelling house or out-building.

(1) Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, or any state-supported school building in this state whether the property of himself or of another, shall be guilty of arson in the first degree, and upon conviction thereof, be sentenced to the penitentiary for not less than five (5) nor more than twenty (20) years and shall pay restitution for any damage caused.

(2) Any person convicted under this section shall be subject to treble damages for any damage caused by such person.

(3) Any property used in the commission of the offense of arson in the first degree shall be subject to forfeiture as provided in Section 97-17-4.

SOURCES: Codes, 1942, § 2006; Laws, 1932, ch. 272; Laws, 1997, ch. 473, § 1, eff from and after passage (approved March 27, 1997).

Cross References — State fire marshal, see §§ 45-11-1 et seq.

Disqualification of persons convicted of certain crimes to hold office in labor organizations or participate in labor management functions, see § 71-1-49.

Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Limitations of prosecutions, generally, see § 99-1-5.

JUDICIAL DECISIONS

1. In general.
2. Malice as element of crime.
3. Indictment.
4. Sufficiency of indictment.
5. —Under former statutes.
6. Corpus delicti.
7. Evidence.
8. Miscellaneous.
9. Lesser-included offense.

1. In general.

Sentence to 20 years imprisonment without reduction, revocation or parole imposed upon defendant convicted of arson and of being habitual criminal is not unconstitutionally excessive where arson conviction is based upon defendant's having set occupied house on fire at both front and back doors and where defendant has prior convictions for burglary and uttering forgery. *Jenkins v. State*, 483 So. 2d 1330 (Miss. 1986).

It is unlawful to burn the dwelling house of another, even though title thereto may be involved in litigation, and it is not necessary that the state litigate the question of disputed ownership with the defendant in the trial of the criminal case when the state is otherwise able to sufficiently identify the property in the indictment and under the proof in such manner as to clearly enable the accused to invoke such indictment and the record of his conviction in support of a plea of former jeopardy if subsequently charged with the same unlawful act. *Jenkins v. State*, 197 Miss. 346, 19 So. 2d 921 (1944).

House joined to a dwelling by an unenclosed gallery and roof was a part of the dwelling house within this section [Code 1942, § 2006]. *Spears v. State*, 92 Miss. 613, 46 So. 166 (1908).

2. Malice as element of crime.

Evidence was sufficient to show malice where the state's expert testified that his opinion was that the fire was set intentionally since, inter alia, the fire had two separate, non-connecting points of origin. *Barnes v. State*, 721 So. 2d 1130 (Ct. App. 1998).

Where indictment for arson was wholly void for failing to allege burning was malicious, validity could be challenged for first time on appeal from overruling of motion to set aside judgment. *Reed v. State*, 171 Miss. 65, 156 So. 650 (1934).

An indictment charging, in the language of the statute, the wilful burning of goods and that it was done feloniously but failing to allege defendant's malice, is fatally defective. *Maxwell v. State*, 68 Miss. 339, 8 So. 546 (1891).

Malice is a necessary ingredient in the crime of arson at common law, and the indictment must charge that it was done "maliciously." *Jesse v. State*, 28 Miss. 100 (1854).

3. Indictment.

Felony murder as a capital crime by definition requires that there be two felonies, the homicide being the intentional or unintentional product of the other felony. The elements set out in the indictment against defendant only charged one felony, that defendant killed the victim by setting the victim on fire and that act was not a capital offense; in order for defendant to have been charged with capital murder, defendant must have been charged with arson by setting the house trailer or sofa on fire and that defendant killed the victim (defendant's husband) as a result. *Buckley v. State*, 875 So. 2d 1110 (Miss. Ct. App. 2004).

Indictment charging that defendant burned a house and designated personalty therein, charged two offenses. *State v. Freeman*, 90 Miss. 315, 43 So. 289 (1907).

4. Sufficiency of indictment.

An indictment charging arson in the disjunctive by use of the word "or" may properly be amended to charge the offense in the conjunctive by substituting the word "and" for the word "or". *Byrd v. State*, 228 So. 2d 874 (Miss. 1969).

Indictment charging defendant "did then and there wilfully, unlawfully and feloniously set fire to and burn a certain dwelling house then and there situated," etc., is sufficient to cover an unoccupied dwelling house. *Banks v. State*, 93 Miss. 700, 47 So. 437 (1908).

An indictment charging, in the language of the statute, the wilful burning of goods and that it was done feloniously but failing to allege defendant's malice is fatally defective. *Maxwell v. State*, 68 Miss. 339, 8 So. 546 (1891).

5. —Under former statutes.

The element of occupancy by some human being was held to have been sufficiently alleged by an indictment which avers that the house in question was a "dwelling house" occupied by the owner and his family. *State v. Stringer*, 105 Miss. 851, 63 So. 270 (1913).

Under a former statute making a crime the setting fire in the nighttime to a structure in which some human being usually stays, lodges or resides at night, it has been held that an indictment must aver distinctly that the "setting fire to" was in the nighttime, and also, that the "staying, lodging, and residing" was in the nighttime (*Lewis v. State*, 49 M 354; *Dick v. State*, 53 M 384); and that under an indictment following the statute, it was error to refuse to instruct that, if it was not dark when the fire was set, accused could not be convicted. *Rist v. State*, 93 Miss. 841, 47 So. 433 (1908).

6. Corpus delicti.

Where the corpus delicti has been established by a preponderance of evidence, a confession of guilt is admissible, and if the proof of the corpus delicti coupled with the confession show the corpus delicti beyond

a reasonable doubt it is sufficient. *Ruffin v. State*, 205 Miss. 642, 39 So. 2d 269 (1949).

Incendiary origin of fire is shown by evidence, aside from confession, showing that two fires were going at same time in two separate places in house, that can and jugs of kerosene were so placed as to aid and guarantee successful fire, that household and personal effects of owner of house were found elsewhere after fire at place defendant claimed to have placed them, and that insurance on house and its contents was increased shortly before fire. *Ruffin v. State*, 205 Miss. 642, 39 So. 2d 269 (1949).

The burning of a dwelling house at night by a fire originating from without, coupled with the fact that shortly after the fire tracks resembling those of the accused were found about 75 yards from the house, is insufficient evidence to establish a corpus delicti of arson. *Bolden v. State*, 98 Miss. 723, 54 So. 241 (1911).

The corpus delicti in a case of arson consists (1) of the burning of the house or other property; and (2) of criminal agency in causing the fire. *Spears v. State*, 92 Miss. 613, 46 So. 166 (1908); *Mister v. State*, 190 So. 2d 869 (Miss. 1966).

7. Evidence.

Defendant's conviction for capital murder and arson was proper; the evidence was sufficient because defendant intended to severely beat the victim, and then moved and burned his body. *Fuqua v. State*, — So. 2d —, 2006 Miss. App. LEXIS 164 (Miss. Ct. App. Mar. 7, 2006).

Where defendant's wife testified that defendant killed her ex-boyfriend, set his house on fire, and threw the pistol into the Tennessee River, the evidence was sufficient to convict defendant of murder, arson, and possession of a firearm by a felon. The trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Roland v. State*, 882 So. 2d 262 (Miss. Ct. App. 2004).

Sufficient evidence existed to convict defendant of arson: the fire started in three different areas in the house and regular household materials were used to start the fire; defendant lied about the condition of the victims, who were killed in the days before the fire, defendant admitted to having hit one victim and

dragged him to a back bedroom where one of the fires was started. *McGruder v. State*, 886 So. 2d 27 (Miss. Ct. App. 2004).

Where defendant had a hostile encounter with his estranged wife, purportedly threatened to burn the homes of the wife's two brothers, and within two hours authorities were called to suspicious fires at the brothers' homes, something more than a threat had to link defendant to the subject fires; because there was no physical evidence linking defendant to the fires, the evidence was legally insufficient to sustain his convictions on two counts of arson. *Oswalt v. State*, 885 So. 2d 720 (Miss. Ct. App. 2004).

Defendant's motion for a new trial was properly denied in an arson case because there was sufficient circumstantial evidence to support the conviction; the evidence showed that defendant, the sole occupant of a residence, was at home shortly before a fire started, an accelerant was used on a couch, and a vehicle left the residence immediately before the fire was reported. *Miller v. State*, 856 So. 2d 420 (Miss. Ct. App. 2003).

Evidence was insufficient to convict where defendant was at the scene of the fire at a time when he could have started the fire, but there was no admission by him that he actually did start the fire and no physical evidence connecting defendant with the fire. *Gatlin v. State*, 754 So. 2d 1157 (Miss. 1999).

The evidence was insufficient to prove beyond a reasonable doubt that the defendant "willfully and maliciously" started the fire in question where there were no witnesses to the fire, and the defendant stated that he "guessed the fire was started by his cigarette" but he said he did not intentionally start the fire. *Isaac v. State*, 645 So. 2d 903 (Miss. 1994).

The evidence was sufficient to support a conviction of arson, even though a person other than the defendant may have set the initial fire in the home, where the defendant told a fire marshall that he started one of the fires in the home by taking a burning rag from another fire and throwing it into a closet. *Cox v. State*, 586 So. 2d 761 (Miss. 1991).

Proof of insurance is probative of the defendant's intent to burn property under

this section, and is, therefore, admissible evidence in an arson prosecution. *Wells v. State*, 521 So. 2d 1274 (Miss. 1987).

Whether confession in arson prosecution was free and voluntary is a question for the trial judge. *Ruffin v. State*, 205 Miss. 642, 39 So. 2d 269 (1949).

Under indictment for arson charging that the house was owned by a named individual and other heirs of a deceased whose names are unknown to the grand jurors, but which was then occupied by defendant's wife, proof that the house did belong to the named individual and to another person or persons unknown was sufficient to support conviction. *Jenkins v. State*, 197 Miss. 346, 19 So. 2d 921 (1944).

8. Miscellaneous.

Appellant could not rely on Miss. Code Ann. § 99-19-101(6) to support her claim that her counsel had inadequately represented her in failing to investigate and present mitigating evidence during her sentencing hearing on her conviction for arson because § 99-19-101(6) concerned mitigating evidence presented to a jury in capital cases. Arson was not a "capital crime" as defined by Miss. Code Ann. § 1-3-4 because § 1-3-4 limited capital crimes to crimes punishable by death or imprisonment for life in the state penitentiary, and the maximum punishment for arson was 20 years in the penitentiary under Miss. Code Ann. § 97-17-1. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

In arson prosecution of storeowner in which 10 year sentence of main witness who is in custody of Mississippi Department of Corrections is vacated after much pressure is brought to bear on witness to implicate owner as witness does, coupled with absence of any evidence of purpose for owner to burn business, particularly at financial loss, owner is entitled to jury instruction to effect that testimony of accomplice should be viewed with great care and caution. *Hussey v. State*, 473 So. 2d 478 (Miss. 1985).

The contention that the district attorney, in his examination of the state's witnesses used language indicating that the barn involved was so connected with the residence as to make its burning first degree arson under Code 1942, § 2006, instead of second degree arson for which

the accused was indicted and was being tried, was not well taken where no objections to the use of the word “barn” referring to the larger building that was burned, was made while the witness was being examined and the defense attorney referred to the building as a barn in his cross-examination, and there is no dispute in the evidence whatsoever that the barn was located some 250 yards from the residence, so that there was no connection between the barn and the residence. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

Words to effect that plaintiff set fire to and burned his house held to be actionable per se. *Jefferson v. Bates*, 152 Miss. 128, 118 So. 717 (1928).

If in a case of arson the verdict be right but the judgment wrong—penalty imposed

under wrong section—the supreme court will reverse leaving the verdict unaffected, and remand the case, that proper judgment may be rendered. *Dick v. State*, 53 Miss. 384 (1876).

9. Lesser-included offense.

Where appellant was charged with two counts of arson under Miss. Code Ann. § 97-17-1, the burning of the second dwelling was not a lesser-included offense of the first count of arson even if damage to the second dwelling was minimal damage to the property's porch because both crimes shared the same elements of a willful or malicious burning of a house. Section 97-17-1 made no exception for minimum to hardly-any damage, done only to a house's front porch. *Smith v. State*, 880 So. 2d 1094 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR. Vacancy or nonoccupancy of building as affecting its character as “dwelling” as regards arson. 44 A.L.R.2d 1456.

Burning of building by mortgagor as burning property of another so as to constituting arson. 76 A.L.R.2d 524.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires. 87 A.L.R.2d 891.

What constitutes “burning” to justify charge of arson. 28 A.L.R.4th 482.

Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 1 et seq.

12 Am. Jur. Pl & Pr Forms (Rev), Fires, Form 1.1 (complaint, petition, or declaration — by owner of building and insurer — against arsonist).

2 Am. Jur. Trials, Investigating Particular Crimes §§ 2-8 (arson).

19 Am. Jur. Trials, Preparation and Trial of Arson Case, §§ 1 et seq.

Practice References. Decker, Ottley, Investigation and Prosecution of Arson (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-3. Arson; first degree; place of worship; failure to report accidental fires; juvenile offenders.

(1) Any person who willfully and maliciously sets fire to, or burns, or causes to be burned, or who is a party to destruction by explosion from combustible material, who aids, counsels, or procures the burning or destruction of any church, temple, synagogue or other established place of worship, whether in use or vacant, shall be guilty of arson in the first degree and, upon conviction therefor, shall be sentenced to the penitentiary for not less than five (5) nor more than thirty (30) years and shall pay restitution for any damage caused.

(2) Any person observing or witnessing the destruction by fire of any state-supported school building or any church, temple, synagogue or other established place of worship, whether occupied or vacant, which fire was the result of his or her act of an accidental nature, and who willfully fails to sound the general alarm or report such fire to the local fire department or other local authorities, shall be guilty of a felony and, upon conviction therefor, shall be sentenced to the penitentiary for not less than two (2) nor more than ten (10) years and shall pay restitution for any damage caused.

(3) Any person, who by reason of his age comes under the jurisdiction of juvenile authorities and who is found guilty under subsection (1) of this section, shall not be eligible for probation unless and until at least six (6) months' confinement has been served in a state reform school.

(4) Any person convicted under this section shall be subject to treble damages for any damage caused by such person.

(5) Any property used in the commission of arson in the first degree shall be subject to forfeiture as provided in Section 97-17-4.

SOURCES: Codes, 1942, § 2006.5; Laws, 1958, ch. 256; Laws, 1997, ch. 473, § 2, eff from and after passage (approved March 27, 1997).

Cross References — Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

The trial judge erred in ordering a minor child, who had been adjudicated delinquent on the basis of a violation of this section, to be confined in a training school for a minimum period of six months, under the impression that subsection (3) of this section required him to do so, since

the Youth Court Law, enacted in 1979 and amended in 1980, clearly supersedes subsection (3) of this section, so that the lower court was authorized to proceed under § 43-21-605 of the Act, which sets forth disposition alternatives in delinquency cases. In re T.D.B., 446 So. 2d 598 (Miss. 1984).

RESEARCH REFERENCES

ALR. Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 1 et seq.

12 Am. Jur. Pl & Pr Forms (Rev), Fires,

Form 14 (complaint, petition, or declaration — by owner of building and insurer — against arsonist).

CJS. 6A C.J.S., Arson § 9.

§ 97-17-4. Forfeiture of property used in commission of arson.

(1) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of Section 97-17-1 or 97-17-3 is subject to civil forfeiture to the state pursuant to the provisions of this section; provided, however, that a forfeiture of personal property encumbered by a bona fide security interest or

real property encumbered by a bona fide mortgage, deed of trust, lien or encumbrance of record shall be subject to the interest of the secured party or subject to the interest of the holder of the mortgage deed of trust, lien or encumbrance of record if such secured party or holder neither had knowledge of or consented to the act or omission.

(2) Property subject to forfeiture may be seized by law enforcement officers upon process issued by any appropriate court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under a lawful administrative inspection;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this section.

(3) When any property is seized pursuant to this section, proceedings under this section shall be instituted promptly.

(4)(a) A petition for forfeiture shall be filed promptly in the name of the State of Mississippi with the clerk of the circuit court of the county in which the seizure is made. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(i) The owner of the property, if address is known;

(ii) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the state by making a good faith effort to ascertain the identity of such secured party as described in paragraphs (b), (c), (d), (e) and (f) of this subsection;

(iii) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the state has actual knowledge;

(iv) A holder of a mortgage, deed of trust, lien or encumbrance of record, if the property is real estate by making a good faith inquiry as described in paragraph (g) of this section; and

(v) Any person in possession of property subject to forfeiture at the time that it was seized.

(b) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the state shall make inquiry of the State Tax Commission as to what the records of the State Tax Commission show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(c) If the property is a motor vehicle and is not titled in the State of Mississippi, then the state shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the state shall make inquiry of the appropriate agency of that state as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest, or other instrument in the nature of a security device which affects the vehicle.

(d) If the property is of a nature that a financing statement is required by the laws of this state to be filed to perfect a security interest affecting the property and if there is any reasonable cause to believe that a financing statement covering the security interest has been filed under the laws of this state, the state shall make inquiry of the appropriate office designated in Section 75-9-501 as to what the records show as to who is the record owner of the property and who, if anyone, has filed a financing statement affecting the property.

(e) If the property is an aircraft or part thereof and if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make inquiry of the administrator of the Federal Aviation Administration as to what the records of the administrator show as to who is the record owner of the property and who, if anyone, holds an instrument in the nature of a security device which affects the property.

(f) In the case of all other personal property subject to forfeiture, if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make a good faith inquiry to identify the holder of any such instrument.

(g) If the property is real estate, the state shall make inquiry at the appropriate places to determine who is the owner of record and who, if anyone is a holder of a bona fide mortgage, deed of trust, lien or encumbrance.

(h) In the event the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust which affects the property, the state shall cause any record owner and also any lienholder, secured party, other person who holds an interest in the property in the nature of a security interest, or holder of an encumbrance, mortgage or deed of trust which affects the property to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(i) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the property is unknown, the state shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of _____," filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, and shall be served as provided in Section 11-33-37 for publication of notice for attachments at law.

(j) No proceedings instituted pursuant to the provisions of this article shall proceed to hearing unless the judge conducting the hearing is satisfied

that this section has been complied with. Any answer received from an inquiry required by paragraphs (b) through (g) of this section shall be introduced into evidence at the hearing.

(5)(a) An owner of property that has been seized shall file a verified answer within twenty (20) days after the completion of service of process. If no answer is filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the state. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court if court would not be in progress within thirty (30) days after filing the answer. Provided, however, that upon request by the state or the owner of the property, the court may postpone said forfeiture hearing to a date past the time any criminal action is pending against said owner.

(b) If the owner of the property has filed a verified answer denying that the property is subject to forfeiture, then the burden is on the state to prove that the property is subject to forfeiture. The burden of proof placed upon the state shall be clear and convincing proof. However, if no answer has been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture.

(c) At the hearing any claimant of any right, title, or interest in the property may prove his lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(d) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property to the state. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party, other person holding an interest in the property in the nature of a security interest or any holder of a bona fide encumbrance, mortgage or deed of trust is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited to the state.

(6)(a) All personal property, including money, which is forfeited to the state and is not capable of being sold at public auction shall be liquidated and the proceeds, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited in the General Fund of the state.

(b) All real estate which is forfeited to the state shall be sold to the highest bidder at a public auction to be conducted by the state at such place, on such notice and in accordance with the same procedure, as far as practicable, as is required in the case of sales of land under execution of law. The proceeds of such sale shall first be applied to the cost and expense in administering and conducting such sale, then to the satisfaction of all mortgages, deeds of trusts, liens and encumbrances of record on such

property. All proceeds in excess of the amount necessary for the cost of the sale of such land and the satisfaction of any liens thereon shall be deposited in the General Fund of the State Treasury.

(c) All other property that has been seized by the state and that has been forfeited shall, except as otherwise provided, be sold at a public auction for cash by the state to the highest and best bidder after advertising the sale for at least once each week for three (3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation throughout the State of Mississippi. Such notices shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be delivered to the circuit clerk and shall be disposed of as follows:

(i) To any bona fide lienholder, secured party, or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(ii) The balance, if any, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited with and used as general funds of the state.

(d) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

(ii) The balance, if any, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited with and used as general funds of the state.

(d) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

SOURCES: Laws, 1997, ch. 473, § 3; Laws, 2001, ch. 495, § 27, eff from and after Jan. 1, 2002.

Cross References — Motor Vehicle Title Law, see §§ 63-2-1 et seq.

RESEARCH REFERENCES

ALR. Lawlessness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities. 38 A.L.R.4th 515.

Am Jur. 36 Am. Jur. 2d, Forfeitures and Penalties § 29.

CJS. 37 C.J.S. Forfeitures, § 1 et seq.

Law Reviews. Payne, An Introduction to Civil Forfeiture in Mississippi: An Effective Law Enforcement Tool or Cash Register Justice?, 59 Miss. L. J. 453, Fall 1989.

§ 97-17-5. Arson; second degree; other buildings or structures.

Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in Section 97-17-1 or Section 97-17-3, shall be guilty of arson in the second degree, and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years.

SOURCES: Codes, 1942, § 2007; Laws, 1932, ch. 272.

Cross References — Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Instructions.

1. In general.

As a matter of common sense, a person who is deaf should not sit on a jury trying a second-degree arson charge but, where the circuit court interrogated the juror with defective hearing and was satisfied that the juror could hear and understand the proceedings, the court was within its discretion and committed no error in its denial of a motion for mistrial and a subsequent motion for a new trial made upon the ground of a defective hearing of the juror. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

While it follows as a matter of common sense that a person who is deaf should not sit on a jury trying a second-degree arson case, where the circuit court had interrogated the juror alleged to have defective hearing and had satisfied itself that the juror could hear and understand the proceedings, the court did not abuse its discretion or commit error in denying defendants motions for mistrial and for a new trial. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th

Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

The contention that the district attorney, in his examination of the state's witnesses used language indicating that the barn involved was so connected with the residence as to make its burning first degree arson under Code 1942, § 2006, instead of second degree arson for which the accused was indicted and was being tried, was not well taken where no objections to the use of the word "barn" referring to the larger building that was burned, was made while the witness was being examined and the defense attorney referred to the building as a barn in his cross-examination, and there is no dispute in the evidence whatever that the barn was located some 250 yards from the residence, so that there was no connection between the barn and the residence. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

2. Indictment.

The fact that § 97-17-11 might also have covered and made unlawful the conduct of the defendant did not preclude his being charged under this section, the second degree arson statute, provided the indictment fairly charged him with the violation of the latter statute. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert.

denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

An indictment stating, in terms of the statute, that the accused set fire and burned a building unlawfully, wilfully, maliciously and feloniously, and that he did so with the wilful, malicious and felonious intent to injure and prejudice the owner of the building, necessarily charged that the accused intended to burn the building. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

An indictment for arson under this section [Code 1942, § 2007] is good though it does not aver that the burning was done in the nighttime, or that there was at the time some human being usually staying, lodging, or residing at night. *Dick v. State*, 53 Miss. 384 (1876).

3. Evidence.

On appeal from a second degree arson conviction, the defendant was not in a position to complain regarding evidence concerning insurance where he was a first party to elicit testimony concerning the subject matter, and he failed to object timely when the prosecution followed up. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

The uncorroborated testimony of an accomplice, where not wholly improbable or otherwise incredible, may be sufficient to support a verdict of guilty of arson in the second degree. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert. denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

An arson defendant, whose right to counsel had attached, had not waived his right to assistance of counsel incident to interrogation, where, at the time he made self-incriminating statements, he had no knowledge or way of knowing that he was being interrogated by an informant, wearing a concealed microphone, who was acting for law enforcement officers, and that his statements were being monitored and recorded, and, since, defendant's state constitutional rights were violated, the admission of tapes containing the incriminating statements in evidence, over de-

fendant's objection, constituted reversible error. *Page v. State*, 495 So. 2d 436 (Miss. 1986).

Statements in tape recorded conversation between defendant and informant which incriminated defendant's wife in arson venture were pure hearsay, and inadmissible at wife's trial when offered as proof of her acts. *Page v. State*, 495 So. 2d 436 (Miss. 1986).

Testimony of person hired by saloon owner to burn competing saloon, which testimony is consistent with fire marshal's testimony concerning manner in which saloon was burned and is also corroborated by testimony of other witnesses, is sufficient to support conviction of saloon owner for arson. *Pace v. State*, 473 So. 2d 167 (Miss. 1985).

Although conflicting, evidence, including testimony of a witness that he had seen the accused set fire to a barn and then drag a lighted bale of straw and place it in a shed in an effort to burn the shed and the tools therein, was sufficient to sustain the accused's conviction under this section [Code 1942, § 2007]. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

Evidence establishing that the prosecuting witness had previously prosecuted the accused was competent as showing a motive on the part of the accused for burning the buildings of the prosecuting witness. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

Where the accused took the stand as a witness in a prosecution for second degree arson, he thereby subjected himself to cross-examination, and made competent his own testimony, or any other admissible evidence tending to establish his former conviction of crimes. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

4. Instructions.

State's instruction, which followed the wording of the statute and the indictment, correctly informed the jury of the elements of the crime of second degree arson notwithstanding the fact that it failed to expressly and specifically require the jury to find the accused had the intent to burn the buildings. *Dorroh v. State*, 229 Miss. 315, 90 So. 2d 653 (1956).

RESEARCH REFERENCES

ALR. Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson. 44 A.L.R.2d 1456.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 2-8 (arson).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

19 Am. Jur. Trials, Preparation and Trial of Arson Case, §§ 1 et seq.

Practice References. Decker, Ottley, Investigation and Prosecution of Arson (Michie).

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Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-7. Arson; third degree; personal property.

Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatsoever class or character; (such property being of the value of twenty-five dollars and the property of another person), shall be guilty of arson in the third degree and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years.

SOURCES: Codes, 1942, § 2008; Laws, 1932, ch. 272.

Cross References — Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Felony murder as a capital crime by definition required that there be two felonies, the homicide being the intentional or unintentional product of the other felony. The elements set out in the indictment against defendant only charged one felony, that defendant killed the victim by setting the victim on fire and that act was not a capital offense; in order for defendant to have been charged with capital

murder, defendant must have been charged with arson by setting the house trailer or sofa on fire and that defendant killed the victim (defendant's husband) as a result. *Buckley v. State*, 875 So. 2d 1110 (Miss. Ct. App. 2004).

A count in an indictment charging that defendant burned a house and designated personalty therein, charges two offenses. *State v. Freeman*, 90 Miss. 315, 43 So. 289 (1907).

RESEARCH REFERENCES

ALR. What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 2-8 (arson).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

19 Am. Jur. Trials, Preparation and Trial of Arson Case, §§ 1 et seq.

Practice References. Decker, Ottley, Investigation and Prosecution of Arson (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-9. Arson; fourth degree; attempt to burn.

(1) Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the penitentiary for not less than one nor more than two years or fined not to exceed one thousand dollars.

(2) The placing or distributing of any flammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually, wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purposes of this section constitute an attempt to burn such building or property.

SOURCES: Codes, 1942, § 2009; Laws, 1932, ch. 272.

Cross References — Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

In a prosecution for arson indictments couched in the language of this section were sufficient to charge defendant with the crime of fourth-degree arson, despite the fact that they did not charge an overt act toward commission of the crime with

which defendant was charged, where the statutory language in the indictments plainly and fully informed defendant of the nature and the causes of the charges against him. *Jackson v. State*, 420 So. 2d 1045 (Miss. 1982).

RESEARCH REFERENCES

ALR. Vacancy or nonoccupancy of building as affecting its character as “dwelling” as regards arson. 44 A.L.R.2d 1456.

Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 2-8 (arson).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

19 Am. Jur. Trials, Preparation and Trial of Arson Case, §§ 1 et seq.

CJS. 6A C.J.S., Arson § 18.

Practice References. Decker, Ottley, Investigation and Prosecution of Arson (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law
Manual (Michie).

Mississippi Penal Code Annotated
(Michie).

§ 97-17-11. Arson; insured property.

Any person who wilfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property, of whatsoever class or character, whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to the penitentiary for not less than one (1) nor more than ten (10) years.

SOURCES: Codes, 1942, § 2010; Laws, 1932, ch. 272; Laws, 1986, ch. 377, eff from and after July 1, 1986.

Cross References — State fire marshal, see §§ 45-11-1 et seq.

Reporting arson incidents, see § 83-5-89.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.

1. In general.

The inability to recover on fire insurance policies is no defense of prosecution of named insured for statutory offense of wilfully burning an insured building with intent to defraud insurer. *Brower v. State*, 217 Miss. 425, 64 So. 2d 576 (1953).

One convicted of arson was properly sentenced under statute in effect when arson was committed, instead of under repealing statute enacted before trial prescribing lighter penalty, in absence of contrary provision in repealing statute. *Byrd v. State*, 165 Miss. 30, 143 So. 852 (1932).

2. Indictment.

The fact that this section might also have covered and made unlawful the conduct of the defendant did not preclude his being charged under § 97-17-5, the second degree arson statute, provided the indictment fairly charged him with the violation of the latter statute. *Weaver v. State*, 497 So. 2d 1089 (Miss. 1986), habeas corpus denied, 896 F.2d 126 (5th Cir. 1990), reh'g denied (5th Cir. 1990), cert.

denied, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990).

Indictment charging burning of building with intent to injure insurance company sufficiently alleged ownership of house and that defendant knew of insurance. *State v. Ingram*, 166 Miss. 543, 146 So. 638 (1933).

3. Evidence.

A prior arson conviction might be admissible for impeachment purposes as a crime involving dishonesty or false statement in situations, for example, where the defendant burned a building as part of a scheme to defraud an insurance company. However, where an arson conviction was admitted for impeachment purposes and the prosecution failed to offer prima facie evidence that the arson involved fraud, dishonesty, false statement or other elements suggesting a propensity for lying, the case would be reversed and remanded for a new trial on all issues. *McInnis v. State*, 527 So. 2d 84 (Miss. 1988).

In prosecution for wilful and felonious burning of a church, other evidence and confession were sufficient to establish a corpus delicti and sustain conviction.

Brower v. State, 217 Miss. 425, 64 So. 2d 576 (1953).

Circumstantial evidence showing beyond reasonable doubt that house was burned by persons employed by defendant to burn it held sufficient to sustain arson conviction. *Byrd v. State*, 165 Miss. 30, 143 So. 852 (1932).

That state in arson prosecution for burning of insured property failed to introduce policy to show that automobile was insured against fire held not error, existence of insurance being amply established by other evidence. *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932).

Evidence in arson prosecution for burning of insured property, held sufficient to establish corpus delicti, as regards admis-

sibility of confession. *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932).

That missing parts of automobile were found in place indicated in confession of defendant was strong proof that crime had been committed in connection therewith. *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932).

Evidence held sufficient to establish defendant's guilt. *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932).

Admitting letter, proof of loss, and bill of sale, if incompetent because not identified as bearing signature of defendant, held harmless; defendant's guilt being clear. *Gipson v. State*, 162 Miss. 480, 139 So. 868 (1932).

RESEARCH REFERENCES

ALR. Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson. 44 A.L.R.2d 1456.

Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 5 Am. Jur. 2d, Arson and Related Offenses §§ 3, 18.

2 Am. Jur. Trials, Investigating Particular Crimes § 68 (insurance fraud).

19 Am. Jur. Trials, Preparation and Trial of Arson Case, §§ 1 et seq.

CJS. 6A C.J.S., Arson § 2, 22, 23.

Practice References. Decker, Ottley, Investigation and Prosecution of Arson (Michie).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-13. Arson; willfully or negligently firing woods, marsh, meadow, etc.; restitution of fire suppression costs.

(1) If any person willfully, maliciously, and feloniously sets on fire any woods, meadow, marsh, field or prairie, not his own, he is guilty of a felony and shall, upon conviction, be sentenced to the State Penitentiary for not more than two (2) years nor less than one (1) year, or fined not less than Two Hundred Dollars (\$200.00) nor more than One Thousand Dollars (\$1,000.00), or both, in the discretion of the court.

(2)(a) If any person recklessly or with gross negligence causes fire to burn any woods, meadow, marsh, field or prairie, not his own, he is guilty of a misdemeanor and shall, on conviction, be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or imprisoned in the county jail not more than three (3) months, or both, in the discretion of the court.

(b) If a person has a brush or debris pile or other material which is or was being burned and reasonable and prudent efforts were not taken to prevent the spread of the fire onto the lands of another shall be evidence that such person recklessly or with gross negligence caused the land to burn.

(3) In addition to the penalties provided in this section, upon conviction, a person shall be ordered to reimburse and pay in restitution directly to any organized fire suppression agency recognized by the Mississippi Forestry Commission all the costs the agency incurred related to the suppression and abatement of the fire.

SOURCES: Codes, Hutchinson's 1848, ch. 13, art. 5(1); 1857, ch. 28, art. 1; 1871, § 2741; 1880, § 2816; 1892, § 1091; Laws, 1906, § 1172; Hemingway's 1917, § 901; Laws, 1930, § 928; Laws, 1942, § 2157; Laws, 1954, ch. 222, §§ 1, 2; Laws, 1960, ch. 243; Laws, 2005, ch. 495, § 2, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment rewrote the section to revise the penalty for persons convicted of burning the lands of another due to recklessness or gross negligence and to require restitution of fire suppression costs.

Cross References — Judge's charge to grand jury with respect to state forest fire laws, see § 13-5-47.

Mississippi Prescribed Burning Act not to limit civil or criminal liability provided for in this section, see § 49-19-307.

Tort of firing woods, see § 95-5-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

In a prosecution for setting fire to a field, where the defendant was tried as a principal on a theory that he was an accessory before the fact, but the only evidence of his participation in the crime consisted in the fact that he was observed sitting in an automobile stopped adjacent to a field which two other men were in the act of firing, and when someone gave an order to put out the fire, the two young men returned to defendant's car and he drove away, such evidence, while sufficient for submission of the case to the jury, left the defendant's guilt in such serious doubt that he would be granted a new trial. *Russell v. Ralston Purina Co.*, 234 So. 2d 50 (Miss. 1970).

The appearance of a forestry commission employee, who had investigated a

forest fire and talked to the witnesses, but had no personal knowledge of the facts, did not constitute an improper influence on the grand jury which indicted the defendant on a charge of feloniously firing woods not his own. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

The fact that a forestry commission employee, who investigated a forest fire and talked to the witnesses but had no personal knowledge of the facts, testified before the grand jury that he brought the case up in Justice of the Peace Court and had the witnesses there for the preliminary hearing, did not place him in the category of a special prosecutor employed to assist with the prosecution, and hence his appearance before the grand jury was not an improper influence. *Case v. State*, 220 So. 2d 289 (Miss. 1969).

RESEARCH REFERENCES

ALR. Pyromania and the criminal law. 51 A.L.R.4th 1243.

Am Jur. 35 Am. Jur. 2d, Fires §§ 5, 6.

19 Am. Jur. Trials, preparation and trial of arson case, §§ 1 et seq.

Law Reviews. Ogletree, A primer con-

cerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-17-14. Aggravated assault upon fire fighter, law enforcement officer or emergency medical personnel by injury-causing arson.

Any person or persons who willfully, feloniously and maliciously set fire to or burn or cause to be burned or who aid, counsel or procure the burning of any commercial or residential building, whether occupied, unoccupied or vacant or any kitchen, shop, barn, stable, outhouse, vehicle, or wood, meadow, marsh, field or prairie, whether the property of the person or persons setting the fire or of another, and thereby cause serious bodily injury to a firefighter, law enforcement officer or any emergency medical personnel while said firefighter, law enforcement officer or emergency personnel is acting within the scope of his duty and office, whether said injury shall be intentional or unintentional, shall be guilty of aggravated assault and upon conviction thereof shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by imprisonment for not more than ten (10) years in the Penitentiary or by both such fine and imprisonment.

SOURCES: Laws, 1986, ch. 394; Laws, 2001, ch. 402, § 1, eff from and after July 1, 2001.

RESEARCH REFERENCES

ALR. Single act affecting multiple victims as constituting multiple assaults or homicides. 8 A.L.R.4th 960.

What constitutes "burning" to justify charge of arson. 28 A.L.R.4th 482.

Admissibility, in criminal case, of evidence discovered by warrantless search in connection with fire investigation — post — Tyler cases. 31 A.L.R.4th 194.

Am Jur. 2 Am. Jur. Trials, Investigation of Particular Crimes §§ 2-8.

19 Am. Jur. Trials, Preparation and Trial of Arson Case §§ 1 et seq.

CJS. 6A C.J.S., Assault & Battery § 86, 87.

§ 97-17-15. Boundary landmarks; altering or destroying.

If any person shall knowingly cut, fell, alter, remove, or destroy, or shall cause to be cut, felled, altered, removed, or destroyed, any boundary tree, or other boundary landmark, to the wrong of another person, he shall, on conviction, be fined not more than two hundred dollars nor less than fifty dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 1(64); 1857, ch. 64, art. 189; 1871, § 2711; 1880, § 2900; 1892, § 1172; Laws, 1906, § 1250; Hemingway's 1917, § 980; Laws, 1930, § 1008; Laws, 1942, § 2239.

Cross References — Resurveying and re-establishing original marks, see §§ 19-27-13, 19-27-15.

RESEARCH REFERENCES

Law Reviews. Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-17-17. Brands of saw-logs; altering or defacing.

If any person shall knowingly and wilfully alter or deface the mark or brand of any saw-log, the property of another, without his consent, and with intent to deprive the owner of his property, he shall, on conviction, be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than three months, or both.

SOURCES: Codes, 1892, § 980; Laws, 1906, § 1056; Hemingway's 1917, § 784; Laws, 1930, § 800; Laws, 1942, § 2026; Laws, 1882, p. 144.

RESEARCH REFERENCES

Am Jur. 52 Am. Jur. 2d, Logs and Timber §§ 3, 12.

§§ 97-17-19 and 97-17-21. Repealed.

Repealed by Laws, 1996, ch. 519, §§ 2-3, eff from and after passage (approved April 11, 1996).

§ 97-17-19. [Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(11); 1857, ch. 64, art. 45; 1871, § 2522; 1880, § 2738; 1892, § 991; 1906, § 1068; Hemingway's 1917, § 796; 1930, § 812; 1942, § 2038]

§ 97-17-21. [Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(10); 1857, ch. 64, art. 44; 1871, § 2521; 1880, § 2737; 1892, § 990; 1906, § 1066; Hemingway's 1917, § 794; 1930, § 810; 1942, § 2036]

Editor's Note — Former § 97-17-19 was entitled: Burglary; breaking and entering dwelling.

Former § 97-17-21 was entitled: Burglary; inhabited dwelling.

RESEARCH REFERENCES

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender). Mississippi Penal Code Annotated (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

§ 97-17-23. Burglary; breaking and entering inhabited dwelling.

Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein,

shall be punished by imprisonment in the Penitentiary not less than three (3) years nor more than twenty-five (25) years.

SOURCES: Codes, 1906, § 1067; Hemingway's 1917, § 795; Laws, 1930, § 811; Laws, 1942, § 2037; Laws, 1996, ch. 519, § 1, eff from and after passage (approved April 11, 1996).

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of evidence.
3. Indictments.
4. Dwelling house of another.
5. Sentence.

1. In general.

After his conviction for burglary of an inhabited dwelling, defendant first argued that the trial court should have given a circumstantial evidence instruction because the prosecution did not have a confession or an eyewitness. However, defendant had failed to offer such an instruction and it was not the obligation of the trial court to have prepared and submitted same. *Harris v. State*, 908 So. 2d 868 (Miss. Ct. App. 2005).

In a case where defendants were convicted of burglary of a dwelling and simple assault, the evidence at trial did not support a lesser included offense instruction of trespass because (1) had defendants succeeded in their defense that they had permission to enter the dwelling, they would not have been guilty of trespass; (2) once defendants realized they were not welcome on the property and that they would not receive permission to enter the home, they broke into and entered the home when they punched through the tape covering the hole by the front door in order to unlock the door from the inside; (3) the existence of the marks on the rear entrance where a tire iron was used to attempt entry supported the more serious offense of burglary rather than trespass; and (4) there was evidence of intent to commit an assault when defendants entered the home based on their previous threats made to the second victim, their use of force to enter the home, their use of violence inside the home, and one defendant's actions of hurling a large rock into the second victim's windshield when he tried to drive away. *Arbuckle v. State*, 894

So. 2d 619 (Miss. Ct. App. 2004), cert. dismissed, 904 So. 2d 184 (Miss. 2005).

Where defendant was convicted of burglary of a dwelling (no threats or force toward persons were shown), his allegation of error concerned the introduction of a small kitchen knife that police found on him when he was arrested. However, as to relevancy and admissibility, the record did not indicate any abuse of discretion by the trial judge in admitting the evidence. *Clayton v. State*, 893 So. 2d 246 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Where three accomplices kicked in the door of a home and stole several items, defendant was properly convicted of burglarizing a home based on evidence that he was seen driving the getaway car. *Deloney v. State*, 874 So. 2d 445 (Miss. Ct. App. 2004).

Where defendant's 20-year sentence with only 14 years actually to serve was within the statutory parameters and was not grossly disproportionate to the crime, defendant failed to show that his sentence was disproportionately harsh for the crime charges, and therefore it was not cruel and unusual. *Alston v. State*, 841 So. 2d 215 (Miss. Ct. App. 2003).

The crime of murder can be the underlying element required to establish the crime of burglary. *Stevens v. State*, 806 So. 2d 1031 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195 (2003).

The defendant was properly sentenced under this section, rather than under former § 97-17-19, where (1) former § 97-17-19 was repealed and this section was enacted in 1996, (2) the offense at issue occurred in 1997, and (3) although the original indictment cited former § 97-17-19, the indictment was amended to cite this section. *Terry v. State*, 755 So. 2d 41 (Miss. Ct. App. 1999).

Proof that a house was occupied at the time of the burglary is not required. *Wilkinson v. State*, 724 So. 2d 1089 (Ct. App. 1998).

A burglarized house was a "dwelling" within the meaning of the statute where the owner of the house was an elderly woman who lived there for four months of every year, received her mail there, and kept personal property there, even though the burglary occurred during the eight months that she lived elsewhere. *Wilkinson v. State*, 724 So. 2d 1089 (Ct. App. 1998).

The word "crime" in the burglary statutes includes misdemeanors as well as felonies. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

Jury could find that incident charged as burglary happened at night, where it was well established in Mississippi that jury was entitled to consider not only facts as testified to by witnesses, but also all inferences that reasonably and logically could be deduced from facts in evidence, and testimony from several witnesses indicated that incident occurred around 7:00 in evening, and jury was properly instructed as to law and heard testimony of witnesses. *Burney v. State*, 515 So. 2d 1154 (Miss. 1987), but see *McCarty v. State*, 554 So. 2d 909 (Miss. 1989).

Defendant's motion to dismiss, on double jeopardy grounds, an indictment charging him with armed burglary of an inhabited dwelling at nighttime was improperly denied, where there was a common nucleus of operative facts from which arose the prosecution for burglary and an earlier prosecution for rape, where defendant had earlier been acquitted of the rape, where the not guilty verdict in the rape trial was well within the evidence, where defendant's only defense at the rape trial was that another person committed the crime, where the jury could not rationally have acquitted him on any other basis, and where the state offered substantial evidence during the rape trial to show that he broke and entered the rape victim's home. *Sanders v. State*, 429 So. 2d 245 (Miss. 1983).

The trial court's failure to define the word "night," as used in this section, for the jury's guidance would not require re-

versal of the defendant's conviction for burglary, where the indictment and proof were sufficient to charge and support the defendant's conviction for burglary as defined by former § 97-17-21. *Harkins & Co. v. Elliott*, 415 So. 2d 678 (Miss. 1982), cert. denied, 459 U.S. 1107, 103 S. Ct. 733, 74 L. Ed. 2d 956 (1983).

An indictment which charged a defendant with breaking and entering into the dwelling house of the victim with intent to commit rape satisfied the statutory requirement of "intent to commit some crime" in a dwelling. *Jefferson v. State*, 386 So. 2d 200 (Miss. 1980).

2. Sufficiency of evidence.

Owner testified that he locked the door-knob and shut the door after allowing defendant to enter his mobile home, and both the owner and a victim testified that defendant declined to sit down and that she stood facing them with her back to the door; according to the victim, defendant had her hand on the doorknob before three masked men rushed through the door, and she never saw any of the masked men point a gun at defendant. Also, immediately after the men left, defendant refused to help the victim untie the owner; thus, the evidence was sufficient, and defendant's convictions for burglary of a dwelling, robbery, kidnapping, and auto theft were not against the weight of the evidence. *Brown v. State*, 926 So. 2d 283 (Miss. Ct. App. 2006).

Trial court did not err in denying defendant's motion for a directed verdict and his motion for judgment notwithstanding the verdict; given the State's evidence, reasonable and fair-minded jurors could have concluded that defendant was guilty of burglary of a dwelling. Also, the pictures of defendant's car were consistent with the description given by the victim to the deputies, the victim identified defendant as the intruder, and clothes were found that matched the description of the intruder's clothes provided by the victim. *Coleman v. State*, 926 So. 2d 205 (Miss. Ct. App. 2006).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to support a rape conviction given the victim's uncontradicted testimony; defendant's act of opening the

porch door was clearly sufficient to constitute a breaking, and entry through the porch was required to gain entrance into the victim's home. *Davis v. State*, 910 So. 2d 1228 (Miss. Ct. App. 2005).

Evidence demonstrated that the elements of burglary under Miss. Code Ann. § 97-17-23 were met where the other participants testified that defendant waited inside while the others ransacked the house searching for valuables and defendant shared in the proceeds. *Stewart v. State*, 909 So. 2d 52 (Miss. 2005).

Evidence sufficed for defendant's convictions for burglary of an inhabited dwelling and sale of a stolen firearm. The two-month time period, between the burglary and the date defendant was found in possession of the gun, distracted from the inference that he committed the burglary, but as to other inferences, he had made reference to other stolen items (never recovered), he had possession of the stolen firearm, and he had sought to sell same to an informant in a concealed setting. *Harris v. State*, — So. 2d —, 2005 Miss. App. LEXIS 530 (Miss. Ct. App. Aug. 9, 2005).

Evidence offered was sufficient to convict defendant of attempted burglary of a dwelling and was not against the weight of the evidence because (1) defendant was seen with a knife outside the victim's house; (2) defendant banged on the victim's front door with such force that objects on the walls of the entrance hall crashed to the floor and the peephole in the door was catapulted out of it; (3) no reasonable person with a broken-down car who needed help would approach a house in the same manner; (4) defendant had burglarized many homes in the past; and (5) defendant's actions on the day in question undoubtedly showed that he was attempting to burglarize the victim's dwelling. *Jones v. State*, 904 So. 2d 149 (Miss. 2005).

Defendant's conviction for house burglary was not against the overwhelming weight of the evidence because (1) the victim testified that someone entered her home, took her purse and her car keys, and stole her car; (2) two witnesses testified to defendant's involvement in the crime; (3) the investigating officer testified that he saw the victim's car near the

house where defendant was staying; and (4) defendant's accomplice was later seen driving the car. *Harris v. State*, 907 So. 2d 972 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Defendant's actions at the first victim's home were sufficient to support defendants' convictions for the crimes of burglary and simple assault because (1) defendants were present at the home for the sole purpose to obtain money; (2) when the victims did not voluntarily allow defendants into the home, defendants went into a rage and broke into the dwelling and assaulted two of the victims; (3) one of the defendants then proceeded to commit a further act of violence when he burst the windshield of one of the second victim's vehicle with a large rock; (4) the other defendant continued to threaten and intimidate the first victim until she surrendered her paycheck whereupon defendants left the premises and cashed the check in order to satisfy a debt; and (5) the jury could reasonably infer that defendants formed the intent to assault those inside the home immediately upon gaining entry to the home. *Arbuckle v. State*, 894 So. 2d 619 (Miss. Ct. App. 2004), cert. dismissed, 904 So. 2d 184 (Miss. 2005).

Evidence was sufficient to support defendant's conviction for burglary of a dwelling where, although nothing was actually stolen from the house, the jury could have inferred from the testimony that defendant broke into the house with the intent to steal. *Clay v. State*, 881 So. 2d 323 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

The State presented testimony from witnesses who identified defendant as the person who committed both the crimes charged. The first victim testified that while working at the convenience store, an individual later identified as defendant, held a box cutter near her neck, and took money out of the cash register and in the burglary case, the victim testified that she was awakened by her cousin's screaming and directly confronted defendant; defendant's motions for a directed verdict, judgment notwithstanding the verdict, and for a new trial, were therefore properly denied. *Hill v. State*, 912 So. 2d 991 (Miss. Ct. App. 2004), cert. denied, 921 So. 2d 344 (Miss. 2005).

There was sufficient evidence to support a conviction for burglary of a dwelling house because an officer saw defendant leave the residence through a patio door after receiving a burglary complaint, the door had been forcibly opened, two televisions were moved towards an exit in the home, and a victim testified that the house had not been left in that condition. *Phinisee v. State*, 864 So. 2d 988 (Miss. Ct. App. 2004).

Where a neighbor saw defendant entering and exiting the victim's home, a deputy testified that defendant admitted to being in the victim's home, and the victim testified that she was unable to identify any particular items as having been stolen but noticed that the drawers to her chest had been rifled and were in disarray, the State offered substantial evidence on each element of burglary. *Cortez v. State*, 876 So. 2d 1026 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Though the testimony of defendant and the woman conflicted about his intent in entering the woman's home, the jury was entitled to believe the woman's testimony, as opposed to defendant's testimony, that defendant forced his way into her house, placed a makeshift noose around her neck, and threatened to kill her, as defendant admitted entering her house and backing her against a wall; accordingly, the evidence was legally sufficient to support defendant's conviction for burglary as the evidence was not such that no reasonable juror could have assigned guilt to defendant on that charge. *Ferguson v. State*, 865 So. 2d 369 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004).

Evidence that police found defendant's fingerprint in a residence that was burglarized and that defendant pawned items that were taken from the residence was sufficient to sustain defendant's conviction for burglary on an inhabited dwelling, and the appellate court refused to review defendant's claim that his sentence of 22 years' confinement was too harsh. *Brown v. State*, 875 So. 2d 214 (Miss. Ct. App. 2003), cert. denied, 876 So. 2d 376 (Miss. 2004).

Evidence was sufficient to allow a jury to resolve issues of credibility against defendant, and return a verdict of guilty;

defendant admitted through his testimony that he broke a window at the victims' home, his fingerprints were found on the glass that matched the prints on the card bearing defendant's information from the police, and the victims both testified that defendant admitted that he committed the offense. *Bridges v. State*, 841 So. 2d 1189 (Miss. Ct. App. 2003).

Evidence that the victim found defendant in the victim's home without permission or explanation and that defendant fled the home when confronted by the victim was sufficient for the jury to infer that defendant had the intent to commit theft inside the home and was sufficient to support defendant's conviction of burglary of a dwelling despite the fact that nothing was taken from the home and very little inside the home had been disturbed; identification of defendant by the victim following defendant's arrest was more than sufficient. *Crawford v. State*, 839 So. 2d 594 (Miss. Ct. App. 2003).

Verdict was not against the overwhelming weight of the evidence where defendant was not only found in close proximity to the burglarized home, but was actually found by the victim at the home that was burglarized; in addition, defendant was in close proximity to the stolen property and the items in his car provided a reasonable inference that the items were in his possession, which was legally sufficient for the jury to infer guilt of burglary. *O'Neal v. State*, 840 So. 2d 750 (Miss. Ct. App. 2003).

State proved that defendant forcibly entered the victim's dwelling and that the evidence did not show that the entry was voluntary; even if the door was unlocked or if only slight force was needed to gain entry, such entry was forcible for the purposes of the burglary statute, and there was no evidence that the victim invited defendant into his home. *Wheeler v. State*, 826 So. 2d 731 (Miss. 2002).

Even though the defendant was acquitted of two counts of assault, the evidence was sufficient to support a conviction for burglary based on evidence that the defendant burst through a door to enter a trailer and that he intended to commit an assault. *Jones v. State*, 785 So. 2d 1099 (Miss. Ct. App. 2001).

Evidence was insufficient to establish that the building which the defendant was alleged to have burglarized was a dwelling within the meaning of the statute where (1) it was uncontradicted that the owner of the home, together with his wife, had permanently ceased to live in the structure and had moved to another county where they were living temporarily in a camper on site while they completed construction work on a new home, (2) there was no evidence even faintly suggesting that the owners had any intention of returning to the structure and resuming their residence there, and (3) there was some testimony that the owners' daughter had been living in the home while she worked as a schoolteacher in the area, but the only evidence concerning the daughter's residency in the home was supplied by her father. *Carr v. State*, 770 So. 2d 1025 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary where (1) a neighbor saw the defendant and a coperpetrator enter the victim's home, (2) responding police officers saw that the double doors to the home had been forced open while the dead-bolt was still extended to lock the doors, (3) the officers found the defendant and his coperpetrator in the master bedroom and bathroom, (4) the defendant said that they were in the house to get food, but the kitchen was at the opposite end of the house, and (5) in the bedroom, drawers were open and items were scattered on the dresser and bed. *Pryor v. State*, 771 So. 2d 958 (Miss. Ct. App. 2000).

Evidence was sufficient to sustain a conviction where (1) the defendant broke into and entered the victim's house without permission by removing a screen and climbing through a window, and (2) the defendant intended to locate the victim's purse and steal money from her once he found it. *Robinson v. State*, 757 So. 2d 1051 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary of a dwelling where evidence showed that the defendant was in recent possession of a video cassette recorder stolen from the dwelling. *Potts v. State*, 755 So. 2d 1196 (Miss. Ct. App. April 25, 2000).

The court refused to affirm a burglary conviction on the theory of constructive breaking where the jury was instructed only on the theory of an actual physical breaking and each theory requires a different set of facts. *Genry v. State*, 1999 Miss. App. LEXIS 716 (Miss. Ct. App. Dec. 14, 1999), subst. op., 767 So. 2d 302 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary, notwithstanding that the home that was entered was only occupied occasionally during the owner's visits to Mississippi, where the owner's daughter lived in the home on a permanent basis while attending high school and had only left the house a few months prior to the burglary, and where testimony revealed that the home contained clothing, a bed, a sofa, a microwave oven and other necessities. *Washington v. State*, 753 So. 2d 475 (Miss. Ct. App. 1999).

There was sufficient evidence to support a conviction for burglary where (1) the defendant denied that he broke into the victim's house to steal, and a witness in his behalf testified that the defendant told him that he was going to the victim's house to pick up some money, rather than commit burglary, but (2) the defendant's accomplice indicated that he and the defendant broke into the victim's house with the intention to burglarize it. *Brown v. State*, 726 So. 2d 248 (Miss. Ct. App. 1998).

Evidence was sufficient to support conviction for burglary of an inhabited dwelling. *Ward v. State*, 726 So. 2d 223 (Miss. Ct. App. 1998).

3. Indictments.

Where defendant was indicted for attempting to bugular a dwelling house, the trial court committed reversible error by allowing the State to amend the indictment to change the charge from "attempt to break and enter" to "break and enter." Defendant was clearly prejudiced because the defense that he had actually completed the crime was no longer available to him. *Spears v. State*, — So. 2d —, 2005 Miss. App. LEXIS 735 (Miss. Ct. App. Oct. 11, 2005).

Defendant's sentence was within the statutory limits of the crime where the indictment was accurate, given that it

plainly said that the building was a mobile home on the victim's property and charged that defendant broke into and entered the dwelling for the purpose of carrying away the property of the victim. *Triplett v. State*, 910 So. 2d 581 (Miss. Ct. App. 2005).

Inmate waived the argument that the inmate's indictment for burglary was defective due to the failure of the indictment to cite to the burglary statute, Miss. Code Ann. § 97-17-23, as this was a technical, nonjurisdictional flaw that the inmate waived with the guilty plea, and the failure to cite to the statute did not hinder the inmate's notice of the charges against the inmate. *Battaya v. State*, 861 So. 2d 364 (Miss. Ct. App. 2003).

While the offense of burglary required an intended crime after breaking and entering the dwelling, it was sufficient that the intended crime of larceny was named in the indictment and inclusion of the elements of larceny in the indictment was not required. *Webb v. State*, 877 So. 2d 399 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

An indictment for burglary stated with the requisite particularity the underlying crime or intent where the indictment charged the defendant with burglary with the intent to commit assault. *Booker v. State*, 716 So. 2d 1064 (Miss. 1998).

4. Dwelling house of another.

In a postconviction proceeding following an inmate's conviction for burglary of a dwelling, there was no plain error in the inmate's trial counsel's failure to raise the issue of whether a vacant house that belonged to a nursing home resident was a "dwelling" because there was an intent to maintain the house for dwelling purposes as shown by its listing on the real estate market; thus, the inmate was not denied effective assistance of counsel. *Sheffield v. State*, 881 So. 2d 249 (Miss. Ct. App. 2003).

The defendant's conviction for burglary of a dwelling was reversed since there was insufficient proof that the site of the burglary qualified as a dwelling where there was no evidence that the property owner ever intended to return to the property to make it his dwelling. *Pool v. State*, 764 So. 2d 440 (Miss. 2000).

The fact that the refrigerator is unplugged and the stove non-functional does not prevent a building from being classified as a dwelling. *Washington v. State*, 753 So. 2d 475 (Miss. Ct. App. 1999).

One cannot be guilty of burglarizing one's own home and, therefore, where the evidence established that the defendant entered his own home, he was entitled to a directed verdict. *Mitchell v. State*, 720 So. 2d 492 (Ct. App. 1998).

5. Sentence.

Without waiving the procedural bar to the inmate's claim that the inmate's sentence was unconstitutional, the court held that the inmate was properly charged under Miss. Code Ann. § 97-9-45 and entered a plea of guilty to the escape, and the sentence of three years was well within the maximum prescribed by the statute, which referred to prisoners sentenced to the Mississippi Department of Corrections and allowed a maximum sentence of five years, and thus the inmate was not entitled to post-conviction relief; although the inmate was in custody and on a work program for a county at the time of the escape, the inmate was considered under the Department's jurisdiction for purposes of § 97-9-45 because (1) the inmate's original burglary sentence required imprisonment in the "penitentiary" under Miss. Code Ann. § 97-17-23, which term meant any facility under the jurisdiction of the Department pursuant to Miss. Code Ann. § 47-5-3, (2) commitment to any institution within the jurisdiction of the Department was to the Department, not a particular institution pursuant to Miss. Code Ann. § 47-5-110, and (3) under Miss. Code Ann. § 47-5-541, the Department recommended rules concerning the participation of inmates in work programs. *Gardner v. State*, 848 So. 2d 900 (Miss. Ct. App. 2003).

Sixteen-year sentence for the crime of burglary of a dwelling was not grossly disproportionate. *Alston v. State*, 841 So. 2d 201 (Miss. Ct. App. 2003).

The defendant was properly sentenced under the statute, notwithstanding that the court mistakenly referred to § 97-17-19, which was repealed and combined into the statute. *Lewis v. State*, 797 So. 2d 248 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR. Sufficiency of showing that burglary was committed at night. 82 A.L.R.2d 643.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Minor's entry into home of parent as sufficient to sustain burglary charge. 17 A.L.R.5th 111.

Use of fraud or trick as "constructive breaking" for purpose of burglary or

breaking and entering offense. 17 A.L.R.5th 125.

Am Jur. 13 Am. Jur. 2d, Burglary §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 9-14 (burglary).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 10 (burglary scene).

§ 97-17-25. Burglary; breaking out of dwelling.

Every person who, being in the dwelling house of another, shall commit a crime, and shall break any outer door, or any other part of said house, to get out of the same, shall be guilty of burglary, and be imprisoned in the penitentiary not more than ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(12); 1857, ch. 64, art. 46; 1871, § 2523; 1880, § 2739; 1892, § 992; Laws, 1906, § 1069; Hemingway's 1917, § 797; Laws, 1930, § 813; Laws, 1942, § 2039.

JUDICIAL DECISIONS

1. In general.

The word "crime" in the burglary statutes includes misdemeanors as well as

felonies. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

RESEARCH REFERENCES

ALR. Burglary: outbuildings or the like as part of "dwelling house." 43 A.L.R.2d 831.

Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering. 20 A.L.R.4th 349.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Am Jur. 13 Am. Jur. 2d, Burglary § 14.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 9-14 (burglary).

CJS. 12A C.J.S., Burglary § 9, 10.

§ 97-17-27. Repealed.

Repealed by Laws, 1996, ch. 519, § 4, eff from and after passage (approved April 11, 1996).

[Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(14); 1857, ch. 64, art. 47; 1871, § 2524; 1880, § 2740; 1892, § 993; 1906, § 1070; Hemingway's 1917, § 798; 1930, § 814; 1942, § 2040]

Editor's Note — Former § 97-17-27 was entitled: Burglary; breaking inner door of dwelling at night.

§ 97-17-29. Burglary; breaking inner door of dwelling by one lawfully in house.

Every person who, being lawfully in the dwelling house of another, shall break an inner door of the same house, with intent to commit a crime, shall be guilty of burglary, and imprisoned in the penitentiary not more than ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(15); 1857, ch. 64, art. 48; 1871, § 2525; 1880, § 2741; 1892, § 994; Laws, 1906, § 1071; Hemingway's 1917, § 799; Laws, 1930, § 815; Laws, 1942, § 2041.

JUDICIAL DECISIONS

1. In general.

The word "crime" in the burglary statutes includes misdemeanors as well as

felonies. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

RESEARCH REFERENCES

ALR. Maintainability of burglary charge, where entry into building is made with consent. 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

Am Jur. 13 Am. Jur. 2d, Burglary § 21.

CJS. 12A C.J.S., Burglary §§ 7, 9, 10.

§ 97-17-31. Burglary; dwelling house defined.

Every building joined to, immediately connected with, or being part of the dwelling house, shall be deemed the dwelling house.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(16); 1857, ch. 64, art. 49; 1871, § 2526; 1880, § 2742; 1892, § 995; Laws, 1906, § 1072; Hemingway's 1917, § 800; Laws, 1930, § 816; Laws, 1942, § 2042.

JUDICIAL DECISIONS

1. In general.

2. Sufficient Evidence.

1. In general.

In a postconviction proceeding following an inmate's conviction for burglary of a dwelling, there was no plain error in the inmate's counsel's failure to raise the issue of whether a vacant house that belonged to a nursing home resident was a "dwelling" because there was an intent to maintain the house for dwelling purposes as shown by the house's listing on the real estate market; thus, the inmate was not denied effective assistance of counsel. *Sheffield v. State*, 881 So. 2d 249 (Miss. Ct. App. 2003).

A burglary of a utility shed which was connected to a house by a common roof and ceiling, with a breezeway between the two, was considered a burglary of a dwelling. *Edwards v. State*, 800 So. 2d 454 (Miss. 2001).

House remains dwelling for purposes of burglary prosecution notwithstanding lengthy stay of resident of house in nursing home, at least so long as all of resident's personal possessions remain in house and resident intends to return to house when health permits. *Course v. State*, 469 So. 2d 80 (Miss. 1985).

Prosecution for burglarizing dwelling house lies for breaking and entering of

week-end home which has been regularly used on alternate weekends for 8 years and in which food, clothing and other necessities have been left. *Gillum v. State*, 468 So. 2d 856 (Miss. 1985).

A prosecution for burglarizing a dwelling house will not lie where the complained of act is the breaking and entering of a motel room; in such a case, defendant should be indicted for breaking and entering a building other than a dwelling house. *Robinson v. State*, 364 So. 2d 1131 (Miss. 1978).

2. Sufficient Evidence.

Witness testified that defendant was one of the three individuals who were

loading the stolen items into a car at the victim's home and who fled at a high rate of speed when they spotted him; that was direct evidence that defendant was not at his grandfather's home, but rather was actively participating in the burglary. Thus, the fact that defendant was not at his grandfather's house would have been admitted through the witness's testimony, regardless of an alleged accomplice's inconsistent statement. Therefore, even without the accomplice's statement, the evidence was sufficient to support the jury verdict finding defendant guilty of burglary. *Long v. State*, — So. 2d —, 2006 Miss. App. LEXIS 192 (Miss. Ct. App. Mar. 21, 2006).

RESEARCH REFERENCES

ALR. What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle. 72 A.L.R.4th 710.

Minor's entry into home of parent as

sufficient to sustain burglary charge. 17 A.L.R.5th 111.

Am Jur. 13 Am. Jur. 2d, Burglary §§ 3-5.

CJS. 12A C.J.S., Burglary §§ 17 et seq.

§ 97-17-33. Burglary; breaking and entering building other than dwelling; railroad car; vessels; automobiles.

(1) Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

(2) Any person who shall be convicted of breaking and entering a church, synagogue, temple or other established place of worship with intent to commit some crime therein shall be punished by imprisonment in the penitentiary not more than fourteen (14) years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(17); 1857, ch. 64, art. 50; 1871, § 2527; 1880, § 2743; 1892, § 996; Laws, 1906, § 1073; Hemingway's 1917, § 801; Laws, 1930, § 817; Laws, 1942, § 2043; Laws, 1940, ch. 243; Laws, 1960, ch. 241; Laws, 1989, ch. 347, § 1; Laws, 1997, ch. 473, § 4, eff from and after passage (approved March 27, 1997).

Cross References — Crime of looting, see § 97-17-65.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. —Joinder of offenses.
4. —Allegations as to ownership.
5. —Variance between indictment and proof.
6. Evidence, generally.
7. —Of breaking and entering.
- 7.5. —Of intent.
8. —Of value.
9. —Of fingerprints.
10. —Of possession or disposition of stolen property.
11. —Of opportunity.
12. —Of prior convictions or other crimes.
13. —Confessions.
14. Questions for jury.
15. Instructions.
16. Conviction.
17. Miscellaneous.

1. In general.

A Goodwill Industries box in the parking lot of a shopping mall was a structure encompassed under this section. *Goldman v. State*, 741 So. 2d 949 (Miss. Ct. App. 1999).

Evidence is sufficient to support verdict of guilty on charge of burglary where defendant confessed to crime after having been read his Miranda rights and having signed written waiver of those rights. *Turbo Trucking Co. v. Rollins*, 511 So. 2d 148 (Miss. 1987).

Voluntary intoxication is not defense to burglary charge. *Cummings v. State*, 465 So. 2d 993 (Miss. 1985).

A prosecution for burglarizing a dwelling house will not lie where the complained of act is the breaking and entering of a motel room; in such a case, defendant should be indicted for breaking and entering a building other than a dwelling house. *Robinson v. State*, 364 So. 2d 1131 (Miss. 1978).

Under the statute defining burglary as the breaking and entering of a building with the intent to steal or commit a felony, any act of force necessary to enter, however slight, constitutes a "breaking". *Branning v. State*, 222 So. 2d 667 (Miss. 1969).

Burglary of a store building is a felony. *McCullum v. State*, 197 So. 2d 252 (Miss. 1967).

A building in process of construction and nearing completion, although designed and intended for occupancy as a dwelling house when completed, but which at the time of the burglary had not yet been occupied, was not a dwelling house in contemplation of Code 1942, §§ 2036 and 2038, and the offense could be properly charged only under Code 1942, § 2043. *Watson v. State*, 254 Miss. 82, 179 So. 2d 826 (1965).

The crime of burglary consists of two elements, (1) the burglarious breaking and entering of the house or building, and (2) the felonious intent to commit a felony therein. *Faust v. State*, 221 Miss. 668, 74 So. 2d 817 (1954).

The crime of burglary consists of two essentials elements, the burglarious breaking and entering the house and the felonious intent to commit some crime therein and it is the criminal breaking without the consent of the owner, for the purpose of taking property stored in a building that constituted the corpus delicti of burglary. *Holderfield v. State*, 215 Miss. 564, 61 So. 2d 385 (1952).

Except in cases of constructive breaking where an entry is effected by fraud or intimidation, there can be no breaking, and therefore there is no burglary where the occupant of the house, or an agent or servant having authority, expressly or impliedly invites or consents to the entry, and the fact that one who enters with the consent of the owner commits a larceny after the entry does not make him guilty of burglary. *Holderfield v. State*, 215 Miss. 564, 61 So. 2d 385 (1952).

Under this section [Code 1942, § 2043] a breaking and entering is necessary to constitute the crime of burglary. *Clanton v. State*, 211 Miss. 568, 52 So. 2d 349 (1951).

The essentials to prove the crime of burglary are a breaking and entering the building, and showing that it was done with intent to steal therein or to commit a felony. *Gross v. State*, 191 Miss. 383, 2 So. 2d 818 (1941).

By "breaking" is meant any act of force, regardless of how slight, necessary to be used in entering the building—the turning of a knob, a slight push to further open a door, the raising of a latch, or like act, being sufficient. *Gross v. State*, 191 Miss. 383, 2 So. 2d 818 (1941).

Transaction between employees of owner of premises burglarized and third person did not amount to consent to commission of the crime. *Gentry v. State*, 102 Miss. 630, 59 So. 853 (1912).

One who is let into a building by a decoy or detective in the service of an acting for the owner is not guilty of burglary. *Strait v. State*, 77 Miss. 693, 27 So. 617 (1900).

2. Indictment.

Where the original indictment identified the inmate by name and stated that he unlawfully, wilfully, feloniously, and burglariously broke into and entered a storage shed, the indictment was not defective as it tracked the language of Miss. Code Ann. § 97-17-33, and a subsequent amendment to change a section number did not require the indictment to be returned to the grand jury. *Ford v. State*, 911 So. 2d 1007 (Miss. Ct. App. 2005).

Language of the indictment explicitly mirrored the burglary statute of Miss. Code Ann. § 97-17-33, as it stated that defendant did willfully, unlawfully and feloniously break and enter a trailer having the intent to commit an assault therein and burglarize it; the language "intent to commit assault" was held to be valid in an indictment to depict the predicate crime for burglary, and it was not necessary for the State to supply the elements of assault, as it was used as the underlying intent crime of burglary. *Lancaster v. State*, 878 So. 2d 140 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1406, 161 L. Ed. 2d 196 (2005).

An indictment for burglary was adequate where it was inartfully drawn but contained all of the required words. *Harrison v. State*, 722 So. 2d 681 (Miss. 1998).

It is not necessary under the burglary statute to allege in the indictment the value of the property stolen. *Faust v. State*, 221 Miss. 668, 74 So. 2d 817 (1954).

Where an indictment charging burglary by stealing of automobile from motor com-

pany stated that the accused kept the automobile for use, transportation, deposit, sale and delivery, this did not impose upon the state the burden of proving all five purposes for which the automobile was kept. *Strickland v. State*, 220 Miss. 71, 70 So. 2d 1 (1954).

Where an indictment for burglary of store building failed to allege an intent to steal, it was fatally defective requiring reversal of conviction. *Taylor v. State*, 214 Miss. 263, 58 So. 2d 664 (1952).

Where an indictment for burglary of a store building omitted an allegation of intent to steal, the defendant's failure to demur to the indictment did not constitute waiver of his right to raise the question on his motion for a new trial and on appeal since the intent to steal was an essential element of the crime. *Taylor v. State*, 214 Miss. 263, 58 So. 2d 664 (1952).

This section [Code 1942, § 2043] does not require the indictment to state the value of the personal property intended to be stolen. *Lewis v. State*, 212 Miss. 775, 55 So. 2d 475 (1951).

Indictment charging breaking and entering a high school building, "the property of Prentiss Consolidated School District," should also have charged that the building in question was the property of the school trustees (naming them) and their successors in office, for the use and benefit of the Prentiss Consolidated School District. *Brown v. State*, 209 Miss. 636, 48 So. 2d 131 (1950).

Indictment for burglary under this section [Code 1942, § 2043] is not demurrable on ground that it does not allege what kind of money was taken, whether greenback bills, silver dollars, or good and lawful money of the United States of America. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Indictment charging that named defendant did wilfully, feloniously and burglariously break and enter storehouse of lumber company, in which goods, merchandise and other things of value were kept, the property of said lumber company, with intent of named defendant then and there to take, steal and carry away sum of \$10 in money, or value of \$10 in money, the property of said lumber company, found and kept for use and sale in said store-

house, charges crime of burglary and demurrer attacking it is properly overruled. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Indictment charging accused with feloniously and burglariously entering store and stealing and carrying away certain property "wilfully and feloniously" held not defective as failing to charge felonious intent in commission of the larceny. *Colburn v. State*, 175 Miss. 704, 166 So. 920 (1936).

Indictment charging burglary held not defective because it did not charge whether crime was committed in day or nighttime. *Colburn v. State*, 175 Miss. 704, 166 So. 920 (1936).

Indictment containing name of county in caption and charging that offense was committed in "said county and State" held to sufficiently charge that cotton house was situated in county. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

Indictment charging that defendant "did wilfully, unlawfully, feloniously and with force and arms burglariously break and enter" held sufficient as against contention that there was no verb charging action with reference to burglary. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

Indictment charging accused entered building with intent to take, steal, and carry away certain property found therein, charges burglary and will not support conviction for larceny. *Fournier v. State*, 96 Miss. 417, 50 So. 502 (1909).

An indictment under the statute is not bad because it does not pursue literally the language of the statute if the words used be synonymous with those in the statute. *Roberts v. State*, 55 Miss. 421 (1877).

3. —Joinder of offenses.

Where an indictment for burglary charged larceny not as a substantive offense but as demonstrative of burglarious intent, it was erroneous upon conviction to impose a separate sentence for larceny, and the sentence for larceny would be deleted as surplusage, without affecting the sentence for burglary. *Bullock v. State*, 222 So. 2d 692 (Miss. 1969).

Burglary and larceny may be charged in the same count of an indictment. *Brown v. State*, 103 Miss. 664, 60 So. 727 (1913).

Assault and battery committed in the house may be so joined with burglary. *Smith v. State*, 57 Miss. 822 (1880).

It is a general rule that two crimes cannot be charged in the same count of an indictment; but as an exception, larceny and burglary may be joined in a single count, and in such case the jury may acquit of burglary and convict of larceny; but if they return a general verdict of guilty, it will be regarded as a conviction of burglary alone. *Roberts v. State*, 55 Miss. 421 (1877); *Harris v. State*, 61 Miss. 304 (1883).

4. —Allegations as to ownership.

In an indictment for burglary the allegations as to ownership of the title to the building constitute surplusage, and, insofar as the burglary is concerned, the occupant of the building at the time of the burglary is the owner, and no such particularization of the description of the title of the building is required. *Taylor v. State*, 214 Miss. 263, 58 So. 2d 664 (1952).

Indictment charging ownership of building burglarized in a partnership insufficient unless names of several partners set forth. *Wright v. State*, 130 Miss. 603, 94 So. 716 (1923).

Indictment charging defendant burglarized railroad car held insufficient for not alleging ownership of the car. *State v. Ellis*, 102 Miss. 541, 59 So. 841 (1912).

It is necessary to allege the ownership of the building burglarized and to prove it as laid. *James v. State*, 77 Miss. 370, 26 So. 929, 78 Am. St. R. 527 (1900).

When a corporation is alleged to be the owner there must be proof of the existence of the corporation. Proof, however, that it is known and acting as a corporation is sufficient. *James v. State*, 77 Miss. 370, 26 So. 929, 78 Am. St. R. 527 (1900).

5. —Variance between indictment and proof.

The fact that the indictment charges an intent in the burglar to steal the property of one person and the proof shows the actual stealing of the property of another is immaterial, "if the conviction be of burglary." *Harris v. State*, 61 Miss. 304 (1883).

6. Evidence, generally.

Where defendant was convicted of burglary of a building, the trial court had not

erred in admitting certain photographs into evidence because the documents provided by the State during discovery effectively put defendant on notice of the existence of the photographs. Similarly, according to the prosecution's undisputed recollection of events, defendant was given an opportunity to view the photographs on the morning of trial. *Powell v. State*, 925 So. 2d 878 (Miss. Ct. App. 2005).

Defendant was properly convicted under Miss. Code Ann. § 97-17-33(1) where the jury could conclude that defendant broke the lock on the owner's storage shed, entered without her permission, and stole her furniture; the jury could believe the State's evidence that defendant was in possession of stolen goods, in close proximity to the house, just after the burglary occurred. *Bowie v. State*, 921 So. 2d 378 (Miss. Ct. App. 2005).

Witness testified that she saw defendant pull over to the side of the road outside the victim's hunting camp, retrieve an air conditioner from the ditch, and place the air conditioner into the trunk of the car; through that testimony, an inference was made by the jury that defendant had previously removed the air conditioner and placed it by the road for later retrieval. Thus, the evidence was sufficient to prove that defendant committed a break-in and his conviction on count I for burglary of a storehouse was appropriate. *Forkner v. State*, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Reasonable inferences from the State's evidence established that defendant and his accomplice had broken the glass door of the store, entered the store, stolen the merchandise, placed it in the back of the truck, driven away, and were making their getaway when they were fortuitously stopped for driving with a burned-out headlight. Thus, a logical inference could be made from the evidence for the jury to find that defendant had committed a breaking and entering of a store with the intent to steal, sufficient to find defendant guilty of the crime of burglary of a business. *Mann v. State*, 892 So. 2d 267 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

Evidence presented to the jury included the statement that defendant did enter the school illegally and assist others in entering the school, and it also included the testimony of a witness who was with defendant inside the school; the witness's testimony and the statement placing defendant inside the school were sufficient evidence presented to the jury for it to reasonably find defendant guilty, and defendant failed to prove that no rational jury could find him guilty on the evidence presented. *Hunter v. State*, 878 So. 2d 1066 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant of burglary because (1) all the elements of burglary, including breaking and entering and evidence from which the jury could find the necessary intent to commit a crime once inside the business, were shown by credible evidence to have occurred; (2) defendant's blood matched the samples taken from the store where the break-in occurred and the ATM machine was stolen; and (3) the only evidence weighing against that persuasive proof was defendant's own self-serving statement that he was attacked by individuals wielding broken bottles that was not corroborated by any unbiased witness or objective demonstrative evidence. *Lee v. State*, 869 So. 2d 1063 (Miss. Ct. App. 2004).

Where an officer investigating the report of a car break-in at a car lot saw defendant at the lot at 4:30 a.m., defendant fled when he approached, and a manager of the lot testified that the auto part found in defendant's pocket came from one of the cars on the lot, the evidence, despite some inconsistencies, had been sufficient to convict defendant of burglary, and his motion to set aside the jury's verdict was properly denied. *Fields v. State*, 879 So. 2d 481 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 234 (Miss. 2004).

Evidence was sufficient to convict defendant where defendant's arrest was lawful, based upon witness information and officer corroboration, and the jury could believe the State's testimony that defendant intended to commit a crime by breaking into the vehicles, even though defendant claimed that he was looking for a phone. *Jackson v. State*, 845 So. 2d 727 (Miss. Ct. App. 2003).

Where defendant was arrested near the scene of a vehicle burglary, the theft was reported soon after defendant's arrest, defendant did not conceal the stolen items when confronted by police, and defendant had no explanation for being in possession of the stereo equipment, there was sufficient evidence presented to support a conviction for automobile burglary. *Cheeks v. State*, 843 So. 2d 87 (Miss. Ct. App. 2003).

In defendant's burglary trial, the employee's identification of defendant at a later lineup was not 100 percent positive, although the employee concluded that defendant matched the suspect, and police later stopped defendant in the same area, where several burglaries had occurred, and found several speakers in defendant's car that generally matched the stolen speakers; thus, the evidence was sufficient to support the jury's verdict, and defendant's motion for a new trial was properly denied. *Coleman v. State*, 841 So. 2d 1170 (Miss. Ct. App. 2003).

Evidence was sufficient to support a conviction for auto burglary where (1) a police officer testified that he saw the defendant enter a truck in the early morning hours, (2) the defendant's coperpetrator testified that both he and the defendant entered the truck with the intent to steal a stereo system, and (3) the owner of the truck testified that he did not know the defendant and did not give him permission to enter the truck. *Hall v. State*, 760 So. 2d 817 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction, notwithstanding the defendant's denial of any involvement in the burglary at issue, where (1) the two coperpetrators implicated the defendant in the burglary, (2) a neighbor saw three people in the burglarized store, and (3) recently stolen items from the store were found at the apartment of the defendant. *James v. State*, 756 So. 2d 850 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary of a building other than a dwelling where (1) the defendant drove himself and his coperpetrator to the rear of a store, (2) the coperpetrator began to break into the store while the defendant acted as a look-out, and (3) the de-

fendant fled when the police arrived. *Henderson v. State*, 756 So. 2d 811 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary of a building other than a dwelling where (1) the activities seen and heard by an off-duty officer were the efforts necessary to push an air conditioner out of an opening onto the floor inside the building and (2) the defendant then took advantage of that opening to begin an entry into the premises for the purpose of committing a theft once inside; the fact that the defendant did not entirely succeed in his effort to enter the building was not helpful to his case as the slightest physical entry into the previously secure enclosure was sufficient to satisfy the entering component of burglary. *Henderson v. State*, 756 So. 2d 811 (Miss. Ct. App. 2000).

Evidence was sufficient to support a conviction for burglary where (1) a stolen safe and its contents were found in the defendant's bedroom five days after a restaurant was broken into, (2) having performed renovations at the restaurant, the defendant testified that he knew where the safe was located in the restaurant, (3) the defendant called inquiring about additional work at the restaurant shortly before the burglary occurred, and (4) a witness testified that she saw the defendant carrying a heavy box-shaped item into his bedroom late one night. *Smith v. State*, 749 So. 2d 1179 (Miss. Ct. App. 1999).

Evidence was sufficient to support conviction for burglary of an automobile. *Ward v. State*, 726 So. 2d 223 (Miss. Ct. App. 1998).

Evidence was sufficient to support a conviction for auto burglary where (1) the defendant's palm print was found on the victim's van near the place where entry was made, and (2) there was also forensic testimony and time proximity of relevant events which connected the defendant to the crime. *Rice v. State*, 723 So. 2d 1239 (Ct. App. 1998).

Mere support for the State's hypothesis in a case based entirely on circumstantial evidence is not enough, because the evidence must be of such quality as to rise to the level of excluding every reasonable

hypothesis other than that of guilt. *Murphy v. State*, 566 So. 2d 1201 (Miss. 1990).

Officer who arrests burglary suspect may testify at trial that suspect was arrested pursuant to outstanding arrest warrant, where no mention is made of charges upon which warrant is based. *Brown v. State*, 483 So. 2d 328 (Miss. 1986).

It is reversible error to take up major portion of burglary trial in introducing evidence of no relevance whatever to guilt of defendant. *Weaver v. State*, 481 So. 2d 832 (Miss. 1985).

Denying accused on redirect examination opportunity to explain what he meant in note to prisoner arrested with him during burglarizing of bar, was not error where any prejudicial effect which may have resulted was removed by testimony of accused at other times during trial which explained purpose of note in detail. *Standard Oil Co. v. Westmoreland*, 291 So. 2d 744 (Miss. 1974).

There was no error in permitting narcotics officer to testify about putting a transmitting "bug", or device on the person of the state witness and listening to conversation between the witness and defendant, notwithstanding contention that no evidence was offered to show that state witness consented to "bugging" or scheme to hear conversation, and the further argument that no recording was made of conversation and, in any case, it was not a confession. *Moore v. State*, 291 So. 2d 187 (Miss. 1974).

Under the decisions of this State, it is well settled that testimony of an accomplice, although entirely without corroboration, will support a verdict of conviction. *Moore v. State*, 291 So. 2d 187 (Miss. 1974).

Where a sheriff took a bottle of wine in lawful custody pending the outcome of a trial on the charge of unlawful possession of the liquor and this bottle was subject of larceny by the defendant, a showing that the defendant broke into courthouse with intent to remove the bottle would be sufficient for conviction of burglary. *Faust v. State*, 221 Miss. 668, 74 So. 2d 817 (1954).

Where seed stolen was mixed with other seed, state was not required to prove how much was stolen at particular theft, since

value of seed was not material. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

Testimony of person who early in the morning following the theft bought the seed as to statements made showing that accused had assisted in breaking into house and taking away the seed held admissible. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

Evidence held sufficient to sustain conviction. *Stokes v. State*, 138 Miss. 701, 103 So. 365 (1925).

7.—Of breaking and entering.

Appellate court reversed defendant's conviction for burglary in violation of Miss. Code Ann. § 97-17-33 as the building that defendant entered was an open, three-sided shed such that there was no actual breaking, an essential element of burglary, and there was no evidence of constructive breaking because defendant did not use deceit to gain access to the shed. *Hill v. State*, 929 So. 2d 338 (Miss. Ct. App. 2005).

Where defendant possessed stolen property within a day or two of a burglary, tried to hide the property, and offered no explanation whatsoever for having it, the inference of burglary was sufficient to support the conviction. *McQuirter v. State*, 862 So. 2d 551 (Miss. Ct. App. 2003).

Defendant's act of entering a store constituted a "breaking" even though store's front door may already have been propped open when defendant arrived, as his passage through the door was the "act or force," however slight, employed to effect an entrance. *Chaney v. State*, 802 So. 2d 113 (Miss. Ct. App. 2001).

The defendant was properly found to have constructively broken into a store where, knowing that the store was closed for business, he shrewdly gained entry by using the fabricated excuse that he was having trouble with his vehicle and needed to telephone his employer. *Genry v. State*, 767 So. 2d 302 (Miss. Ct. App. 2000).

Evidence was sufficient to show breaking and entering where the defendant and his accomplice entered a Goodwill Industries box in the parking lot of a shopping mall by crawling up a chute used for depositing donated items. *Goldman v.*

State, 741 So. 2d 949 (Miss. Ct. App. 1999).

Burglary having been established by proof of breaking and entering with felonious intent, positive proof as to the identity of an article alleged to have been stolen is not necessary; but when such article is offered in evidence, there must be proof warranting a finding that it was taken from the burglarized premises. *Lee v. State*, 236 Miss. 716, 112 So. 2d 254 (1959).

Proof showing that lock of house was broken, the door opened, and seed taken away without consent of owner, held to establish corpus delicti without showing that accused did the breaking. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

Evidence only that the lock of the door out of which accused came had been tampered with was insufficient to establish breaking and entry. *Griffin v. State*, 111 Miss. 335, 71 So. 572 (1916).

7.5. —Of intent.

Evidence was sufficient to show the defendant's intent to commit a crime after breaking into a church, notwithstanding his assertion that he broke in merely to use the telephone, where a cassette player was missing from the church and a witness testified that he saw stereo equipment in the back of the defendant's car that did not belong to a car. *Harrison v. State*, 722 So. 2d 681 (Miss. 1998).

8. —Of value.

Evidence consisting of the defendant's palm print on a vending machine in a vocational complex that was burglarized was insufficient to support a conviction for business burglary under this section, since the palm print answered only the question of identity, and there was no additional evidence establishing that the defendant was the person who unlawfully entered the building with the intent to commit a crime. *DeLoach v. State*, 658 So. 2d 875 (Miss. 1995).

9. —Of fingerprints.

A fingerprint as the sole proof of guilt in a criminal prosecution is insufficient. Fingerprint evidence must be coupled with some other evidence, especially when the fingerprint was not found at the crime

scene but on some object away from the scene. The State must corroborate the physical evidence with other proof of guilt. Thus, the evidence was insufficient to support a conviction of the defendant for burglary where a grocery store was burglarized sometime during the evening or early morning hours when the store was closed, an unidentified man was seen dropping the items stolen from the grocery store and running from a police officer at 4:00 a.m. that morning, the defendant's fingerprints were found on 3 of 6 stolen cartons of cigarettes recovered by the police department, and these cartons were generally inaccessible to the public during business hours at the grocery store. *Corbin v. State*, 585 So. 2d 713 (Miss. 1991).

Although fingerprint evidence alone will not support conviction for burglary, such evidence coupled with evidence of other circumstances tending to reasonably exclude hypothesis that print was impressed at time other than that of crime will support conviction. *Wooten v. State*, 513 So. 2d 1251 (Miss. 1987).

Evidence was sufficient to support conviction for burglary where fingerprints of defendant impressed into fresh blood lifted from both inside and outside of broken glass, thus indicating that they were left after glass was broken and not before, and defendant had injuries consistent with blood and broken glass which coincided in time with break-in, and had misrepresented to police officers his name and circumstances of his injuries. *Wooten v. State*, 513 So. 2d 1251 (Miss. 1987).

10. —Of possession or disposition of stolen property.

Mere possession of stolen articles, by itself, is not enough to convict a person for the crime of burglary. Thus, there was insufficient evidence to support a defendant's conviction for business burglary, involving the theft of chain saws from a sawmill, where the evidence showed only that the building containing the chain saws was locked at the close of business, several hours later the defendant was in the area and he came into possession of the chain saws, and that he eventually sold the chain saws, and there was no evidence, such as eyewitnesses, finger-

prints, or footprints, linking the defendant to the breaking and entering of the building. *Murphy v. State*, 566 So. 2d 1201 (Miss. 1990).

Evidence was sufficient to support guilty verdict of accessory after the fact of larceny where defendant assisted in disposition of items of personal property taken in course of burglary. *Buckley v. State*, 511 So. 2d 1354 (Miss. 1987).

Unexplained possession of property which has recently been stolen in burglary is *prima facie*, although by no means conclusive, evidence of guilt of burglary defendant. *Weaver v. State*, 481 So. 2d 832 (Miss. 1985).

There was ample testimony to sustain jury's verdict where defendant was discovered with watch identified as the make taken from burglarized store, jury could have reasonably questioned genuineness of invoices of watches introduced by the defendant, and, moreover, officers, by means of "bug" device, heard conversation between state's witness and defendant in which purchase of watch with marked money was made, and officers later found marked money on premises where conversation took place. *Moore v. State*, 291 So. 2d 187 (Miss. 1974).

11. —Of opportunity.

In a prosecution for attempted burglary, the trial court committed reversible error in allowing police officers to testify regarding evidence of another burglary found on the defendant's person at the time of his arrest for the attempted burglary where the testimony lacked any permissible probative value other than to imply that the defendant was guilty of the attempted burglary since he had apparently taken part in a prior burglary as well, the trial judge failed to conduct a probative value versus prejudicial effects test under Rule 403, Miss.R.Ev., and no limiting instruction was given to the jury regarding the testimony of the alleged prior offense. *Watts v. State*, 635 So. 2d 1364 (Miss. 1994).

The evidence was sufficient to support a conviction for burglary of a store where an eyewitness stated that he saw the defendant walk across the street from the store with 2 grocery bags and a fingerprint expert testified that the defendant's fin-

gerprints matched those lifted from the scene of the burglary. *Griffin v. State*, 607 So. 2d 1197 (Miss. 1992).

Testimony placing accused within seventeen miles of place of burglary at a cafe on direct highway to place of burglary is admissible in evidence when accused claims to have been in different city at time of burglary. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Testimony of officer describing car and its contents which officer saw on street on night of burglary near building burglarized and which he saw following afternoon in garage in another city where defendant had been placed in jail, claiming that neither he nor car had left city on night of burglary, is admissible in prosecution for burglary even though officer had no search warrant. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

12. —Of prior convictions or other crimes.

A trial court committed reversible error in admitting 2 prior burglary convictions into evidence under Rule 609(a)(2), Miss.R.Ev. in order to impeach the testimony of the defendant where the prior convictions were 7 years old, the defendant was on trial for burglary and therefore the prior convictions involved identical crimes, the defendant's testimony was crucial to the defense since he was the only defense witness, and though credibility was a central issue, burglary is not necessarily a crime affecting veracity and therefore the low probative value of the convictions on the issue of credibility did not raise the need for the evidence. *Townsend v. State*, 605 So. 2d 767 (Miss. 1992).

Allowing state to introduce in burglary prosecution evidence connecting defendant to burglary for which defendant has not being charged as reversible error. *Griffin v. State*, 482 So. 2d 233 (Miss. 1986).

13. —Confessions.

There was no physical evidence linking defendant to the burglary but the jury was provided with physical evidence connecting his accomplice to the crime. Then, the jury was told that defendant was able to identify his accomplice close to the crime scene when said identification had already been suppressed due to the viola-

tion of defendant's Fifth and Sixth Amendment rights at the time of his arrest (Miranda violation); thus, the identification testimony by the officer was unquestionably prejudicial, the prosecutor's closing argument further compounded the problem by linking the physical evidence connecting the accomplice to the crime to defendant, and the trial court committed reversible error in denying defendant's motions for a mistrial and for a new trial. *Carpenter v. State*, 910 So. 2d 528 (Miss. 2005).

Evidence was more than sufficient to support defendant's guilt for the crimes with which he was charged where the law enforcement officers stated that defendant gave incriminating statements in which he acknowledged that he had burglarized several automobiles, gave descriptions of those vehicles, and described what items he took from them. *Stewart v. State*, 879 So. 2d 1089 (Miss. Ct. App. 2004).

When accused is deprived of no constitutional right by failure of trial court to furnish, or offer to furnish, an attorney to defend him on trial in state court for burglary, trial court is not in error in admitting confession of guilt where it is done without objection on part of defendant during his trial, unless it is manifestly given under duress or is obviously untrue. *Odom v. State*, 205 Miss. 572, 37 So. 2d 300 (1948), cert. denied, 336 U.S. 932, 69 S. Ct. 747, 93 L. Ed. 1092 (1949).

Upon the trial of a defendant indicted for burglary testimony that the outer door of the building had been broken and the cash drawer therein opened, even in the absence of direct evidence that anything had been stolen, is a sufficient showing of an intent to steal and of the corpus delicti to authorize the admission in evidence of defendant's confession. *Brown v. State*, 85 Miss. 27, 37 So. 497 (1904).

14. Questions for jury.

In a prosecution for burglary under this section, the trial court did not err in denying an instruction on the lesser included offense of trespass where the defendant argued only that he was not guilty because he had permission to be on the property and that the crime charged should have been "house burglary" rather than "business burglary," and therefore no

defense was presented that he was guilty only of trespass. *Wilson v. State*, 639 So. 2d 1326 (Miss. 1994).

In prosecution for burglary by stealing of automobile the question of truth or falsity of testimony of defendant's accomplice was for jury. *Strickland v. State*, 220 Miss. 71, 70 So. 2d 1 (1954).

In prosecution for burglary and larceny, the testimony of the owner of the building was a question for the determination of the jury under proper instructions as to whether or not he had given the accused consent to enter the building. *Holderfield v. State*, 215 Miss. 564, 61 So. 2d 385 (1952).

Whether defendant confessed to burglary before or after punishment by officers was administered to him is question for jury under conflicting evidence. *Scarbrough v. State*, 204 Miss. 487, 37 So. 2d 748 (1948).

Weight of testimony of accomplice in burglary held for jury, where there was no evidence as to accused's reputation for veracity, accomplice was not impeached, and no evidence of alibi. *Brownlee v. State*, 165 Miss. 193, 147 So. 339 (1933).

In burglary prosecution, whether goods, wares, and merchandise, were kept in store for use and sale alleged, held for jury. *Osser v. State*, 165 Miss. 680, 145 So. 754 (1933).

15. Instructions.

Trial court did not err in denying defendant a jury instruction on the lesser-included offense of trespass during his trial for business burglary because if the jury had believed defendant's testimony that he was not present when a storage locker was burglarized, it would have believed that he never entered the storage locker and had not committed trespass. *Gray v. State*, — So. 2d —, 2006 Miss. App. LEXIS 52 (Miss. Ct. App. Jan. 17, 2006).

Where defendant was convicted of burglary of a building, the trial court had not erred in denying his proposed instruction on eyewitness testimony because defendant's identification and subsequent conviction did not rest entirely upon the testimony of a single witness and the State presented evidence that property stolen from the store was recovered from defendant's truck, which provided additional

independent evidence of his involvement in the crime. *Powell v. State*, 925 So. 2d 878 (Miss. Ct. App. 2005).

Portion of defendant's requested instruction on identification testimony was consistent with the Mississippi Supreme Court's ruling in *Davis v. State*, and could have been granted, but the trial court's substituted instruction did not constitute reversible error, as the trial court properly instructed jury it had to acquit defendant, unless the State proved beyond a reasonable doubt that defendant committed the burglary. *Coleman v. State*, 841 So. 2d 1170 (Miss. Ct. App. 2003).

When a defendant's requested instruction is a proper statement of the law and is the only instruction that presents his or her theory of the case, it should be granted. *Murphy v. State*, 566 So. 2d 1201 (Miss. 1990).

It was not error for trial court to submit to jury supplemental instruction which defined "breaking" element of crime of burglary, although danger that supplemental instruction might cause jury to single out and focus upon point presented in it and give it undue importance was recognized, where trial judge added to supplemental instruction sentence stating that jury was to read and consider that instruction along with other instructions. *Wright v. State*, 512 So. 2d 679 (Miss. 1987).

Burglary defendant is entitled to instruction to effect that uncorroborated testimony of accomplice should be viewed with great caution and suspicion where without testimony of accomplice there is nothing to indicate that defendant was in any way involved in burglary. *Holmes v. State*, 481 So. 2d 319 (Miss. 1985).

Testimony by defense witnesses to effect that defendant was sleeping at trailer at time of burglary with which defendant is charged, contradicting state witnesses placing defendant at scene of burglary, entitles defendant to have alibi instruction given. *Holmes v. State*, 481 So. 2d 319 (Miss. 1985).

An instruction to the jury properly setting forth the essentials of burglary as to the breaking and entering and the intent, but the personal property, the object of the intent was described as money of the

value of \$50 or more, cigarettes and a pistol was proper where the indictment did not allege or charge the value of the single article alleged to have been stolen or carried away because the indictment did allege the value of the money to be \$80 and the proof showed that at least \$50 of such money was actually stolen and carried away. *Lewis v. State*, 212 Miss. 775, 55 So. 2d 475 (1951).

Instruction that the burglary charged may be proven by circumstances, and it is not necessary to have eyewitness to deed if circumstances in evidence are sufficient to create in minds of jury belief that accused is guilty beyond reasonable doubt and to exclusion of every other reasonable hypothesis than that of guilt of accused is correct charge to jury. *Bone v. State*, 207 Miss. 868, 43 So. 2d 571 (1949).

Instruction referring to defendant and another breaking into house held not objectionable as depriving defendant of severance granted in trial, since it was proper to show who did the breaking, as each was guilty if both broke into building, or if one did it with assistance of the other. *Yates v. State*, 172 Miss. 581, 161 So. 147 (1935).

16. Conviction.

Evidence was sufficient to support defendant's burglary conviction, where the prosecution presented evidence that (1) defendant's fingerprints were found on a coin dispenser located in a restricted portion of the bank; (2) a patrolman witnessed defendant emerging from a back door of the bank at approximately 1:38 a.m.; (3) defendant was dressed in a heavy jacket and long sleeve shirt in the middle of May; (4) the point of entry was a broken glass window; (5) defendant had broken glass particles in his clothing and on his person and (6) defendant had possession of a bag of coins taken from the bank. *Williams v. State*, 919 So. 2d 250 (Miss. Ct. App. 2005).

Evidence was sufficient to convict defendant of a burglary of a high school, as two witnesses testified they heard defendant admit he had committed the burglary, and defendant's statement placed him inside the school. *Hunter v. State*, 878 So. 2d 1066 (Miss. Ct. App. 2004).

State proved that defendant entered auto repair shop with the intent to steal

valuable items inside even though no item of value was on his person when he was arrested hanging from a window of the shop's building around midnight, as the fair and logical inference to be drawn from the evidence was that defendant intended to take the valuable items since he had no other reasonable explanation for the circumstances. *Brown v. State*, 799 So. 2d 870 (Miss. 2001).

Since conspiracy and burglary are separate and distinct crimes requiring proof of different elements, a defendant did not have a double jeopardy claim based on the prosecution of these 2 crimes arising from the same incident, despite the fact that the prosecution chose to prosecute the defendant for these crimes at separate trials. *House v. State*, 645 So. 2d 931 (Miss. 1994).

A jury would have been warranted in finding the defendant guilty as an accessory after the fact to burglary or larceny, but not as a principal to burglary, where the defendant was present at the time of the burglary of a store but neither assisted nor encouraged the perpetrator of the burglary by any word or act to commit the crime. *Smith v. State*, 523 So. 2d 1028 (Miss. 1988).

Where defendant helped plan the crime, watched and stood guard while other parties did the actual breaking and entering of gasoline station, defendant was properly convicted of burglary notwithstanding he did not engage in the actual breaking. *Wilkerson v. State*, 207 Miss. 556, 42 So. 2d 745 (1949).

Judgment reciting verdict finding accused guilty of burglary, and adjudging accused guilty of burglary and larceny, held good; word "larceny" being surplusage. *Brownlee v. State*, 165 Miss. 193, 147 So. 339 (1933).

Conviction under indictment for burglary with intent to commit larceny not disturbed in absence of evidence that burglarious entry had different object. *Moseley v. State*, 92 Miss. 250, 45 So. 833 (1908).

Under indictment having two counts conviction must be referred to sufficient count and not insufficient one. *Moseley v. State*, 92 Miss. 250, 45 So. 833 (1908).

Under indictment charging burglary and larceny, verdict of "guilty as charged"

is one of guilty of burglary alone. *Dees v. State*, 89 Miss. 754, 42 So. 605 (1907).

17. Miscellaneous.

Where defendant was convicted of burglary of a building, although the prosecution violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04 for failing to provide defendant with a copy of his false pretense conviction, the error did not require reversal. Although defendant argued that the State's use of his false pretense conviction to impeach him was devastating to his credibility, the instant case was not a circumstantial one and defendant was caught in the criminal act of which he was convicted. *Powell v. State*, 925 So. 2d 878 (Miss. Ct. App. 2005).

Where defendant's sentence for burglary was the maximum, but was within the statutory limits, there was no violation of U.S. Const. amend. VIII in terms of cruel and unusual punishment, and the fact the conviction was defendant's first felony conviction was inconsequential. *Nichols v. State*, 826 So. 2d 1288 (Miss. 2002).

Where the jury was properly instructed as to the elements of burglary and grand larceny and the prosecutor did not elicit testimony specific to the statutory elements of burglary, the jury's verdict to acquit on the burglary charge and convict on the grand larceny charge was supported by the evidence. *Allen v. State*, 755 So. 2d 47 (Miss. Ct. App. 1999).

A burglary conviction is not ordinarily admissible under Rule 609(a)(2), Miss.R.Ev., as a crime involving dishonesty or false statement. *Townsend v. State*, 605 So. 2d 767 (Miss. 1992).

Records of criminal offenses are kept pursuant to § 45-27-1. The legislature of Mississippi has specifically authorized expungement of criminal offender records in limited cases-youth court cases, §§ 43-21-159 and 43-21-265; first offense misdemeanor convictions occurring prior to age 23, § 99-19-71; drug possession convictions occurring prior to age 26, § 41-29-150; purchase of alcoholic beverages by one under age 21, § 67-3-70; and municipal court convictions, § 21-23-7. Expungement of felony convictions which arose pursuant to guilty pleas are governed by § 99-15-57 which provides that

any person who pled guilty within 6 months prior to the effective date of § 99-15-26 may apply to the court for an order expunging his or her criminal records. Under §§ 99-15-57 and 99-15-26 a circuit court has the power to expunge a felony conviction pursuant to a guilty plea under certain conditions. Accordingly, a petitioner who pled guilty to the felony of burglary might have been eligible for relief pursuant to §§ 99-15-57 and 99-15-26 if his guilty plea had occurred on or after October 1, 1982, that being the earliest date to satisfy the "within 6 months prior to" March 31, 1983, requirement of § 99-15-57. However, the petitioner pleaded guilty to burglary on October 9, 1979, 3 years prior to October 1, 1982, and admitted that he did not fall within the criterion in any of the statutes authorizing expungement, and thus the trial court did not err in denying his petition for expungement. *Caldwell v. State*, 564 So. 2d 1371 (Miss. 1990).

Circuit Court was within its discretion in instructing jury that they should deliberate further after jury sent court note at 5:50 p.m. indicating that it was deadlocked; argument that court erred in failing to consider jurors' personal needs, i.e. that it was nearing supertime, was rejected. *Wright v. State*, 512 So. 2d 679 (Miss. 1987).

Sentence of 6 years was not excessive for conviction of burglary where defendant was 21 years old at time of sentence, married and had 2 children, had no prior

criminal record, co-operated with authorities, and crime was not one of violence, because sentence was within maximum penalty provided by statute for that offense. *Turbo Trucking Co. v. Rollins*, 511 So. 2d 148 (Miss. 1987).

Petitioner was subject to 7-year sentence for burglary, where the documentation presented for sentencing in the trial court indicated that he had 2 prior convictions for grand larceny and for business burglary-and had been sentenced to separate terms of one year or more in the state penal institution. *Rideout v. State*, 496 So. 2d 667 (Miss. 1986).

Where it appeared that when accused's burglary case was called he requested a continuance in order to obtain counsel, which was granted for one day, and a request for continuance made the following day for the same purpose was denied, whereupon accused was tried and convicted, accused was not deprived of due process of law guaranteed by the 14th amendment to the United States Constitution, it appearing that the accused had had ample notice of the charge made against him and ample opportunity to employ counsel to defend him if he so desired, he was a man of at least average intelligence, had cross-examined witnesses at his trial, and testimony on his behalf showed that he had a clear understanding of the case made against him. *Poole v. State*, 229 Miss. 176, 90 So. 2d 212 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1286, 1 L. Ed. 2d 1144 (1957).

RESEARCH REFERENCES

ALR. Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 A.L.R.2d 1396.

Maintainability of burglary charge, where entry into building is made with consent. 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle. 72 A.L.R.4th 710.

Am Jur. 13 Am. Jur. 2d, Burglary §§ 6, 7.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 9-14 (burglary).

3 Am. Jur. Trials, Preparing and Using Photographs in Criminal Cases § 10 (burglary scene).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 12A C.J.S., Burglary §§ 25-29.

§ 97-17-35. Burglary; possession of burglar's tools.

It is unlawful for any person to have in his possession implements, tools,

or instruments designed to aid in the commission of burglary, larceny or robbery; and on the conviction of any person thereof, he shall be punished by imprisonment in the penitentiary not exceeding five (5) years, or in the county jail not exceeding one year. The carrying concealed about one's person, or in one's baggage, implements, tools, or instruments peculiarly adapted to aid in the commission of burglary, larceny or robbery, shall be prima facie evidence of intention to use them for such purpose.

SOURCES: Codes, 1892, § 997; Laws, 1906, § 1074; Hemingway's 1917, § 802; Laws, 1930, § 818; Laws, 1942, § 2044; Laws, 1956, ch. 246.

JUDICIAL DECISIONS

1. In general.
2. What are burglar's tools.
3. Possession.
4. Evidence.
5. Sentence.

1. In general.

The elements of the offense of possession of burglary tools are as follows: (1) adaptation and design of the tool or implement for breaking and entering; (2) possession of such tools by one with knowledge of their character, and (3) a general intent to use or employ them in breaking and entering. *Pamphlet v. State*, 271 So. 2d 403 (Miss. 1972).

Although it is not necessary to show a specific intent to use the tools in a burglary, there must be evidence either that the tools have probably been recently used for the purpose of unlawfully breaking and entering or that they are about to be used for such purpose. *Pamphlet v. State*, 271 So. 2d 403 (Miss. 1972).

It is not an essential element of the crime of possession of burglary tools that any particular tool be specifically designed for the purpose of being used in a burglary, but there must be evidence from which the jury can find the intent to use them in breaking and entering. *Pamphlet v. State*, 271 So. 2d 403 (Miss. 1972).

The elements of the offense of possessing burglar's tools are adaptation for breaking and entering, possession with knowledge of their character, and a general intent to use them in breaking and entering. *Johnson v. State*, 246 Miss. 182, 145 So. 2d 156 (1962), appeal dismissed, cert. denied, 372 U.S. 702, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963).

To warrant a conviction of the possessor of articles susceptible of lawful use, it is sufficient to prove a general felonious intent, without showing an intent to commit a particular crime. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

2. What are burglar's tools.

Key question in determining whether a particular tool qualifies as a burglary tool is whether the evidence reveals circumstances from which it may be inferred beyond a reasonable doubt that the possessor intended that he or some other person use the article or articles in aid of burglary or other similar crime. *Peters v. State*, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Even tools designed for a lawful purpose can be considered burglar's tools. *Peters v. State*, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Where a bolt cutter, a long crowbar, several hammers and other crowbars together with a burglar alarm jumper were found in the automobile of the defendant, he was properly convicted of possession of burglar's tools. *McCullum v. State*, 197 So. 2d 252 (Miss. 1967).

It is not necessary that a tool or article be designed and made solely as a burglar's tool to warrant a conviction under this section [Code 1942, § 2044], if they are possessed for the purpose of committing burglary. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018,

10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

The possession of particular articles may or may not be unlawful under the statute, depending on whether the evidence reveals circumstances from which unlawful use is intended. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

3. Possession.

The possession of burglar's tools may be actual or constructive, joint or individual. Two persons may have constructive possession, or one may have actual possession and the other constructive possession. *Johnson v. State*, 246 Miss. 182, 145 So. 2d 156 (1962), appeal dismissed, cert. denied, 372 U.S. 702, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963).

Constructive possession of burglar's tools may be shown by evidence of the surrounding circumstances. *Johnson v. State*, 246 Miss. 182, 145 So. 2d 156 (1962), appeal dismissed, cert. denied, 372 U.S. 702, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963).

One riding as a passenger in an automobile may be found to be in constructive possession of burglar's tools therein, where there are indications that her presence was not temporary and her handbag contained a police badge and two loaded pistols. *Johnson v. State*, 246 Miss. 182, 145 So. 2d 156 (1962), appeal dismissed, cert. denied, 372 U.S. 702, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963).

Where the record showed that the owner had complete control and possession of the automobile, and the burglary tools, articles and instruments found therein belonged to him, mere fact that the accused was a passenger in the automobile while the tools were in the trunk thereof was insufficient to sustain his conviction for possession of burglary tools. *Newton v. State*, 232 Miss. 114, 98 So. 2d 116 (1957).

4. Evidence.

Evidence was more than sufficient to sustain defendant's conviction for posses-

sion of burglary tools where the evidence showed beyond a reasonable doubt that he possessed a crowbar knowing of its character, and that he intended to use, or had in fact used, the crowbar to burglarize county property. *Peters v. State*, 920 So. 2d 1050 (Miss. Ct. App. 2006).

Where defendant attempted to remove tires from a vehicle in a car lot at two o'clock in the morning, and police found a screwdriver and a small flashlight in his possession and a four-way lug wrench was on the ground, the evidence supported his conviction for possession of larceny tools. The State was not required to present direct testimony that defendant lacked consent to remove the tires, because possession of larceny tools did not require proof of a "taking", permissive or otherwise. *Brownlee v. State*, 912 So. 2d 1000 (Miss. Ct. App. 2005).

Burglar's tools observed by a police officer who saw them through the window of an automobile which he had stopped after receiving information which constituted probable cause that its occupants had recently engaged in a felony were properly introduced in evidence at the trial of the driver of the automobile. *McCollum v. State*, 197 So. 2d 252 (Miss. 1967).

In view of testimony that tools of this type were commonly found in the possession of burglars, the jury could find defendants guilty of possession of burglary tools where a sledge hammer, to which a cold chisel had been welded, and another tool, which could be used as a crowbar or wedge, was found in the car which the defendants were driving, and the earpiece of a walkie-talkie was found in the pocket of one of the defendants. *Corn v. State*, 250 Miss. 157, 164 So. 2d 777 (1964).

A conviction for possessing burglar's tools is warranted by proof of possession of 150 skeleton keys of various kinds, socket wrenches, loaded pistols, extra ammunition, policeman's badge, a keyhole flashlight, kid gloves, spot lights, and a stolen pistol. *Fuqua v. State*, 246 Miss. 191, 145 So. 2d 152 (1962), appeal dismissed, cert. denied, 372 U.S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963), reh'g denied, 373 U.S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963).

5. Sentence.

Where defendant was convicted for possession of larceny tools, the circuit court properly sentenced him to five years with all five suspended. His sentence was

clearly within statutory limits and not disproportionate to the crime. *Brownlee v. State*, 912 So. 2d 1000 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Propriety of specific jury instructions as to credibility of accomplices. 4 A.L.R.3d 351.

Validity, construction and application of statutes relating to burglars' tools. 33 A.L.R.3d 798.

What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Am Jur. 13 Am. Jur. 2d, Burglary §§ 74-77.

CJS. 12A C.J.S., Burglary § 78.

§ 97-17-37. Burglary; with explosives.

Any person, who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe or other secure place by the use of nitroglycerine, dynamite, gunpowder or any other explosive, shall be deemed guilty of burglary with explosives.

Any person duly convicted of burglary with explosives shall be punished by imprisonment in the state penitentiary for a term of not less than five (5) years nor more than forty (40) years.

SOURCES: Codes, 1930, §§ 819, 820; Laws, 1942, §§ 2045, 2046; Laws, 1926, ch. 176; Laws, 1940, ch. 240.

Cross References — Limitations of prosecutions generally, see § 99-1-5.

JUDICIAL DECISIONS**1. In general.**

The word "crime" in the burglary statutes includes misdemeanors as well as

felonies. *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

RESEARCH REFERENCES

ALR. What is "building" or "house" within burglary or breaking and entering statute. 68 A.L.R.4th 425.

Am Jur. 13 Am. Jur. 2d, Burglary § 21.

2 Am. Jur. Trials, Investigating Particular Crimes § 13 (safecracking).

CJS. 12A C.J.S., Burglary § 30.

§ 97-17-39. Penalties for injuring, destroying or defacing certain cemetery property, public buildings, schools or churches, or property thereof.

If any person, by any means whatever, shall wilfully or mischievously injure or destroy any of the burial vaults, urns, memorials, vases, foundations, bases or other similar items in a cemetery, or injure or destroy any of the work,

materials, or furniture of any courthouse or jail, or other public building, or schoolhouse or church, or deface any of the walls or other parts thereof, or shall write, or make any drawings or character, or do any other act, either on or in said building or the walls thereof, or shall deface or injure the trees, fences, pavements, or soil, on the grounds belonging thereto, or an ornamental or shade tree on any public road or street leading thereto, such person, upon conviction, for such offense, shall be punished as follows:

(a) If the damage caused by the destruction or defacement of such property has a value of less than Three Hundred Dollars (\$300.00), any person who is convicted of such offense shall be fined not more than One Thousand Dollars (\$1,000.00) or be imprisoned in the county jail for not more than one (1) year, or both.

(b) If the damage caused by the destruction or defacement of such property has a value equal to or exceeding Three Hundred Dollars (\$300.00), any person who is convicted of such offense shall be fined not more than Five Thousand Dollars (\$5,000.00) or be imprisoned in the State Penitentiary for up to five (5) years, or both.

SOURCES: Codes, 1880, § 2978; 1892, § 989; Laws, 1906, § 1065; Hemingway's 1917, § 793; Laws, 1930, § 809; Laws, 1942, § 2035; Laws, 1989, ch. 451, § 1, eff from and after July 1, 1989.

Cross References — Powers of board of supervisors over courthouse and jail, see §§ 19-3-41, 19-7-23.

Responsibility of sheriff for courthouse and jail, see §§ 19-25-69, 19-25-71, 47-1-49, 47-1-51.

Crime of looting, see § 97-17-65.

Malicious mischief, see § 97-17-67.

Federal Aspects — Native American Graves Protection and Repatriation Act, P. L. 101-601, 25 USCS § 3001 et seq.

RESEARCH REFERENCES

ALR. Liability for desecration of graves and tombstones. 77 A.L.R.4th 108.

Am Jur. 52 Am. Jur. 2d, Malicious Mischief § 11.

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 54 C.J.S., Malicious or Criminal Mischief or Damage to Property § 9, 10.

§ 97-17-41. Grand larceny; second or subsequent offense of felonious taking of motor vehicle; penalties.

(1) Every person who shall be convicted of taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars (\$500.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years; or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both. The total value of property taken and carried away by the person from a single victim shall be aggregated in determining the gravity of the offense.

(2) Every person who shall be convicted of taking and carrying away, feloniously, the property of a church, synagogue, temple or other established place of worship, of the value of Five Hundred Dollars (\$500.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years, or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(63); 1857, ch. 64, art. 190; 1871, § 2652; 1880, § 2901; 1892, § 1173; Laws, 1906, § 1251; Hemingway's 1917, § 981; Laws, 1930, § 1009; Laws, 1942, § 2240; Laws, 1966, ch. 359, § 1; Laws, 1992, ch. 380, § 1; Laws, 1993, ch. 337, § 1; Laws, 1996, ch. 544, § 2; Laws, 1997, ch. 473, § 5; Laws, 2003, ch. 499, § 1; Laws, 2004, ch. 526, § 7, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment added the last sentence in (1).

Cross References — Crime of looting, see § 97-17-65.

Theft of credit cards, see § 97-19-13.

Application of this section to the penalty for a conviction of shoplifting merchandise with a stated price exceeding two hundred and fifty dollars, see § 97-23-93.

Limitations of prosecutions, generally, see § 99-1-5.

Description of property in indictments for larceny, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Larceny.
3. Obtaining by false pretenses.
4. Embezzlement.
5. Possession of stolen property distinguished from larceny.
6. Intent.
7. Asportation.
8. Subjects of larceny.
9. Lost property.
10. Assisting thief.
11. Successive larcenies.
12. Indictment.
13. —Variance between indictment and proof.
14. Evidence.
15. —Sufficiency.
16. Inference from possession of stolen property.
17. Instructions, generally.
18. —Intent.
19. —Circumstantial evidence.
20. —Lesser included offense.
21. —Evidence of trespass.
22. —Possession of stolen property.
23. Verdict.
24. Sentence and punishment.
25. Miscellaneous.

1. In general.

One who sells property of another in his possession, believing it to be his own, is not guilty of larceny. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

In the absence of statutory modifications, it is essential to every larceny that there be a felonious or fraudulent taking, accompanied by the carrying away or asportation by one person of the personal goods of property of another which may be the subject of larceny and such taking must be without the consent and against the will of the owner involving a trespass to latter's possession or its equivalent, and with the felonious intent on the part of the taking existing at the time of the taking, to steal the same. *Smith v. State*, 214 Miss. 453, 59 So. 2d 74 (1952); *Simmons v. State*, 208 Miss. 523, 44 So. 2d 857 (1950).

Where the defendant borrowed a shotgun with the promise to return it the next morning, but did not return it and informed the prosecuting witness that the gun was lost and the defendant promised to buy a new one but never did so, the evidence was insufficient to sustain a conviction of larceny. *Smith v. State*, 214 Miss. 453, 59 So. 2d 74 (1952).

Where hotel maid while cleaning guest's room found guest's wallet containing money under pillow and took it with her to her sister's home when she went off duty, jury was warranted in finding that the trespass, which is an essential element of the crime of larceny, was committed when the defendant concluded to take the property of the guest away from the hotel in disobedience of her instructions to report it either to the manager or the housekeeper. *Harris v. State*, 207 Miss. 241, 42 So. 2d 183 (1949).

There is no offense where owner consents to conversion. *Foster v. State*, 123 Miss. 721, 86 So. 513 (1920).

Selling property which the seller knows not to belong to him and appropriating the proceeds to his own use is not necessarily larceny, a felonious taking is necessary. *Watkins v. State*, 60 Miss. 323 (1882).

2. Larceny.

Under state's evidence showing that the defendant was present, aiding, abetting and participating in the theft of a combine, he should have been charged with grand larceny, and his conviction of receiving stolen property was improper, requiring reversal. *Hentz v. State*, 489 So. 2d 1386 (Miss. 1986).

When a person, even an agent of the owner, takes possession of property with the unlawful intent to feloniously convert the property to his own use at the time he acquires possession, he is guilty of larceny and not embezzlement. *Mahfouz v. State*, 303 So. 2d 461 (Miss. 1974).

In a prosecution for the theft of certain cattle, defendant's co-indictee, the cattle manager and employee of the partnership owning the cattle who could only make sales for partnership upon authorization of one of the partners, was a mere caretaker with custody of the property, and the offense charged was grand larceny as contrasted with embezzlement. *Mills v. State*, 231 Miss. 641, 97 So. 2d 386 (1957).

Where the possession of personal property is fraudulently obtained, there being no intention on the part of the owner that ownership or legal title should thereby pass, and the person who obtained possession intends to deprive the owner of the property, and in pursuance of such intent does deprive the owner thereof, the of-

fense is larceny. *Conn v. State*, 228 Miss. 833, 89 So. 2d 840 (1956).

A servant or employee who feloniously appropriates to his own use property of his master or employer to which he has access only by reason of mere physical propinquity as an incident of his employment, and not be reason of any charge or oversight over the property entrusted to him, commits the offense of larceny. *Jackson v. State*, 211 Miss. 828, 52 So. 2d 914 (1951).

Larceny is the taking and carrying away from any place, at any time, of the personal property of another without his consent, by a person not entitled to possession thereof, feloniously with the intent to deprive the owner of his property permanently and to convert it to the use of the taker or of some person other than the owner. *Jackson v. State*, 211 Miss. 828, 52 So. 2d 914 (1951); *Crouse v. State*, 229 Miss. 15, 89 So. 2d 919 (1956).

Obtaining and keeping of money under practice known as "pigeon-dropping", victim delivering money of his own to pretended finder of large sum to establish right to participate in division of money found, constitutes crime of grand larceny instead of obtaining money under false pretenses. *Garvin v. State*, 207 Miss. 751, 43 So. 2d 209 (1949).

The crime of grand larceny was complete where defendant and others induced the complaining witness to part with \$1,500 for the purpose of changing it into bills of larger denominations by a chemical process, upon the promise to return the identical money used together with a sum of money as a profit for its use, and upon receiving such money defendant disappeared with it, as against the contention that the complaining witness's money was taken in his presence and with his consent and therefore there was no larceny. *Ware v. State*, 186 Miss. 533, 191 So. 678 (1939).

One who unlawfully takes another's personal property not intending to steal, but who afterward converts it to his own use intending to steal, is guilty of larceny. If the original taking were lawful the rule is different. *Beatty v. State*, 61 Miss. 18 (1883).

But if a person by fraudulent means obtains possession of goods even with the

owner's consent with the felonious intent to deprive the owner of them and do in fact deprive him of his property, it is larceny. *Watson v. State*, 36 Miss. 593 (1859).

3. Obtaining by false pretenses.

If possession of property is obtained by fraud and the owner intends to part with his title as well as his possession, the crime is that of obtaining property by false pretenses, provided the means by which it is acquired comply therewith, but the possession of property if fraudulently obtained with present intent on the part of the person obtaining it to convert the property to his own use, and the owner intends to part with possession merely and not with the title, the offense is larceny. *Wilkinson v. State*, 215 Miss. 327, 60 So. 2d 786 (1952).

When personal property is fraudulently obtained under such circumstances that owner intends that no title shall pass, offense is grand larceny, but when he intends that ownership or legal title shall pass the offense is that of obtaining money under false pretenses. *Garvin v. State*, 207 Miss. 751, 43 So. 2d 209 (1949).

4. Embezzlement.

Embezzlement is the wrongful appropriation or conversion of property where the original taking was lawful, or with the consent of the owner, while in larceny the taking involves a trespass, and a felonious intent must exist at the time of such taking. *Jackson v. State*, 211 Miss. 828, 52 So. 2d 914 (1951).

5. Possession of stolen property distinguished from larceny.

One who receives stolen car from thief, knowing it was stolen, and after assuring thief that if he would steal and bring him a good car defendant would receive and pay for it, is not guilty of larceny but of receiving stolen goods. *Harper v. State*, 207 Miss. 733, 43 So. 2d 183 (1949).

6. Intent.

Defendant's taking of a tiller from the hardware store without paying for it and his delivering the tiller to his father for one-hundred dollars was proof that defendant had the intent to permanently deprive the owner of the property. *Berry v.*

State, 754 So. 2d 539 (Miss. Ct. App. 1999).

In a prosecution for grand larceny arising from the erroneous issuance of a \$13,860 check to the defendant, the defendant's wrongful possession occurred when the corporation that issued the check realized the error and made demand for the property, and the requisite intent to wrongfully keep the property developed at that time since the defendant did not thereafter return it. *State v. Smith*, 652 So. 2d 1126 (Miss. 1995).

The specific intent to deprive the owner of his property wholly and permanently is a necessary ingredient of larceny; the taking of property with the intention of using it temporarily and with no intention of depriving its owner permanently is not larceny. *Slay v. State*, 241 So. 2d 362 (Miss. 1970).

Where the defendant admitted the wrongful taking of an automobile from a motor company lot, but claimed that he intended only to drive it around that night and then return it, and it was shown that he drove it only within the city limits even after he was given a ticket for driving without a license and tag, such evidence precluded a conviction of grand larceny, but rather indicated an act of trespass less than larceny, since it did not appear that the defendant intended to deprive the owner permanently. *Slay v. State*, 241 So. 2d 362 (Miss. 1970).

Felonious intent is not negated by abandonment of property when the owner appeared and made no attempt to repossess it after he left. *Mapp v. State*, 248 Miss. 898, 162 So. 2d 642 (1964).

Larcenous taking must be *animo furandi*, that is, there must be intent permanently to deprive owner of his property. *Hubbard v. State*, 41 So. 2d 1 (Miss. 1949).

7. Asportation.

Removal from one part of the owner's premises to another is a sufficient asportation. *Mapp v. State*, 248 Miss. 898, 162 So. 2d 642 (1964).

An asportation or carrying away of the property is an essential element of the crime. A bare removal from the place where the goods are found is sufficient.

Alexander v. State, 60 Miss. 953 (1883);
Williams v. State, 63 Miss. 58 (1885).

8. Subjects of larceny.

Failure of owner's son-in-law and employee to return automobile with which he had been entrusted, constitutes embezzlement but not larceny. Peerless Ins. Co. v. St. Laurent, 247 Miss. 134, 154 So. 2d 135 (1963).

Where two butane gas heaters were placed in the auditorium of the church and they were bolted or screwed on to the pipes which had been run under and through the floor and which carried gas, the gas heaters were not fixtures and defendant was properly indicted under this section [Code 1942, § 2240] instead of Code 1942, § 2246, which deals with larceny of fixtures. Garrett v. State, 213 Miss. 328, 56 So. 2d 809 (1952).

Contraband liquor may be the subject of larceny. Passons v. State, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other grounds, Simmons v. State, 568 So. 2d 1192 (Miss. 1990).

A deed to land is the subject of larceny under Code 1892, §§ 1173, 1174, 1513. State v. Hughes, 80 Miss. 609, 31 So. 963 (1902).

9. Lost property.

One who fraudulently claims an estray from the person taking it up for lost property from the finder may be convicted of larceny. Wilkinson v. State, 215 Miss. 327, 60 So. 2d 786 (1952).

Where an accused urges employer to falsely represent to possessor of stray cattle that such cattle belong to the employer and to thereby obtain possession and sell such cattle and share the proceeds of the sale, he was properly prosecuted under the grand larceny statute. Wilkinson v. State, 215 Miss. 327, 60 So. 2d 786 (1952).

One who falsely impersonates another and in such assumed character receives property intended for such other person, is guilty of larceny if he does so with the requisite felonious intent, provided the transaction does not involve the passing of title to the property from the owner to him. Wilkinson v. State, 215 Miss. 327, 60 So. 2d 786 (1952).

A pressing shop employee who, finding a diamond bar pin lying loose in the bottom

of a clothes basket, laid it aside in some place other than the desk in the office, and, the owner not having claimed it in two or three weeks, disposed of it to a pawnbroker, was not guilty of "larceny," it appearing that he had not relinquished the custody and control of the pin while it remained in the pressing shop, and it not being shown that he knew who was the owner of the pin or that he had any immediate means of ascertaining who the owner was with any reasonable degree of certainty. Calhoun v. State, 191 Miss. 82, 2 So. 2d 802 (1941).

10. Assisting thief.

One who steals property, or who is accessory before fact to grand larceny cannot be convicted of receiving, concealing, or aiding in concealing, the property stolen. Thomas v. State, 205 Miss. 653, 39 So. 2d 272 (1949).

One who drives his car to seed house door after midnight, assists in loading fertilizer in car after two other persons have unlocked door, entered seed house and brought fertilizer to door, and is actually present, aiding, abetting, and participating in theft of fertilizer, is a principal guilty of larceny and not of receiving stolen property. Thomas v. State, 205 Miss. 653, 39 So. 2d 272 (1949).

One aiding and assisting thief in making away with property after knowledge that it is stolen guilty of "larceny." Devine v. State, 132 Miss. 492, 96 So. 696 (1923).

11. Successive larcenies.

Defendant was not subjected to double jeopardy as while the two grand larceny offenses were committed closely in time and against the same victim, the record reflected that the offenses had occurred at different times, in different locations, and arose from separate acts. Hughery v. State, 915 So. 2d 457 (Miss. Ct. App. 2005).

Two entries into church, taking 2 heaters from church each time, which are for primary purpose of stealing 4 heaters, are single continuous transaction for purposes of grand larceny prosecution. Ellis v. State, 469 So. 2d 1256 (Miss. 1985).

Evidence that the accused, charged with stealing 10 sacks of dairy feed at a total value of \$35, took the feed, one sack

at a time, from the owner's barn by wheelbarrow, and the transportation in this manner was a continuous, consecutive operation, was sufficient to sustain a grand larceny conviction as against the accused's contention that he could not be guilty of that crime since the proof showed, at most, that he took and carried away only one sack of feed at a time, worth only \$3.50. *Barnes v. State*, 230 Miss. 299, 92 So. 2d 863 (1957).

Several petty larcenies cannot be consolidated so as to constitute grand larceny, but where the several takings are one continuous transaction it constitutes grand larceny. *Dodson v. State*, 130 Miss. 137, 93 So. 579 (1922).

Where this is one continual transaction, the thief may be convicted of the final carrying away although there may have been several distinct asportations, but where there are successive larcenies each complete and distinct and not constituting one continuing transaction, the mere retention and possession by the thief of the fruits of his petit larcenies do not make him guilty of grand larceny. *Scarver v. State*, 53 Miss. 407 (1876).

There is no presumption that various articles found in defendant's possession were all stolen at one time. *Scarver v. State*, 53 Miss. 407 (1876).

12. Indictment.

Where the inmate asserted that the sentence on the charge of grand larceny under Miss. Code Ann. § 97-17-41 was illegal because no indictment on that charge was ever returned before the inmate pled guilty to it, the claim failed, as the inmate waived the right to an indictment in writing and in open court. *Battaya v. State*, 861 So. 2d 364 (Miss. Ct. App. 2003).

An indictment charging grand larceny for the removal of flowers from a grave was not fatally flawed even if it incorrectly named the owner of the flowers where the indictment specified the date of the theft, the property taken, and the location from which it was taken, and was therefore sufficient to put the defendants on notice of the crime charged and to prevent subsequent prosecution for the same incident. *Cooper v. State*, 639 So. 2d 1320 (Miss. 1994).

A defendant convicted of a single charge of grand larceny could not successfully complain because he had been charged in a multi-count indictment which in addition to the grand larceny charge also charged him with conspiracy to commit grand larceny, and a further charge that he was a recidivist in that he had previously been convicted of four separate felonies. *Perkins v. State*, 487 So. 2d 791 (Miss. 1986).

An indictment charging the theft of 34 bundles of roofing of the total value of \$103.70 is not vague or indefinite. *Murray v. State*, 266 So. 2d 139 (Miss. 1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1534, 36 L. Ed. 2d 196 (1973), reh'g denied, 411 U.S. 959, 93 S. Ct. 1929, 36 L. Ed. 2d 419 (1973).

An indictment incorrectly charging that the grand larceny was committed on November 14, 1968, while the evidence showed that it was actually committed on August 16, was not insufficient where the defendant was not surprised or prejudiced by testimony that the offense occurred on August 16, and in fact offered testimony of alibi for both dates. *Deaton v. State*, 242 So. 2d 452 (Miss. 1970).

An indictment under this section [Code 1942, § 2240] must allege the value of the property charged to have been stolen. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

Where accused had allegedly stolen property in another state and transported it into Mississippi, the indictment must aver the larceny took place in the county where accused is found possessing it, if he is to be tried there. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

An indictment charging that the accused stole 10 sacks of dairy seed of the value of \$3.50 each, the total value of \$35, the personal property of another, was sufficient, without specifying the different types of grain, or other elements, and a percentage of each, composing the dairy feed. *Barnes v. State*, 230 Miss. 299, 92 So. 2d 863 (1957).

An indictment for grand larceny containing an incongruous description of the cow allegedly stolen if defective should have been availed of by demurrer and such defect could not be raised for first

time on appeal. *Clark v. State*, 39 So. 2d 783 (Miss. 1949), error overruled, 206 Miss. 701, 40 So. 2d 591 (1949).

An indictment for larceny should describe the property alleged to have been taken with reasonable certainty, so that the description will enable the court to determine that the property in question is the subject of larceny, show the jury that such property is that upon which the indictment is founded, reasonably inform the accused of the instance meant in conformity with the constitutional guaranty in that respect so that he may properly prepare his defense, and be such that the judgment rendered after trial upon the indictment may be pleaded in bar of a subsequent prosecution for the same offense. *Rutherford v. State*, 196 Miss. 321, 17 So. 2d 803 (1944).

While Code 1942, § 2459 provides the exception as to descriptions of property in indictments for larceny by allowing the same to be described in general terms where the charge is for larceny of money or evidences of debt, the chapter on criminal procedure does not otherwise abrogate the common-law rule requiring the description of personal property in an indictment for larceny to be reasonably definite and certain. *Rutherford v. State*, 196 Miss. 321, 17 So. 2d 803 (1944).

Indictment in grand larceny prosecution charging defendant with theft of "a quantity of clover seed," of the value of "more than \$25 in lawful money," was so vague, uncertain and indefinite as to give defendant no intimation regarding amount of clover seed which he was accused of stealing and was subject to demurrer. *Rutherford v. State*, 196 Miss. 321, 17 So. 2d 803 (1944).

An indictment charging the defendants with the theft of three suits of clothes, but separately stating each suit and its respective value of \$15 without charging the total amount, was not objectionable as failing to charge a felony, since necessarily the taking and stealing of separate suits of the separate value of \$15 each aggregated \$45 and constituted grand larceny. *Harvey v. State*, 188 Miss. 428, 194 So. 925 (1940).

If the indictment charge that the accused stole "a mule," it will not be bad

because it does not aver that the mule was "personal" property. *Jones v. State*, 51 Miss. 718, 24 Am. R. 658 (1875).

Where chattels are stolen in one county and carried into another, the indictment in the latter should charge the larceny to have been committed there. *Johnson v. State*, 47 Miss. 671 (1873).

13. —Variance between indictment and proof.

Case remanded for sentencing on grand larceny where the State failed to prove every element of the indictment for robbery, but did prove all the elements of the lesser-included offense of grand larceny. *Clayton v. State*, 759 So. 2d 1169 (Miss. 1999).

In a prosecution for grand larceny, where the testimony showed that a common carrier had the property involved in its possession for transportation from consignors to consignees who were the owners of the property, the freight line was a common carrier bailee in rightful possession of the property and there was no fatal variance between the proof and the indictment charging that the articles of personal property alleged to have been stolen were the property of the common carrier. *Mahfouz v. State*, 303 So. 2d 461 (Miss. 1974).

Variance between allegation of indictment that animal allegedly stolen was "white," whereas proof showed it was white with small yellow and brown spots was held not a material variation especially in view of testimony that the yearling was of a breed known as "white cattle." *Clark v. State*, 39 So. 2d 783 (Miss. 1949), error overruled, 206 Miss. 701, 40 So. 2d 591 (1949).

14. Evidence.

Evidence was competent to sustain a grand larceny conviction where the State proved that the value of the stolen desk was more than \$250 where the item was purchased for substantially more than \$250; since the property in question tended not to decline in value, the fact that the victim's husband paid more than \$250 was credible evidence that would support a grand larceny conviction. *Thompson v. State*, 910 So. 2d 60 (Miss. Ct. App. 2005).

From testimony presented, there was sufficient evidence for the jury to resolve any conflicts in favor of the State and find defendant guilty of grand larceny; the owner of the stolen carburetor testified that it was worth at least \$1000 and that he had to buy a used carburetor for \$400 to replace the stolen one. *Nelson v. State*, 839 So. 2d 584 (Miss. Ct. App. 2003).

An unlawful taking may be established by circumstantial evidence, such as subsequent conduct. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

Whether defendant's explanation of how he came into possession of property charged to have been stolen sufficiently disproves an intent to steal, is for the jury, save where the evidence fails to establish such intent beyond a reasonable doubt. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

In a grand larceny prosecution, admission of testimony of a witness, who had been indicted for receiving property involved in the theft, which was not contradicted, was not improbable, and was reasonable, was not error, even though the witness testified that he had an agreement with the state that if he told the truth the charges against him would be dropped. *Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957).

Where the sheriff, in testifying, had attributed to the accused statements which were admissions of fact pertinent to the issue which, in connection with other facts, tended to prove accused's guilt, the trial court committed reversible error in refusing to permit the accused to either show by the sheriff that the accused had denied the crime or to show the entire statement, upon the ground that any explanation of the statement made by the accused to the sheriff would be self-serving. *Davis v. State*, 230 Miss. 183, 92 So. 2d 359 (1957).

Although consisting of a mixed statement of fact and opinion, the admission of testimony of an expert, who made plaster casts of the tire tracks of the truck used in the larceny, as to distinguishing marks in the tracks and tire cast was not reversible error. *Crouse v. State*, 229 Miss. 15, 89 So. 2d 919 (1956).

In prosecution for the crime of "pigeon dropping" which under this section [Code

1942, § 2240] is larceny, the trial court was not in error in permitting the state to reopen the case in order to more clearly prove the victim's ownership of the money which has been taken from her, where the defendant was offered opportunity to present any further testimony she might desire. *Lewis v. State*, 56 So. 2d 397 (Miss. 1952).

In prosecution for grand larceny, when every essential element except intent is shown by evidence, intent may be inferred from circumstances surrounding taking, i.e., that it occurred under cover of darkness and that after the asportation the property was concealed. *Simmons v. State*, 208 Miss. 523, 44 So. 2d 857 (1950).

Where corpus delicti, in prosecution for larceny, is shown by preponderance of evidence, confession of defendant is admissible in evidence, and if confession coupled with proof of corpus delicti aliunde shows corpus delicti beyond reasonable doubt it is sufficient. *Simmons v. State*, 208 Miss. 523, 44 So. 2d 857 (1950).

Testimony of the manager of a stock yard as to the price paid for a yearling was admissible where the price coincided with the price admittedly received for a stolen yearling. *Davis v. State*, 200 Miss. 514, 27 So. 2d 769 (1946).

An agreement for the entry of a plea of guilty at a former term, which the evidence showed was induced by a promise of leniency, was incompetent as evidence against one accused of grand larceny. *Elliot v. State*, 185 Miss. 381, 189 So. 796 (1939).

On trial of trustee for larceny in taking portion of mortgaged goods he may testify as to what authority he had for his alleged unlawful act. *Guthrie v. State*, 47 So. 639 (Miss. 1908).

Where defendant denied having stolen money and it was found on him, he will not be permitted to testify in explanation as to what he told others or they told him. *Lohrey v. State*, 91 Miss. 853, 45 So. 145 (1907).

15. —Sufficiency.

Defendant's conviction for grand larceny in violation of Miss. Code Ann. § 97-17-41 was reversed; the fact that defendant had asked the victim for money and then later had over \$600 to buy a key-

board was insufficient to prove that defendant stole the victim's money from his car, especially where the victim had left the money in his car for several hours with the car doors unlocked and the car windows rolled down. *Hobbs v. State*, — So. 2d —, 2006 Miss. App. LEXIS 248 (Miss. Ct. App. Apr. 4, 2006).

Victim's father testified that he had paid between \$ 3,000 and \$ 4,000 for the truck rims; although this was not direct testimony as to the value of the rims, it circumstantially provided a basis for the jury to infer that the rims were worth at least \$ 250; defendant's conviction for attempt to commit grand larceny was therefore appropriate and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. *Smith v. State*, 881 So. 2d 908 (Miss. Ct. App. 2004).

State's theory of the case was that defendant and the driver of the car that pulled into the victim's driveway had engaged in a prior conspiracy to steal the victim's truck rims, but there was no evidence of a "union of the minds" of defendant and the driver because the evidence showed that (1) when the car pulled into the driveway, defendant ran and hid behind the house and, clearly, if the two parties had been acting in concert, defendant would have recognized his co-conspirator and not hid; (2) defendant left on foot and not in the car, even though the car was still in the driveway; and (3) although the rims were removed from the truck, defendant made no attempt to put them into the car that was in the driveway; thus, although the appearance of the car in the victim's driveway was somewhat puzzling, a finding that its appearance was due to the furtherance of a conspiracy to steal the rims off of the truck would be an impermissible stretch. Therefore, the evidence was insufficient to support defendant's conviction for conspiracy to commit grand larceny. *Smith v. State*, 881 So. 2d 908 (Miss. Ct. App. 2004).

Evidence was sufficient to convict defendant where defendant's explanation for having the stolen tank was neither reasonable nor credible, especially given that his passenger, whom he claimed was help-

ing, was highly intoxicated at the time of the stop. *Ray v. State*, 864 So. 2d 1031 (Miss. Ct. App. 2004).

Circumstantial evidence that defendant was one of only three people who knew that his mother kept a locked safe in her home and the combination to the safe, that someone used the combination to open the safe and steal cash and other items, that defendant had been in the house while his mother was on an overnight trip, and that defendant had gambled at a riverboat casino on the night of the theft despite not having worked in approximately one month, excluded every reasonable hypothesis except that defendant had committed the theft; evidence was therefore sufficient to support conviction. *Cates v. State*, 823 So. 2d 1229 (Miss. Ct. App. 2002).

Where the jury was properly instructed as to the elements of burglary and grand larceny and the prosecutor did not elicit testimony specific to the statutory elements of burglary, the jury's verdict to acquit on the burglary charge and convict on the grand larceny charge was supported by the evidence. *Allen v. State*, 755 So. 2d 47 (Miss. Ct. App. 1999).

Evidence was sufficient to establish that the value of the property taken by the defendant was at least \$250 and, therefore, to sustain his conviction for grand larceny where the least value of the amount of money contained in the victim's purse found in the record was \$342, the amount which a deputy sheriff testified that the victim told him when he went to her home in response to her telephone call to the police and where the court's analysis of the victim's testimony indicated that her estimate that \$400 in cash was in her billfold before she paid for the propane gas was consistent with her description of the bills she paid before she returned home with the defendant. *Millender v. State*, 734 So. 2d 225 (Miss. Ct. App. 1999).

Testimony of deputy sheriff and member of church that heaters stolen from church were worth about \$150-\$200 each, which evidence is contradicted by by defense testimony that heaters were worth only \$35-\$40 each, is sufficient for jury to find that value of items allegedly stolen was in excess of \$100. *Ellis v. State*, 469 So. 2d 1256 (Miss. 1985).

In a prosecution for larceny arising out of a "pigeon dropping" scheme, the evidence was sufficient to uphold the verdict where the victim positively identified the defendant and where the defendant's alibi witnesses had not actually seen the defendant during the morning of the crime but had only allegedly spoken to her over the telephone. *Baker v. State*, 396 So. 2d 1021 (Miss. 1981).

Testimony of the owner of 200 stolen quail and of an accomplice of the defendant was sufficient to establish the value of the quail at \$1 each, or a total value in excess of the necessary \$100 to constitute grand larceny. *Deaton v. State*, 242 So. 2d 452 (Miss. 1970).

Evidence held to support conviction of larceny of hog by person not able to give satisfactory account of its possession. *Wilson v. State*, 237 Miss. 294, 114 So. 2d 677 (1959).

In a prosecution for larceny of property in another state and brought into Mississippi, conviction was supported by evidence that accused was in the apartment where the property was located at time the owner left for work, and when the owner returned neither accused nor property was there, possession of the property by accused two days later hundreds of miles away, together with accused's explanation of the admitted taking of the property, which explanation was neither reasonable nor credible. *Coggins v. State*, 234 Miss. 369, 106 So. 2d 388 (1958).

A conviction for grand larceny resting largely upon the testimony of an alleged accomplice, which was without substantial corroboration, was against the overwhelming weight of the evidence where the defendant's evidence included the court records of a justice of the peace court showing that the defendant, at about the time the crime was committed, had been arrested for speeding and reckless driving at a place approximately 140 miles from the scene. *Boyce v. State*, 231 Miss. 847, 97 So. 2d 222 (1957).

Where testimony by the sheriff and the owner of the stolen property about the finding of the stolen property upon defendant's premises was incompetent because the search was made without warrant, evidence as to the tracks left at the scene

of the theft and their comparison with the tracks made by defendant's truck was insufficient to sustain conviction, especially in view of testimony by defendant and his wife that defendant's son had borrowed the truck on the night of the theft, and that defendant had nothing to do with or knowledge of, the theft. *Holder v. State*, 230 Miss. 792, 93 So. 2d 841 (1957).

Testimony of dairy feed owner, who was experienced with dairy feed and its component parts, that he was owner of the ingredients that went into the finished product, detailing the nature, percentages and values of the different ingredients, and that the value of the 10 sacks of feed, which the accused was charged with stealing, was \$35 was sufficient to show that the value of the stolen property was worth as much as \$25. *Barnes v. State*, 230 Miss. 299, 92 So. 2d 863 (1957).

Circumstantial evidence which gave rise to a number of reasonable hypotheses as to what might have become of the prosecuting witness's billfold, other than the accused taking it, was not sufficient to sustain the accused's conviction of grand larceny. *Williamson v. State*, 229 Miss. 305, 90 So. 2d 657 (1956).

In prosecution for grand larceny where evidence showed that the accused received money for the purpose of changing it into bills of larger denomination by a chemical process, after which he was to return the identical money used together with a sum of money as a profit for its use and accused did not return the money, there was guilt of grand larceny effected by fraud. *Jones v. State*, 223 Miss. 812, 79 So. 2d 273 (1955), appeal dismissed, cert. denied, 350 U.S. 869, 76 S. Ct. 116, 100 L. Ed. 770 (1955), reh'g denied, 350 U.S. 919, 76 S. Ct. 192, 100 L. Ed. 805 (1955).

In a prosecution for larceny the state must prove ownership of stolen property as alleged in the indictment beyond a reasonable doubt. *Bester v. State*, 222 Miss. 706, 77 So. 2d 270 (1955).

In grand larceny prosecution where the owner testifies that he had not given anyone permission to take property that was sufficient proof of lack of consent by owner to take the property. *Brady v. State*, 48 So. 2d 865 (Miss. 1950).

In grand larceny prosecution for stealing purse containing several \$20 bills, undisputed evidence that defendant was in possession of a \$20 bill positively identified as having been among the bills stolen, was sufficient to make out case for jury. *Haney v. State*, 199 Miss. 568, 24 So. 2d 778 (1946).

Defendant did not, beyond a reasonable doubt, have felonious intent to steal so as to justify conviction of grand larceny, where, upon being directed by his mother to sell a cow to pay debts, defendant openly and in the daytime took the cow from the custody, and with the knowledge, of another in whose lot it was pastured, and subsequently in the daytime and in the presence of several witnesses, sold it to another who took bill of sale from defendant. *Dillon v. State*, 18 So. 2d 457 (Miss. 1944).

In prosecution for larceny of three yearlings and a cow, testimony held not to sustain conviction of grand larceny. *Pitts v. State*, 115 Miss. 189, 76 So. 140 (1917).

In grand larceny taking of property of sufficient value to constitute the offense must be shown beyond all reasonable doubt. *Francis v. State*, 87 Miss. 493, 39 So. 897 (1906).

Value must be proved or a conviction of grand larceny at least will be set aside. *Stokes v. State*, 58 Miss. 677 (1881).

16. Inference from possession of stolen property.

If the defendant's explanation as to how property which he is charged with stealing came into his possession is reasonable and credible, the burden is on the prosecution to prove its falsity; but if it is unreasonable or improbable, the burden of proving its truth is on the accused. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

Inability to satisfactorily account for possession of stolen property warrants conviction of larceny. *Wilson v. State*, 237 Miss. 294, 114 So. 2d 677 (1959).

Presumption of guilt of larceny arises from possession of stolen property only where the elapsed time was so short as to render it reasonably certain that there could have been no intermediate change of possession; and is not applicable where four years intervened between the steal-

ing and the discovery of the property. *Minor v. State*, 234 Miss. 140, 106 So. 2d 41 (1958).

The presumption is not one of law, but of fact, and cannot exist where accused's explanation of his possession is satisfactory, or at least raises a reasonable doubt of guilt. *Minor v. State*, 234 Miss. 140, 106 So. 2d 41 (1958).

The possession of property recently stolen is a circumstance which may be considered by the jury and from which, in the absence of reasonable explanation, the jury may infer guilt of larceny; also the presumption as to the possession of stolen property unexplained includes the element of asportation. *Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957).

Where there is any substantial dispute as to the possession of the stolen property by the accused, the better practice is to instruct that if the jury believes that the defendant was in possession of the property, which was recently stolen, such possession is a circumstance which may be considered and from which, in the absence of a reasonable explanation, the jury may infer guilt of larceny. *Fogle v. State*, 231 Miss. 746, 97 So. 2d 645 (1957).

Presumption, if any, arising from recent possession of stolen truck, cannot be invoked in prosecution for grand larceny of truck when defendant's explanation of possession is reasonable. *Hubbard v. State*, 41 So. 2d 1 (Miss. 1949).

Possession of recently stolen truck by defendant in prosecution for grand larceny is reasonably explained by testimony that he accompanied his brother in truck to nearby town at invitation of brother and at request of brother returned truck to garage of owner, without any knowledge of how brother came into possession of truck, and explanation precludes invocation of presumption, if any, arising from recent possession of stolen truck. *Hubbard v. State*, 41 So. 2d 1 (Miss. 1949).

Presumption of guilt arises from possession of recently stolen property, provided that the proof is sufficient to establish that the money was in fact stolen, and that the accused failed to give a reasonable explanation of his possession of such property. *Haney v. State*, 199 Miss. 568, 24 So. 2d 778 (1946).

Recent possession of stolen property raises a presumption of guilt, to be considered by the jury in connection with the reasonableness of the explanation of such possession. *McDougal v. State*, 199 Miss. 39, 23 So. 2d 920 (1945).

Possession of an article must be recent, after it is missed, in order to impute guilt of larceny. *Calhoun v. State*, 191 Miss. 82, 2 So. 2d 802 (1941).

While the recent possession of stolen property is a circumstance which may be considered and from which, in the absence of a reasonable explanation, the jury may infer guilt, yet the law does not raise a presumption of guilt from such possession and it is error to instruct that it does. *Harper v. State*, 71 Miss. 202, 13 So. 882 (1893).

No definite length of time after loss of goods and before possession shown in accused seems to be settled as raising a presumption of guilt; the possession must however be recent and in such case if the party fail satisfactorily to account for his possession of stolen goods, the presumption which is one of fact will warrant his conviction of larceny. If a reasonable account be given, the state must show it to be false; if it be unreasonable, the accused must show its truth. *Davis v. State*, 50 Miss. 86 (1874); *Jones v. State*, 51 Miss. 718, 24 Am. R. 658 (1875); *Foster v. State*, 52 Miss. 695 (1876); *Stokes v. State*, 58 Miss. 677 (1881); *Matthews v. State*, 61 Miss. 155 (1883); *Snowden v. State*, 62 Miss. 100 (1884).

17. Instructions, generally.

In a grand larceny prosecution, wherein the defendant was accused of stealing 530 gallons of insecticide of the value of \$1,645.00, the trial court did not err in giving the state an instruction as to larceny only of a 55-gallon drum of insecticide of the value of \$415.50. *Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957).

In prosecution for grand larceny, modification, by insertion of words "as a gift," of instruction requested by defendants to effect that if victim gave money to defendant they would not be guilty of larceny is not error when it is shown that victim delivered money to defendant to establish his right to participate equally in a fund alleged to have been found, and evidence

shows that all parties understood money was to be returned to victim with one-third of found sum. *Garvin v. State*, 207 Miss. 751, 43 So. 2d 209 (1949).

Instructions in prosecution under indictment charging grand larceny of two young cows are not erroneous as charging separate larcenies, one for stealing blue heifer and another for stealing red heifer, or as referring jury to indictment for description of cattle charged to have been stolen, when one instruction referred to "a heifer or heifers as charged in the indictment" and another instruction referred to "the cows here in question", and when one heifer of value of \$75 was identified as the property stolen, the value being more than \$25, a case of grand larceny is shown. *Kirby v. State*, 206 Miss. 231, 39 So. 2d 770 (1949).

Instruction in prosecution for grand larceny assuming disputed facts, that the property belongs to the prosecuting witness and that it was of the value of more than \$25, was erroneous. *Marble v. State*, 195 Miss. 386, 15 So. 2d 693 (1943).

Instruction omitting element of felonious or fraudulent taking, error. *Dedeaux v. State*, 125 Miss. 326, 87 So. 664 (1921).

18. —Intent.

In a prosecution for grand larceny for theft of an automobile, the trial court did not err in failing to instruct the jury that a necessary element of the crime of grand larceny was that the defendant must have intended to permanently deprive the owner of his automobile, where the court instructed the jury that it should find the defendant guilty of grand larceny if he "did feloniously take, steal, and carry away the property," since the word "feloniously" means done with criminal intent. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

19. —Circumstantial evidence.

In a prosecution for grand larceny for the theft of an automobile, the testimony of a highway patrol officer was sufficient to support the denial of a circumstantial evidence instruction, even though the statements were denied, where the officer testified that the defendant told him he had been driving the automobile in question, the defendant told the officer that his

papers were in the glove compartment, the officer retrieved the papers and asked the defendant his name, the defendant responded that his name was on the papers, the officer made up a fictitious name and asked the defendant if that was his name, and the defendant responded affirmatively. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

Where there was direct proof by the admission of the accused that he had shot the calf which he was accused of stealing and that he and his companion had butchered it and transported it to Louisiana, the case was not one of circumstantial evidence requiring inclusion in the instructions the phrase "beyond every other reasonable hypothesis." *Burgess v. State*, 245 Miss. 1, 145 So. 2d 160 (1962).

In a prosecution for larceny in which guilty intent is an element and in which the defense was that accused was too drunk to know what he was doing, it is error to charge that voluntary intoxication is no defense. *Best v. State*, 235 Miss. 318, 108 So. 2d 840 (1959).

20. —Lesser included offense.

In a prosecution for grand larceny for theft of an automobile, the trial court correctly refused an instruction on the lesser included offense of trespass where the defendant did not claim that he was joyriding or that he was using the vehicle for a brief period and expected to return it, but rather, his defense was an alibi that he was not present when the automobile was stolen. *Deal v. State*, 589 So. 2d 1257 (Miss. 1991).

In a prosecution for grand larceny based on the taking of \$750 from a cash drawer in a bank, the trial court did not err in denying the defendant's request for a jury instruction regarding the lesser included offense of petit larceny, even though no witness could testify to actually seeing more than \$100 being taken. *Ford v. State*, 555 So. 2d 691 (Miss. 1989).

21. —Evidence of trespass.

The court properly refused the accused's tendered instruction that if the property allegedly stolen was shown to have been taken openly and in the presence of third persons, it would be only evidence of trespass, where there was no evidence that

the property was taken openly in the presence of other persons. *Crouse v. State*, 229 Miss. 15, 89 So. 2d 919 (1956).

Refusing to grant defendant's requested instructions in grand larceny prosecution that if the property alleged to have been stolen is shown to have been taken openly and in the presence of the owner or third persons then this carries with it only evidence of trespass was not error in view of the court's other instructions which cured the defect. *Oakman v. State*, 206 Miss. 136, 39 So. 2d 777 (1949).

Where defense in prosecution for grand larceny against defendant who allegedly bought five cows and took six was his bona fide belief that he purchased the extra cow and there was no question that this animal was taken with an intent to retain and control it, failure of the court to instruct jury as to the alternative of criminal trespass was held not error. *Oakman v. State*, 206 Miss. 136, 39 So. 2d 777 (1949).

Where the sum of \$1500 was taken from the complaining witness clandestinely by means of a confidence game whereby the defendant and others represented that the complaining witness' money would be manufactured into bills of larger denominations, a requested instruction that if the money was openly taken in the presence of the owner, that of itself was only evidence of trespass, was properly refused. *Holt v. State*, 186 Miss. 727, 191 So. 673 (1939).

22. —Possession of stolen property.

Instruction in grand larceny prosecution that possession of recently stolen property was presumptive proof of defendant's guilt of larceny, and the burden of explaining or accounting for such possession was cast upon the defendant, and when satisfactory explanation was not given, the jury would be warranted in finding him guilty, constituted reversible error. *Hall v. State*, 279 So. 2d 915 (Miss. 1973).

Where there is any substantial dispute as to the possession of the stolen property by the accused, the better practice is to instruct that if the jury believes from the evidence beyond every reasonable doubt that the defendant was in possession of the property and that such property was

recently stolen, such possession is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt of larceny. *Fogle v. State*, 231 Miss. 746, 97 So. 2d 645 (1957).

Instruction that possession of property recently stolen is circumstance which may be considered by jury and from which, in absence of reasonable explanation, jury may infer guilt of larceny, is not error when proof shows that the property was stolen; that the property found in possession of accused was the stolen property; that possession was recently after the larceny and that accused's possession was personal, conscious, exclusive and unexplained by direct or circumstantial evidence which would rebut presumption of taking by accused. *Lott v. State*, 204 Miss. 610, 37 So. 2d 782 (1948).

In grand larceny prosecution for stealing purse containing several \$20 bills where undisputed evidence showed that defendant was in possession of a \$20 bill positively identified as having been among the bills stolen, court erred in instructing jury that they could not find defendant guilty of a greater offense than that of petit larceny inasmuch as the testimony showed that not more than one \$20 bill came into possession of defendant, since the jury was entitled to believe from all the circumstances that whoever stole the \$20 bill also stole the remaining contents of the purse. *Haney v. State*, 199 Miss. 568, 24 So. 2d 778 (1946).

23. Verdict.

Verdict finding defendant guilty as "accessory to the crime" was too vague, uncertain and indefinite to support a conviction of grand larceny, where the evidence pointed strongly to another who actually took the money, since it could not be ascertained whether the jury meant, by "accessory," that defendant was guilty as accessory before or after the larceny or that the defendant had received the money from another knowing it to have been stolen, and the defects of the verdict were not cured by statute pertaining to jeofails. *McDougal v. State*, 199 Miss. 39, 23 So. 2d 920 (1945).

Where indictment charged grand larceny in second count, and jury was in-

structed to find accused not guilty of the first count, finding accused "guilty as charged in the second count in the indictment" not objectionable as failing to show crime defendant found guilty of. *Lemon v. State*, 95 Miss. 526, 49 So. 515 (1909).

24. Sentence and punishment.

Appellate court affirmed defendant's conviction and the sentence imposed, as the trial court did not err by allowing the State to amend the indictment to correct the section number to reflect that defendant was being charged with felony shoplifting, and a five year sentence did not exceed the maximum punishment in Miss. Code Ann. § 97-17-41. *Watson v. State*, — So. 2d —, 2006 Miss. App. LEXIS 121 (Miss. Ct. App. Feb. 21, 2006).

Where an inmate was sentenced for two counts of grand larceny and could have received a maximum sentence of ten years in the custody of Mississippi Department of Corrections, but instead, the trial court suspended five years of the ten year sentence, leaving five years of incarceration to serve, with two years of post-release supervision, the inmate's sentence was not illegal. Thus, the trial court properly denied the inmate's motion for post-conviction relief. *Hill v. State*, 912 So. 2d 494 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where his argument that his grand larceny sentence was in excess of the five-year maximum allowed under law because he was not given credit for the five months he served should first be addressed to the Department of Corrections. In the event that he was denied credit for that time served, then he should seek redress in the courts. *Gable v. State*, 919 So. 2d 1075 (Miss. Ct. App. 2005).

Miss. Code Ann. § 97-17-41 does not provide a minimum sentence for grand larceny. Because the statute set no minimum penalty, the court was not obligated to inform defendant of the minimum sentence for grand larceny; hence, defendant's petition for postconviction relief was properly denied after defendant pled guilty to two counts of grand larceny and one count of possession of cocaine. *Dockens v. State*, 879 So. 2d 1072 (Miss. Ct. App. 2004).

Where an indictment for burglary, charged larceny not as a substantive offense but as demonstrative of burglarious intent, it was erroneous upon conviction to impose a separate sentence for larceny, and the sentence for larceny would be deleted as surplusage, without affecting the sentence for burglary. *Bullock v. State*, 222 So. 2d 692 (Miss. 1969).

Where the record showed that the defendant was tried on an indictment charging grand larceny, the instructions of the court were on grand larceny, and the jury's verdict, finding defendant guilty as charged, was justified by the evidence, a statement appearing in the judgment of the court imposing sentence to the effect that defendant had been tried and found guilty on a charge of false pretenses was merely a clerical error, not requiring reversal. *Jones v. State*, 244 Miss. 596, 145 So. 2d 446 (1962).

In prosecution for grand larceny, an order indefinitely postponing sentence after a plea of guilty did not result in loss of court's jurisdiction to impose sentence even after a period of five years, at least, in the absence of motion by defendant to be allowed to withdraw his plea of guilty. *Crump v. Trapp*, 210 Miss. 905, 36 So. 2d 459 (1948).

25. Miscellaneous.

Convictions for both murder during course of armed robbery and grand larceny violated double jeopardy prohibition against multiple punishments for same offense, where robbery charge, which was used to elevate case to capital murder, encompassed elements of grand larceny. *Holly v. State*, 671 So. 2d 32 (Miss. 1996), post-conviction relief denied, cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

In a prosecution for grand larceny, evidence that the defendant kept a \$13,860 check erroneously issued and sent to him,

and subsequently used it to pay off debts, raised a factual issue for the jury as to whether he had the requisite intent to wrongfully keep the money. *State v. Smith*, 652 So. 2d 1126 (Miss. 1995).

The trial court is not authorized or required to appoint counsel for a defendant accused of grand larceny, a noncapital felony. *Fogle v. State*, 231 Miss. 746, 97 So. 2d 645 (1957).

The conflict in testimony as to whether an alleged confession, made by the accused charged with grand larceny, was free and voluntary, including the fact that the confession was made while the accused was under arrest and confined in jail without a warrant, were questions for decision by the trial judge on a preliminary hearing. *Crouse v. State*, 229 Miss. 15, 89 So. 2d 919 (1956).

Where testimony of three alleged accomplices was sufficient to convict defendant of grand larceny of cattle, but on motion for new trial all three alleged accomplices repudiated their testimony after being advised by trial court of their right not to incriminate themselves by an admission of perjury and that they could be sent to the penitentiary if they should falsely repudiate their former testimony, such repudiation when considered in the light of testimony of an alibi and the good reputation of defendant as a law abiding citizen warranted reversal of conviction and remand for new trial. *Gathings v. State*, 46 So. 2d 800 (Miss. 1950); *Quinn v. State*, 46 So. 2d 802 (Miss. 1950).

Judgment in grand larceny prosecution merely stating that defendant was tried by twelve good and lawful men, without adjudicating that they composed a jury was not invalid where record showed accused was tried and convicted by a jury in judicial proceeding. *Watts v. State*, 209 Miss. 322, 46 So. 2d 789 (1950).

Conviction of larceny under indictment for burglary, reversed. *Fournier v. State*, 96 Miss. 417, 50 So. 502 (1909).

RESEARCH REFERENCES

ALR. Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 A.L.R.2d 1396.

Stealing carcass as within statute making it larceny to steal of cattle or livestock. 78 A.L.R.2d 1100.

Taking, and pledging or pawning, another's property as larceny. 82 A.L.R.2d 863.

Stolen money or property as subject of larceny or robbery. 89 A.L.R.2d 1435.

Larceny: entrapment or consent. 10 A.L.R.3d 1121.

Larceny: cotenant taking cotenancy property. 17 A.L.R.3d 1394.

Single or separate larceny predicated upon stealing property from different owners at the same time. 37 A.L.R.3d 1407.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine. 45 A.L.R.3d 1286.

Series of takings over a period of time as involving single or separate larcenies. 53 A.L.R.3d 398.

Changing of price tags by patron in self-service store as criminal offense. 60 A.L.R.3d 1293.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 A.L.R.3d 1202.

What constitutes larceny "from a person". 74 A.L.R.3d 271.

Receiver of stolen goods as accomplice of thief for purposes of corroboration. 74 A.L.R.3d 560.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 A.L.R.3d 842.

Retaking of money lost at gambling as robbery or larceny. 77 A.L.R.3d 1363.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Admissibility of photographs of stolen property. 94 A.L.R.3d 357.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft. 94 A.L.R.3d 824.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 A.L.R.4th 481.

Retailer's failure to pay to government sales or use tax funds as constituting

larceny or embezzlement. 8 A.L.R.4th 1068.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property. 30 A.L.R.4th 488.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

Cat as subject of larceny. 55 A.L.R.4th 1080.

Possession of stolen property as continuing offense. 24 A.L.R.5th 132.

Liability for loss of hat, coat, or other property deposited by customer in place of business. 54 A.L.R.5th 393.

Consideration of sales tax in determining value of stolen property or amount of theft. 63 A.L.R.5th 417.

Joyriding or similar charge as lesser-included offense of larceny or similar charge. 78 A.L.R.5th 567.

What constitutes taking and carrying away, with intent to steal or purloin, within the meaning of the Federal Bank Robbery Act (18 USCS § 2113(b)). 46 A.L.R. Fed. 841.

What constitutes "thing of value of the United States" of which stealing, embezzling, or receiving violates 18 USCS § 641. 76 A.L.R. Fed. 323.

Am Jur. 50 Am. Jur. 2d, Larceny §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 15-21 (larceny).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 52B C.J.S., Larceny §§ 57 et seq.

Law Reviews. 1978 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 137, March 1979.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-42. Taking possession of or taking away a motor vehicle.

(1) Any person who shall, willfully and without authority, take possession

of or take away a motor vehicle belonging to another, and any person who knowingly shall aid and abet in such taking possession or taking away, shall be guilty of a felony and shall be punished by commitment to the Department of Corrections for not more than five (5) years.

(2) Any person convicted under this section who causes damage to any motor vehicle shall be ordered by the court to pay restitution to the owner or owners of any such motor vehicle.

(3) This section shall not apply to the enforcement of a security interest in a motor vehicle.

(4) Any person who shall be convicted for a second or subsequent offense of taking and carrying away, feloniously, a motor vehicle which is the personal property of another, of any value, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Laws, 1996, ch. 544, § 1; Laws, 2003, ch. 499, § 2, eff from and after July 1, 2003.

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of evidence.

1. In general.

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. *Mixon v. State*, 921 So. 2d 275 (Miss. 2005).

Trial court properly rejected tendered instruction that required the jury in a prosecution for violation of Miss. Code Ann. § 97-17-42 that the jury must have known that the vehicle in question was stolen took possession; the tendered instruction was an improper statement of the law as guilty knowledge was not an element of the offense. *Johnson v. State*, 823 So. 2d 582 (Miss. Ct. App. 2002).

Defendant did not show that he was prejudiced by the mistaken inclusion of the dollar amount of the vehicle in the indictment for motor vehicle theft under this section that is required under § 97-

17-41(1) for grand larceny; he was not unaware of what crime he was charged with committing or unable to prepare an adequate defense because of the indictment. *Richmond v. State*, 751 So. 2d 1038 (Miss. 1999).

It is within the province of the legislature to proscribe certain acts as malum prohibitum with no required mens rea as this statute does, and the legislature's failure to set out a mens rea does not automatically render the statute unconstitutional. *Richmond v. State*, 751 So. 2d 1038 (Miss. 1999).

2. Sufficiency of evidence.

Defendant, convicted for stealing a car, argued on appeal that because the State did not call the co-owner of the sales lot to testify that he did not give defendant permission to take the car, reasonable doubt existed regarding whether the co-owner gave defendant permission to take the station wagon. Defendant was attacking the sufficiency of the evidence, rather than its weight — however, the issue of whether the co-owner gave defendant permission to take the car created a question of fact for the jury to resolve and the appellate court's standard of review prevented it from substituting its conclusion for the jury's, so the jury's decision stood.

Allen v. State, 906 So. 2d 802 (Miss. Ct. App. 2004).

Defendant was shown to have been in close proximity to the stolen vehicle and to have made statements to at least two individuals consistent with a claim of ownership or, at a minimum, the right to possession of the vehicle; defendant's claim of right of possession, plainly refuted by testimony, was direct evidence implicating defendant, and the trial court was plainly correct in denying a circumstantial evidence instruction and also properly admitted a knife found on defendant's person, probative of how the vehicle may have been started without a key. Parks v. State, 859 So. 2d 1084 (Miss. Ct. App. 2003).

Because (1) the evidence showed that, while police attempted to arrest defendant on an outstanding warrant, defendant jumped into a vehicle, twice drove the vehicle to strike a police officer, and then defendant drove the vehicle into another police officer vehicle, causing injury, and (2) the court was not persuaded that the evidence tending to demonstrate defendant's innocence was of such weight that it constituted a substantial miscarriage of justice to permit the present verdicts to stand, the court affirmed defendant's convictions of taking possession of or taking away a motor vehicle and aggravated assault on a law enforcement officer. Hogan v. State, 854 So. 2d 497 (Miss. Ct. App. 2003).

§ 97-17-43. Petit larceny defined; penalty.

(1) If any person shall feloniously take, steal and carry away any personal property of another under the value of Five Hundred Dollars (\$500.00), he shall be guilty of petit larceny and, upon conviction, shall be punished by imprisonment in the county jail not exceeding six (6) months or by fine not exceeding One Thousand Dollars (\$1,000.00), or both. The total value of property taken, stolen or carried away by the person from a single victim shall be aggregated in determining the gravity of the offense.

(2) If any person shall feloniously take, steal and carry away any property of a church, synagogue, temple or other established place of worship under the value of Five Hundred Dollars (\$500.00), he shall be guilty of petit larceny and, upon conviction, shall be punished by imprisonment in the county jail not exceeding one (1) year or by fine not exceeding Two Thousand Dollars (\$2,000.00), or both.

(3) Any person who leaves the premises of an establishment at which motor fuel offered for retail sale was dispensed into the fuel tank of a motor vehicle by driving away in that motor vehicle without having made due payment or authorized charge for the motor fuel so dispensed, with intent to defraud the retail establishment, shall be guilty of petit larceny and punished as provided in subsection (1) of this section and, upon any second or subsequent such offense, the driver's license of the person shall be suspended as follows:

(a) The person shall submit the driver's license to the court upon conviction and the court shall forward the driver's license to the Department of Public Safety.

(b) The first suspension of a driver's license under this subsection shall be for a period of six (6) months.

(c) A second or subsequent suspension of a driver's license under this subsection shall be for a period of one (1) year.

(d) At the expiration of the suspension period, and upon payment of a restoration fee of Twenty-five Dollars (\$25.00), the suspension shall terminate and the Department of Public Safety shall return the person's driver's license to the person. The restoration fee shall be in addition to the fees provided for in Title 63, Chapter 1, and shall be deposited into the State General Fund in accordance with Section 45-1-23.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 1(19); 1857, ch. 64, art. 191; 1871, § 2653; 1880, § 2902; 1892, § 1174; Laws, 1906, § 1252; Hemingway's 1917, § 982; Laws, 1930, § 1010; Laws, 1942, § 2242; Laws, 1896, ch. 85; Laws, 1940, ch. 238; Laws, 1966, ch. 360, § 1; Laws, 1971, ch. 491, § 1; Laws, 1992, ch. 380, § 2; Laws, 1997, ch. 473, § 6; Laws, 1999, ch. 553, § 1; Laws, 2003, ch. 499, § 3; Laws, 2004, ch. 526, § 8, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment added the last sentence in (1).

Cross References — Debt adjusting or credit arranging, see §§ 85-9-1 et seq.

Jurisdiction of justices of the peace of cases under \$200.00, see § 89-17-21.

Stealing wool from dead sheep, see § 97-17-49.

Another section derived from same 1942 code section, see § 97-17-53.

Crime of looting, see § 97-17-65.

Theft of credit cards, see § 97-19-13.

Theft of electricity, gas or water by tampering with meters, see § 97-25-3.

Limitations of prosecutions, generally, see § 99-1-5.

Description of property in indictments for larceny, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Affidavit charging offense.
3. —Variance between affidavit and proof.
4. Malicious Prosecution.
5. Sufficient Evidence.

1. In general.

Defendant's motion for a peremptory instruction and judgment notwithstanding the verdict was properly denied by the trial court where considering the strength of all inferences and circumstances of possession by defendant of the victim's check, together with his attempt to negotiate the check at the bank, the jury was fully warranted in concluding that defendant was guilty of uttering a forged instrument and petit larceny. *Miles v. State*, 864 So. 2d 963 (Miss. Ct. App. 2003).

Lesser-included offense of petit larceny was not warranted where there was sufficient testimony for the jury to conclude the value of the stolen carburetor exceeded \$250, as there was evidence from the owner that the carburetor was worth

\$1000, and the replacement cost \$400. *Nelson v. State*, 839 So. 2d 584 (Miss. Ct. App. 2003).

In a prosecution for grand larceny based on the taking of \$750 from a cash drawer in a bank, the trial court did not err in denying the defendant's request for a jury instruction regarding the lesser included offense of petit larceny, even though no witness could testify to actually seeing more than \$100 being taken. *Ford v. State*, 555 So. 2d 691 (Miss. 1989).

Evidence was insufficient to support finding beyond reasonable doubt that value of stolen property was in excess of \$100; therefore, defendant should have been sentenced for offense of petit larceny, where in affidavit sworn out in justice court, value of property was set at \$90, while at trial testimony regarding value of stolen property was inconsistent. *Dulin v. State*, 507 So. 2d 897 (Miss. 1987).

Contraband liquor may be the subject of larceny. *Passons v. State*, 208 Miss. 545, 45 So. 2d 131 (1950), overruled on other

grounds, *Simmons v. State*, 568 So. 2d 1192 (Miss. 1990).

Petit larceny statute and statute respecting larceny by severing fixtures are separate statutes containing separate and distinct elements to constitute crime. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

2. Affidavit charging offense.

The use of the word "feloniously" in describing larceny is not merely descriptive of the grade of the offense, but is an essential ingredient of the crime. *Austin v. State*, 195 Miss. 317, 15 So. 2d 684 (1943).

Affidavit charging that accused "did then and there unlawfully take, steal and carry away" certain personal property was fatally defective for omitting the word "feloniously" in describing larceny, and such omission going to the very essence of the offense might be availed of for the first time on appeal. *Austin v. State*, 195 Miss. 317, 15 So. 2d 684 (1943).

Affidavit charging defendant with stealing tomato plants valued at \$17, personal property of person named, charged offense under petit larceny statute. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

Where affidavit charges petit larceny by alleging different articles stolen to be property of different persons, on trial state will be compelled to show a single asportation. *Ward v. State*, 90 Miss. 249, 43 So. 466 (1907); *State v. Dalton*, 91 Miss. 162, 44 So. 802 (1907); *State v. Quintini*, 51 So. 276 (Miss. 1910).

3. —Variance between affidavit and proof.

In a prosecution for larceny of a CB radio, speaker and antenna, the conviction would be affirmed only as to petit larceny where the evidence consisted of testimony from the victim that his used radio was worth at least \$150, which assessment was contradicted by a defense witness who sold new and used radios and

who stated that the stolen radio was not worth as much as \$100 on the open market. *Barry v. State*, 406 So. 2d 45 (Miss. 1981).

Where affidavit charged offense under petit larceny statute, but proof showed offense under statute respecting larceny in severing fixtures, court should have granted peremptory instruction and held accused under bond for further proceedings. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

Where affidavit charged stealing of tomato plants as personal property, offense under petit larceny statute, proof showing plants were growing when stolen proved different offense, and conviction could not be pleaded as *res judicata* against new trial under statute respecting larceny in severing fixtures. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

4. Malicious Prosecution.

Summary judgment was properly granted in favor of a former employer in a malicious prosecution case because there was probable cause to arrest a former employee for petit larceny based on the act of alerting a customer to cash in a token in a slot machine; moreover, there was no evidence that a former employer acted with malice by having the employee arrested for the theft. *Croft v. Grand Casino Tunica, Inc.*, 910 So. 2d 66 (Miss. Ct. App. 2005).

5. Sufficient Evidence.

Defendant's conviction for grand larceny in violation of Miss. Code Ann. § 97-17-43 was proper where one of his co-defendants testified that he and defendant were together in his brother's trailer, devising the plan to steal cigarettes, on the morning that the larceny took place. Two other co-defendants testified as to the incriminating statements made by defendant after the crime had occurred. *Ross v. State*, 914 So. 2d 814 (Miss. Ct. App. 2005).

ATTORNEY GENERAL OPINIONS

The offense of petit larceny should be handled as a misdemeanor and may be

heard in justice court. Embry, October 23, 1998, A.G. Op. #98-0662.

RESEARCH REFERENCES

ALR. Single or separate larceny predicated upon stealing property from different owners at the same time. 37 A.L.R.3d 1047.

Changing of price tags by patron in self-service store as criminal offense. 60 A.L.R.3d 1293.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 A.L.R.3d 1202.

What constitutes larceny "from a person". 74 A.L.R.3d 271.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 A.L.R.3d 842.

Admissibility of photographs of stolen property. 94 A.L.R.3d 357.

Cat as subject of larceny. 55 A.L.R.4th 1080.

Liability for loss of hat, coat, or other property deposited by customer in place of business. 54 A.L.R.5th 393.

Consideration of sales tax in determining value of stolen property or amount of theft. 63 A.L.R.5th 417.

What are "goods, wares, merchandise, or securities," within meaning of 18 USC § 2314, making transportation of stolen goods a criminal offense. 6 A.L.R. Fed. 194.

Am Jur. 50 Am. Jur. 2d, Larceny §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 15-21 (larceny).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 52B C.J.S., Larceny §§ 57 et seq.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-17-45. Larceny; stealing bond, note, bill, securities, etc.; proof of value.

If any person shall steal any bond, covenant, note, bank-bill, bill of exchange, draft, order, receipt, or other evidence of debt, or chose in action, or any public security issued by the United States, or any state, or any instrument whereby any demand, right, or obligation shall be created, increased, released, extinguished, or diminished, the money due thereon, or secured thereby, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property transferred or affected thereby, as the case may be, shall be deemed the value of the article sold, without further proof thereof.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(67); 1857, ch. 64, art. 193; 1871, § 2654; 1880, § 2904; 1892, § 1176; Laws, 1906, § 1254; Hemingway's 1917, § 984; Laws, 1930, § 1012; Laws, 1942, § 2244.

Cross References — Theft or destruction of court or other public records and papers, see § 97-9-3.

Grand larceny, see § 97-17-41.

Alteration, destruction or concealment of will, see § 97-9-77.

Petit larceny, see § 97-17-43.

Theft of railroad tickets, see § 97-25-11.

Description of property in indictments for larceny, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.

It is not error upon the trial of one charged under this section [Code 1942, § 2244] with larceny of a promissory note

to exclude evidence that the paper was uncollectible because worthless. *McDowell v. State*, 74 Miss. 373, 20 So. 864 (1896).

RESEARCH REFERENCES

Am Jur. 50 *Am. Jur.* 2d, Larceny §§ 78, 86.

CJS. 52B *C.J.S.*, Larceny § 10.

2 *Am. Jur. Trials*, Investigating Particular Crimes §§ 15-21 (larceny).

§ 97-17-47. Larceny; severing crops, or parts of improvements or enclosures.

If any person shall sever from the soil of another any produce growing thereon, or shall sever from any building, gate, fence, railing, or other improvement or inclosure any part thereof, and shall take and convert the same to his own use with intent to steal the same, he shall be guilty of larceny in the same manner and of the same degree as if the article so taken had been severed at some previous and different time.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4(69); 1857, ch. 64, art. 194; 1871, § 2655; 1880, § 2905; 1892, § 1178; Laws, 1906, § 1256; *Hemingway's* 1917, § 986; Laws, 1930, § 1014; Laws, 1942, § 2246.

Cross References — Trespass to buildings, fences, etc., see § 95-5-23.

Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

JUDICIAL DECISIONS

1. In general.

2. Affidavit charging offense.

distinct elements to constitute crime. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

1. In general.

Where two butane gas heaters were placed in the auditorium of the church and they were bolted or screwed onto the pipes which had been run under and through the floor and which carried gas, the gas heaters were not fixtures and defendant was properly indicted under Code 1942, § 2240, which deals with common-law larceny of personal property, instead of this section [Code 1942, § 2246]. *Garrett v. State*, 213 Miss. 328, 56 So. 2d 809 (1952).

Petit larceny statute and statute respecting larceny by severing fixtures are separate statutes containing separate and

2. Affidavit charging offense.

Where affidavit charged offense under petit larceny statute, but proof showed offense under statute respecting larceny in severing fixtures, court should have granted peremptory instruction and held accused under bond for further proceedings. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

Where affidavit charged stealing of tomato plants as personal property, offense under petit larceny statute, proof showing plants were growing when stolen proved different offense, and conviction could not be pleaded as *res judicata* against new

trial under statute respecting larceny in severing fixtures. *O'Neal v. State*, 166 Miss. 538, 146 So. 634 (1933).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny §§ 59 et seq. **CJS.** 52B C.J.S., Larceny §§ 57 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 15-21 (larceny).

§ 97-17-49. Larceny; shearing wool from dead sheep.

If any person shall shear or take off in any manner the wool from any sheep that has been killed by dog or otherwise, without first obtaining permission from the owner of such sheep so killed, with intent to convert to his own use or conceal the same, he shall be guilty of a misdemeanor, and on conviction, shall be fined not less than five dollars nor more than twenty-five dollars and imprisoned in the county jail not less than five days nor more than twenty days.

SOURCES: Codes, 1880, § 818; 1892, § 1180; Laws, 1906, § 1258; Hemingway's 1917, § 988; Laws, 1930, § 1016; Laws, 1942, § 2248.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny § 66. **CJS.** 52B C.J.S., Larceny §§ 57 et seq.

§ 97-17-51. Larceny; stealing dog.

Every person who shall feloniously steal, take and carry away any dog, the property of another, shall be subject to indictment therefor, and on conviction shall be punished by a fine of not more than five hundred dollars (\$500.00), or imprisoned in the county jail not more than six (6) months, or both, or imprisoned in the penitentiary not less than one year nor more than two years.

SOURCES: Codes, 1880, § 2903; 1892, § 1175; Laws, 1906, § 1253; Hemingway's 1917, § 983; Laws, 1930, § 1011; Laws, 1942, § 2243; Laws, 1962, ch. 314, eff from and after July 1, 1962.

Cross References — Petit larceny, see § 97-17-43.

RESEARCH REFERENCES

ALR. Admissibility of photographs of stolen property. 94 A.L.R.3d 357. **Am Jur.** 50 Am. Jur. 2d, Larceny § 65.
Cat as subject of larceny. 55 A.L.R.4th 1080. **CJS.** 52B C.J.S., Larceny §§ 8, 57 et seq.

§ 97-17-53. Larceny; stealing livestock; restitution.

(1) If any person shall feloniously take livestock belonging to another, either without the consent of the other to the taking, or by means of fraudulent conduct, practices or representations, he shall be guilty of larceny, regardless of the value of the livestock. Upon conviction, such person is guilty of a felony and shall be committed to the custody of the State Department of Corrections for not less than twelve (12) months nor more than five (5) years, and fined an amount not less than One Thousand Five Hundred Dollars (\$1,500.00), nor more than Ten Thousand Dollars (\$10,000.00).

(2) In addition to any such fine or imprisonment which may be imposed, the court shall order that restitution be made to the owner of any such stolen livestock. The measure for restitution in money shall be the amount of the actual financial loss to the owner of the livestock, including any loss of income, any court costs and attorney's fees incurred by the owner to recover the stolen livestock, the current replacement value of the stolen livestock if the livestock is not recovered, and any other costs incurred by the owner as a result of actions in violation of subsection (1) of this section.

(3) For purposes of this section, the term "livestock" shall mean horses, cattle, swine, sheep and other domestic animals produced for profit.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 1(19); 1857, ch. 64, art. 191; 1871, § 2653; 1880, § 2902; 1892, § 1174; Laws, 1906, § 1252; Hemingway's 1917, § 982; Laws, 1930, § 1010; Laws, 1942, § 2242; Laws, 1896, ch. 85; Laws, 1940, ch. 238; Laws, 1966, ch. 360, § 1; Laws, 1971, ch. 491, § 1; Laws, 1981, ch. 385, § 1; Laws, 1993, ch. 438, § 1, eff from and after July 1, 1993.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Brands, marks, and transporting cattle, see § 69-29-1.

Any person convicted of stealing livestock subject to penalties provided in this section, see § 69-29-11.

Any person convicted of stealing livestock subject to penalties provided in this section, see § 69-29-105.

Jurisdiction of justices of the peace of cases under \$200.00, see § 89-17-21.

Penalty for maliciously or mischievously injuring livestock, see § 97-41-15.

Limitations of prosecutions, see § 99-1-5.

Description of property in indictments for larceny, see § 99-7-31.

Sentence upon conviction, see § 99-19-17.

Restitution to victims of crimes, generally, see §§ 99-37-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Evidence.

1. In general.

Where three defendants are charged with the larceny of a cow, but there is no evidence that a cow was missing or that a

cow was stolen, and the only evidence that a crime had been committed were the confessions of each defendant implicating the other defendants, the evidence is insufficient to sustain a criminal conviction; the state must prove the corpus delicti of the body of a crime by showing that the

subject crime charged did in fact occur; the confession of one criminally accused will not suffice to sustain a conviction absent proof of the body of the crime. *Bullock v. State*, 447 So. 2d 1284 (Miss. 1984).

Evidence in a prosecution for larceny of a cow under this section was insufficient as a matter of law to establish the corpus delicti, where each of the three defendants who had been jointly indicted, tried and convicted, had confessed, where the confession of each implicated the others, and where there was no independent proof that a cow was missing from the herd of the alleged victim, in that the confessions of the defendants could not be used against each other. *Bullock v. State*, 447 So. 2d 1284 (Miss. 1984).

In a prosecution for larceny of a cow the defendant was improperly convicted of such crime, where at the time the men arrived at the cow's location it was dead, where there was no evidence placing the defendant at the scene when the cow was killed, where there was no evidence that the cow had been shot, and where there was no testimony or evidence from which it might reasonably have been inferred that the defendant killed the cow or had knowledge that the cow did not belong to the person who had sought his assistance in moving the cow. *Sessums v. State*, 419 So. 2d 189 (Miss. 1982).

In a prosecution for larceny of a black Angus heifer belonging to another, the trial court erred in refusing a defense instruction based upon § 97-17-61 where the defendant presented evidence that he had accidentally struck the heifer with his automobile, that the animal had been

killed with a gunshot to put it out of its misery, and that he and others had taken the carcass and had it cut, wrapped and divided four ways; since the defendant's proof tended to establish that there was no intent to appropriate the cow at any time before it was shot, thereby negating the crime of larceny, the trial judge in effect peremptorily instructed the jury to disregard the defendant's defense when he refused the requested instruction. *Knowles v. State*, 410 So. 2d 380 (Miss. 1982).

An indictment charging the larceny of a "neat calf" was in compliance with that part of the section which states that if any person shall feloniously take, steal and carry away any of the kind of neat or horned cattle, he shall be guilty of larceny. *Miller v. State*, 243 So. 2d 558 (Miss. 1971).

The larceny of cattle being a felony under this section [Code 1942, § 2242], an indictment for cattle-stealing need not allege value. *Pearson v. State*, 248 Miss. 353, 158 So. 2d 710 (1963).

2. Evidence.

Evidence was sufficient to support a conviction where (1) the two victims both testified they had cows stolen from their fields and that this taking was in no way consensual, (2) an investigator testified that he was able to verify that one of the cows had been sold under the name of the defendant and the two cows which had not yet been sold were left under the name of his fiancée, and (3) the investigator also testified that the defendant confessed to the crime. *Forrest v. State*, 782 So. 2d 1260 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR. Stealing carcass as within statute making it larceny to steal cattle or livestock. 78 A.L.R.2d 1100.

Single or separate larceny predicated upon stealing property from different owners at the same time. 37 A.L.R.3d 1407.

Admissibility of photographs of stolen property. 94 A.L.R.3d 357.

What are "goods, wares, merchandise, or securities," within meaning of 18 USC § 2314, making transportation of stolen goods a criminal offense. 6 A.L.R. Fed. 194.

Am Jur. 50 Am. Jur. 2d, Larceny § 66.
2 Am. Jur. Trials, Investigating Particular Crimes, §§ 15-21 (larceny).

CJS. 52B C.J.S., Larceny §§ 57 et seq.

§ 97-17-55. Larceny; stealing milk from cow.

Any person who shall milk the cow of another, knowingly, without his consent, or who shall pen or confine by any means any milk-cow, or the calf of any such cow, not his own, with intent to procure milk from such cow, without the consent of the owner, shall, on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than three months, or both. Proof that any one penned or confined any cow or her calf not his own, shall be deemed prima facie evidence of an intent to procure milk in violation of this section.

SOURCES: Codes, 1880, § 1912; 1892, § 1187; Laws, 1906, § 1265; Hemingway's 1917, § 995; Laws, 1930, § 1023; Laws, 1942, § 2255.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny § 66. **CJS.** 52B C.J.S., Larceny §§ 57 et seq.

§ 97-17-57. Repealed.

Repealed by Laws, 1985, ch. 316, § 1, eff from and after July 1, 1985.
[Codes, 1942, § 2244.5; Laws, 1968, ch. 346, § 1; 1972, ch. 313, § 1]

Editor's Note — Former § 97-17-57 was entitled: Larceny; stealing fish from fish farmers.

§ 97-17-58. Repealed.

Repealed by Laws, 2003, ch. 403, § 2, eff from and after July 1, 2003.
[Laws, 1974, ch. 463, eff from and after passage (approved March 28, 1974).]

Editor's Note — Former § 97-17-58 established penalties for the theft of crab pots.

§ 97-17-59. Larceny; stealing timber; restitution.

(1) Any person who shall knowingly, willfully and feloniously take, steal and carry away from the lands of another any merchantable timber on the property of another, of the value of less than Two Hundred Fifty Dollars (\$250.00), whether such timber is growing, standing or lying on the lands, shall be guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine of not less than Two Hundred Dollars (\$200.00) nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one hundred (100) days, or both, in the discretion of the court.

(2) Any person who shall knowingly, willfully and feloniously take, steal and carry away from the lands of another any merchantable timber on the property of another, of the value of Two Hundred Fifty Dollars (\$250.00) or more, whether such timber is growing, standing, or lying on the lands, shall be guilty of a felony; and upon conviction thereof, shall be punished by a fine of not

less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or by imprisonment in the Penitentiary for a term of not less than one (1) year nor more than five (5) years, or both, in the discretion of the court.

(3) In addition to any such fine or imprisonment which may be imposed upon a convicted individual, the court shall order that restitution be made to the owner of any such stolen timber. The measure for restitution in money shall be the amount of the actual financial loss to the owner of the timber, including any loss of income, any court costs, expert fees and attorney's fees incurred by the owner to recover the loss and any other costs incurred by the owner as a result of actions in violation of subsections (1) and (2) of this section. The value of the timber shall be calculated by the fair market value of the timber at the time of the loss.

SOURCES: Codes, 1942, § 2386.5; Laws, 1954, ch. 221, §§ 1, 2(¶¶ 1, 2); Laws, 2000, ch. 355, § 1; Laws, 2004, ch. 419, § 3, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment rewrote (3).

Cross References — Tampering with timber, etc., to injure owner, see §§ 97-3-89 et seq.

Cutting or rafting of timber on state lands, see § 97-7-65.

Cutting or rafting of timber on the lands of another, see § 97-17-81.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Evidence of Value.
2. Evidence held sufficient.
3. Intent.

1. Evidence of Value.

Where defendant's logger testified that he carried logs from the victim's property to mills and that the timber sold for approximately \$ 21,000, the victim's failure to assign value to the stolen timber was irrelevant, as the evidence established a timber value in excess of \$ 250. *Chisolm v. State*, 856 So. 2d 681 (Miss. Ct. App. 2003).

2. Evidence held sufficient.

Where there was evidence that defendant ignored the victim's clear withholding of permission to cut timber, that he

removed the timber, and there was testimony and documentary evidence of the timber's value, the trial court properly denied defendant's motion for directed verdict; his conviction was not contrary to the overwhelming weight of the evidence. *Chisolm v. State*, 856 So. 2d 681 (Miss. Ct. App. 2003).

3. Intent.

Victim's testimony that he denied giving permission to anybody to cut timber in the area where defendant had done so was sufficient to prove that defendant had the requisite intent, even though defendant testified that he had permission; the credibility of these witnesses was for the jury to determine. *Chisolm v. State*, 856 So. 2d 681 (Miss. Ct. App. 2003).

ATTORNEY GENERAL OPINIONS

A conviction for timber larceny under this section is a disqualifying crime pursuant to Section 241 of the Mississippi

Constitution. Vowell, April 30, 1999, A.G. Op. #99-0186.

RESEARCH REFERENCES

Law Reviews. Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-17-60. Payment for timber acquired for resale; penalties.

(1) Any person who acquires, with the consent of an owner, any timber product from that owner and who receives payment for the timber product shall, within thirty (30) days of such receipt, make payment in full to the owner.

(2) If the owner has not received payment within the required thirty (30) days, the owner shall notify the offender of his demand for payment at the offender's last known address by certified mail or by personal delivery of the written notice to the offender. The offender shall make payment in full within ten (10) days after the mailing or delivery of the written notice or the offender shall be in violation of this section.

(3) A written agreement signed by the owner providing for a means of payment contrary to this section shall constitute an affirmative defense.

(4) For the purposes of this section, the following terms shall have the meanings ascribed to them herein unless the context clearly indicates otherwise:

(a) "Timber product" means timber of all kinds, species or sizes, including, but not limited to, logs, lumber, poles, pilings, posts, blocks, bolts, cordwood and pulpwood, pine stumpwood, pine knots or other distillate wood, crossties, turpentine (crude gum), pine straw, firewood and all other products derived from timber or trees which have a sale or commercial value.

(b) "Owner" means any person, partnership, corporation, unincorporated association or other legal entity having any interest in any timber product, any land upon which a timber product is growing or any land from which a timber product has been removed.

(5) Whoever violates this section, upon conviction thereof, when the value of the timber product is Five Hundred Dollars (\$500.00) or less, shall be fined not more than One Thousand Dollars (\$1,000.00), or imprisoned for not more than one (1) year, or both. When the value of the timber product is more than Five Hundred Dollars (\$500.00), the violator, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or imprisoned for not more than ten (10) years, or both.

SOURCES: Laws, 2004, ch. 419, § 2, eff from and after July 1, 2004.

§ 97-17-61. Larceny; taking and carrying away certain animals or motor vehicles not amounting to larceny.

Any person who shall, without the consent of the owner or his agent, take away any horse, mare, gelding, mule, jack, jennet, sheep, cow, bull, ox, hog, or other livestock or dog, or automobile, truck or other motor vehicle, where such taking and carrying away shall not amount to larceny, shall upon conviction,

be fined not exceeding One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding one (1) year in the county jail, or both. A verdict of guilty of such taking and carrying away may be rendered under an indictment for larceny, if the evidence shall not warrant a verdict of guilty of larceny but shall warrant a conviction under this section. This section shall not apply to anyone who takes such property believing, in good faith, that he has a right to it. The court shall order any person convicted under this section to pay restitution for any damage caused to any property as a result of violating this section.

SOURCES: Codes, 1880, § 2911; 1892, § 1186; Laws, 1906, § 1264; Hemingway's 1917, § 994; Laws, 1930, § 1022; Laws, 1942, § 2254; Laws, 1940, ch. 239; Laws, 1996, ch. 544, § 3, eff from and after July 1, 1996.

Cross References — Brands, marks, and transporting cattle, see § 69-29-1.

JUDICIAL DECISIONS

1. In general.

In a prosecution for larceny of a black Angus heifer belonging to another, the trial court erred in refusing a defense instruction based upon this section where the defendant presented evidence that he had accidentally struck the heifer with his automobile, that the animal had been killed with a gunshot to put it out of its misery, and that he and others had taken the carcass and had it cut, wrapped and divided four ways; since the defendant's proof tended to establish that there was no intent to appropriate the cow at any time before it was shot, thereby negating the crime of larceny, the trial judge in effect peremptorily instructed the jury to disregard the defendant's defense when he refused the requested instruction. *Knowles v. State*, 410 So. 2d 380 (Miss. 1982).

Where the defendant admitted the wrongful taking of an automobile from a motor company lot, but claimed that he intended only to drive it around that night and then return it, and it was shown that he drove it only within the city limits even

after he was given a ticket for driving without a license and tag, such evidence precluded a conviction of grand larceny, but rather indicated an act of trespass less than larceny, since it did not appear that the defendant intended to deprive the owner permanently. *Slay v. State*, 241 So. 2d 362 (Miss. 1970).

Evidence failing to indicate that defendant intended to steal truck but at most established offense of trespass less than larceny, was insufficient to warrant conviction of grand larceny. *Ephram v. State*, 204 Miss. 879, 35 So. 2d 708 (1948).

Person who helped owner of cornfield catch and pen a hog, and after owner refused to pay 50¢ for the hog's keep, paid owner of cornfield 50¢ for the hog and offered to turn it over to its owner upon payment of 50¢, did not violate this section [Code 1942, § 2254]. *Husbands v. State*, 112 Miss. 17, 72 So. 836 (1916).

Not larceny where defendant directed by owner to take a certain animal took another by mistake. *Barnes v. State*, 98 Miss. 458, 53 So. 956 (1911).

RESEARCH REFERENCES

ALR. Automobiles: elements of offense defined in "joyriding" statutes. 9 A.L.R.3d 633.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 A.L.R.3d 1202.

Admissibility of photographs of stolen property. 94 A.L.R.3d 357.

Cat as subject of larceny. 55 A.L.R.4th 1080.

Am Jur. 50 Am. Jur. 2d, Larceny §§ 59 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes, §§ 16-18 (automobile thefts).

§ 97-17-63. Larceny; tenants in common.

Any tenant in common of personal property, or person who is in any manner interested in any such property in which any other person has an interest, who shall sell, give away, conceal, or in any way convert or dispose of such property, with intent to defraud his cotenant or other person interested in such property, shall be punished as if he had committed larceny of such property of the value of the interest of his cotenant or other person interested in such property.

SOURCES: Codes, 1880, § 2913; 1892, § 1188; Laws, 1906, § 1266; Hemingway's 1917, § 996; Laws, 1930, § 1024; Laws, 1942, § 2256.

Cross References — Affidavit for attachment against person unlawfully converting or disposing of property, etc., see § 11-33-9.

Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny §§ 98 et seq. **CJS.** 52B C.J.S., Larceny §§ 42, 57 et seq.

§ 97-17-64. Larceny; under lease or rental agreement.

(1) A person who obtains personal property of another under a lease or rental agreement is guilty of theft if he exercises unlawful or unauthorized control over the property with purpose to deprive the owner thereof. As used in this section, the word "deprive" means to withhold property of another permanently or for so extended a period that a significant portion of its economic value, or the use or benefit thereof, is lost to the owner; or to withhold the property with intent to restore it to the owner only upon payment of a reward or other compensation; or to conceal, abandon or dispose of the property so as to make it unlikely that the owner will recover it; or to sell, give, pledge, or otherwise transfer any interest in the property.

(2) It shall be prima facie evidence of purpose to deprive when a person:

(a) In obtaining such property presents identification or information which is materially false, fictitious, misleading or not current, with respect to such person's name, address, place of employment, or any other material matter; or

(b) Fails to return such property to the owner or his representative within ten (10) days after proper notice following the expiration of the term for which such person's use, possession or control of the property is authorized; or

(c) Fails to contact the owner or his representative to make arrangements to return such property within ten (10) days after proper notice

following the expiration of the term for which such person's use, possession or control of such property is authorized.

(3) For the purpose of this section, "proper notice" means either actual notification as may be otherwise proven beyond a reasonable doubt or a written demand for return of the property mailed to the defendant, which satisfies the following procedure:

(a) The written demand must be mailed to the defendant by certified or registered mail with return receipt attached, which return receipt by its terms must be signed by the defendant personally and not by his representative;

(b) The written demand must be mailed to the defendant at either the address given at the time he obtained the property or the defendant's last known address if later furnished in writing by the defendant to the owner or his representative; and

(c) The return receipt bearing the defendant's signature must be returned to the owner or his representative.

(4) It shall be an affirmative defense to prosecution under this section that:

(a) The defendant was unaware that the property was that of another; or

(b) The defendant acted under an honest claim of right to the property involved or that he had a right to acquire or dispose of it as he did; or

(c) The defendant was physically incapacitated and unable to request or obtain permission of the owner to retain the property; or

(d) The property was in such a condition, through no fault of the defendant, that it could not be returned within the requisite time after receipt of proper notice.

(5) Any person convicted of the offense of theft under this section shall be:

(a) Guilty of a misdemeanor when the value of the personal property is less than Two Hundred Fifty Dollars (\$250.00) and punished by a fine of not more than Two Hundred Fifty Dollars (\$250.00), or by imprisonment in the county jail for a term of not more than six (6) months, or by both such fine and imprisonment; or

(b) Guilty of a felony when the value of the personal property is Two Hundred Fifty Dollars (\$250.00) or more and punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment in the State Penitentiary for a term of not more than three (3) years, or by both such fine and imprisonment.

SOURCES: Laws, 1987, ch. 352, eff from and after July 1, 1987.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

CJS. 52B C.J.S., Larceny §§ 47.

§ 97-17-65. Looting.

(1) A person commits looting when he knowingly without authority of law or of the owner enters any home or dwelling, or upon any premises of another, or enters any commercial, mercantile, business or industrial building, plant or establishment, in which a normal security of property is not present by virtue of a hurricane, fire or vis major of any kind or by virtue of a riot, mob, or other human agency and obtains or exerts control over or injures or removes property of the owner.

(2) Any person who commits looting shall be guilty of a felony and, upon conviction, such person shall be punished by imprisonment in the penitentiary for a period not to exceed fifteen (15) years or by a fine not to exceed ten thousand dollars (\$10,000.00), or both such fine and imprisonment.

(3) The fact that a person may be subject to prosecution under this section shall not bar his prosecution or punishment under the statutes relating to larceny or burglary, or under any other statute or ordinance to the extent that such would otherwise be permitted in the absence of this section.

SOURCES: Codes, 1942, § 2257.5; Laws, 1968, ch. 348, §§ 1-3, eff from and after passage (approved July 11, 1968).

Cross References — Larceny, see §§ 97-17-41 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. Trials, Defending
Minor Felony Cases §§ 1 et seq.

§ 97-17-67. Malicious mischief.

(1) Every person who shall maliciously or mischievously destroy, disfigure, or injure, or cause to be destroyed, disfigured, or injured, any property of another, either real or personal, shall be guilty of malicious mischief.

(2) If the value of the property destroyed, disfigured or injured is Five Hundred Dollars (\$500.00) or less, it shall be a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00) or imprisonment not exceeding twelve (12) months in the county jail, or both.

(3) If the value of the property destroyed, disfigured or injured is in excess of Five Hundred Dollars (\$500.00), it shall be a felony punishable by a fine not exceeding Ten Thousand Dollars (\$10,000.00) or imprisonment in the Penitentiary not exceeding five (5) years, or both.

(4) In all cases restitution to the victim for all damages shall be ordered. The value of property destroyed, disfigured or injured by the same party as

part of a common crime against multiple victims may be aggregated together and if the value exceeds One Thousand Dollars (\$1,000.00), shall be a felony.

(5) For purposes of this statute, value shall be the cost of repair or replacement of the property damaged or destroyed.

(6) Anyone who by any word, deed or act directly or indirectly urges, aids, abets, suggests or otherwise instills in the mind of another the will to so act shall be considered a principal in the commission of said crime and shall be punished in the same manner.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 7(2); 1857, ch. 64, art. 202; 1871, § 2709; 1880, § 2919; 1892, § 1209; Laws, 1906, § 1287; Hemingway's 1917, § 1019; Laws, 1930, § 1049; Laws, 1942, § 2281; Laws, 1962, ch. 319; Laws, 1968, ch. 357, § 1; Laws, 2003, ch. 434, § 1, eff from and after July 1, 2003.

Cross References — Reports of students charged with misdemeanors, see §§ 37-11-29 et seq.

Theft or destruction of court or other public records and papers, see § 97-9-3.

Alteration, destruction or concealment of will, see § 97-9-77.

Defacing or destroying public buildings, schools, churches, etc., see § 97-17-39.

Crime of looting, see § 97-17-65.

JUDICIAL DECISIONS

1. In general.

Section 21-13-19, which gives a municipal court the authority to try misdemeanors and allows municipalities to incorporate all state misdemeanors as municipal violations, does not bar the State from prosecuting misdemeanors committed within municipal boundaries; the effect of § 21-13-19 is to allow more than one governmental entity to prosecute misdemeanors, as the statute simply grants municipalities the authority to make use of the legislature's classifications of misdemeanors; thus, a county circuit court had original jurisdiction over a prosecution for malicious mischief under this section, in spite of the defendant's argument that his violation constituted a municipal offense and that the case should have

been heard by a municipal court. *Collins v. State*, 594 So. 2d 29 (Miss. 1992).

It is unnecessary for an indictment under this section [Code 1942, § 2281] to specify the value of the property destroyed or the monetary amount of the damage, for in this respect it is only necessary to show destruction or injury of property and its disfiguration. *Cain v. State*, 253 Miss. 368, 175 So. 2d 638 (1965).

One maliciously injuring real property of another by tearing down and removing a fence therefrom is not guilty of malicious mischief. *City of Greenville v. Laurent*, 75 Miss. 456, 23 So. 185 (1898).

It is not necessary under this statute [Code 1942, § 2281] to aver that the acts were wilfully done, "maliciously" is enough. *Funderburk v. State*, 75 Miss. 20, 21 So. 658 (1897).

RESEARCH REFERENCES

Am Jur. 52 Am. Jur. 2d, Malicious Mischief §§ 1 et seq.

59 Am. Jur. 2d, Parent and Child §§ 93 et seq.

§ 97-17-68. Coin operated devices; description of offenses and imposition of penalties.

(1) It shall be unlawful for any person: (a) to willfully open, enter, remove,

break into, tamper with or damage any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services with the intent to commit a larceny therefrom; (b) to possess a key or device designed and intended by him to aid in the commission of larceny from any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services; (c) to possess a drawing, print or mold of a key or device designed and intended by him to aid in the commission of larceny from any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services; or (d) to break into or enter any parking meter, coin telephone or other coin-operated vending machine dispensing goods or services with the intent to steal therefrom.

(2) Any person who violates any provision of this section shall be punished upon the first conviction by imprisonment in the county jail or sentenced to hard labor for the county for a period of not more than thirty (30) days, or by a fine of not more than two hundred dollars (\$200.00), or by both such fine and imprisonment. Upon any subsequent conviction, such person shall be punished by imprisonment in the county jail for a period of not less than six (6) months nor more than one (1) year, or by a fine of not more than five hundred dollars (\$500.00), or by both such fine and imprisonment.

SOURCES: Laws, 1974, ch. 356, §§ 1, 2, eff from and after passage (approved March 14, 1974).

RESEARCH REFERENCES

ALR. Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine. 45 A.L.R.3d 1286.

Criminal prosecutions for use of “blue box” or similar device permitting user to make long-distance telephone calls without incurring charges. 78 A.L.R.3d 449.

§ 97-17-69. Repealed.

Repealed by Laws, 1993, ch. 359, § 5, eff from and after July 1, 1993.

[Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 4(72); 1857, ch. 64, art. 196; 1871, § 2657; 1880, § 2907; 1892, § 1181; 1906, § 1259; Hemingway’s 1917, § 989; 1930, § 1017; 1942, § 2249]

Editor’s Note — Former § 97-17-69 provided for the crime of receiving stolen property. Similar provisions are now found in § 97-17-70.

§ 97-17-70. Receiving stolen property.

(1) A person commits the crime of receiving stolen property if he intentionally possesses, receives, retains or disposes of stolen property knowing that it has been stolen or having reasonable grounds to believe it has been stolen, unless the property is possessed, received, retained or disposed of with intent to restore it to the owner.

(2) The fact that the person who stole the property has not been convicted, apprehended or identified is not a defense to a charge of receiving stolen property.

(3) Any person who shall be convicted of receiving stolen property which exceeds Five Hundred Dollars (\$500.00) in value shall be committed to the custody of the State Department of Corrections for a term not exceeding ten (10) years or by a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(4) Any person who shall be convicted of receiving stolen property which does not exceed Five Hundred Dollars (\$500.00) in value shall be punished by imprisonment for not more than six (6) months or by a fine of not more than One Thousand Dollars (\$1,000.00), or both.

SOURCES: Laws, 1993, ch. 359, § 1; Laws, 2003, ch. 499, § 4; Laws, 2005, ch. 511, § 1, eff from and after July 1, 2005.

Editor's Note — Similar provisions were formerly found in repealed § 97-17-69.

Amendment Notes — The 2005 amendment purported to revise the defenses to a charge of receiving stolen property. However, the section was not actually amended by Laws, 2005, ch. 511, § 1.

Cross References — Unlawful purchasing of derelict property from finder, see § 89-17-27.

Junk dealers required to keep records of copper, aluminum, and railroad track materials purchases, see § 97-17-71.

Receiving things of value obtained by fraudulent use of credit card, see § 97-19-27.

Buying or receiving embezzled goods, see § 97-23-23.

Search warrant for stolen goods, see § 99-15-11.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Evidence.
3. Sufficiency of evidence.
- 4-14. [Reserved for future use.]

II. UNDER FORMER § 97-17-69.

15. In general.
16. Guilty knowledge.
17. Accessories.
18. Inference from possession of stolen goods.
19. Indictment.
20. Evidence.
21. —Sufficiency.
22. Instructions.
23. Miscellaneous.

I. UNDER CURRENT LAW.

1. In general.

The statutory requirements for the crime of receiving stolen property are:(1)

the possession, receipt, retention or disposition of personal property;(2) stolen from someone else; and (3) with knowledge or a reasonable belief that the property is stolen. *Washington v. State*, 726 So. 2d 209 (Ct. App. 1998).

2. Evidence.

Evidence of the unexplained possession of recently stolen goods by one charged with unlawfully receiving them is admissible in a prosecution for the offense and is a strong circumstance to be considered with all the evidence in the case on the question of guilty knowledge. *Washington v. State*, 726 So. 2d 209 (Ct. App. 1998).

3. Sufficiency of evidence.

Appellate court agreed with the State that the value of the stolen car was proven at trial where the defense introduced a purported bill of sale for the vehicle which defendant was driving; the bill of sale

listed the purchase price at \$1,500, which was more than the \$250 needed on the charge of possession of stolen property. *Hubbard v. State*, — So. 2d —, 2006 Miss. App. LEXIS 163 (Miss. Ct. App. Mar. 7, 2006).

Where defendant was charged with possession of stolen property, the jury was presented with absolutely no evidence of the stolen truck's value. There was insufficient evidence to support a felony conviction for possession of stolen property pursuant to Miss. Code Ann. § 97-17-70(3); instead, defendant was guilty of misdemeanor possession of stolen property. *Rogers v. State*, 920 So. 2d 550 (Miss. Ct. App. 2006).

Defendant's motion for judgment notwithstanding the verdict or, alternatively, a new trial, was properly denied, as his argument that he did not "knowingly" receive the stolen property, just after the subject burglary, was controverted by the testimony of the three men who did commit the burglary, and the jury verdict was not against the overwhelming weight of the evidence given the identity of the stolen items and the testimony of said three men, who stated that the stolen items were traded to defendant for marijuana. In sum, the jury was presented with two versions of what happened, and found the State's version more credible, and accordingly, allowing the verdict to stand did not constitute an unconscionable injustice. *Primas v. State*, 915 So. 2d 1095 (Miss. Ct. App. 2005).

Defendant's conviction for receiving stolen goods in violation of Miss. Code Ann. § 97-17-70 was vacated because defendant could not be convicted of receiving stolen goods, where the evidence showed she was guilty of larceny of the goods in question. There was no evidence that defendant received the gun from a third person who had stolen it, rather, the evidence showed that the weapon belonged to her ex-husband, that it had been reported stolen, and that she was required to return it if she found it in her home after their divorce, but that she had not yet returned it. *Young v. State*, 908 So. 2d 819 (Miss. Ct. App. 2005).

State proved that defendant intentionally possessed, received, retained or dis-

posed of stolen property knowing that it had been stolen where defendant's having the stolen property in his personal automobile, his selling it far below market price, and the secretive way in which he secured a buyer provided the jurors reason to find defendant had guilty knowledge sufficient to support guilt; since defendant provided no explanation of his possession of the recently stolen goods, this would lead a reasonable person to believe the property was stolen. *Russell v. State*, 844 So. 2d 506 (Miss. Ct. App. 2003).

Evidence was insufficient to establish that a stolen stereo and a stolen flashlight received by the defendant had a value of more than \$250 so that the evidence only supported a conviction under subsection (4), rather than subsection (3); the owner of the stolen property had testified that he paid \$600 for the stereo two and a half years before the theft and \$110 for the flashlight a year prior to the crime and that both items were still in good condition, but there was no testimony from anyone familiar with the market value of these items. *Williams v. State*, 763 So. 2d 186 (Miss. Ct. App. 2000).

Circumstantial evidence, when viewed in the light most favorable to the state, supported the jury verdict finding the defendant guilty of receiving stolen property and conspiracy to receive stolen property where the state showed that a pattern existed wherein vehicle identification number plates from older vehicles were placed onto newer stolen vehicles to prevent recovery by the lawful owner. *Washington v. State*, 726 So. 2d 209 (Ct. App. 1998).

4.-14. [Reserved for future use.]

II. UNDER FORMER § 97-17-69.

15. In general.

"Received" within the meaning of former § 97-17-69 is not limited to physical receipt. Receipt of stolen property is continuing conduct and includes handling thereafter; the act encompasses a "continuous course of receiving." Physical possession of the property is not required nor is exclusive control or dominion. It is adequate that the prosecution prove that the

property was subject to the defendant's dominion and control. Thus, a defendant could be convicted of receiving stolen property where he aided others in their handling of stolen guns and substantially facilitated their continued dominion, control and ultimately, disposition of the guns, even though he never physically handled the guns and may never have possessed or controlled the guns. *Davis v. State*, 586 So. 2d 817 (Miss. 1991).

Under state's evidence showing that the defendant was present, aiding, abetting and participating in the theft of a combine, he should have been charged with grand larceny, and his conviction of receiving stolen property was improper, requiring reversal. *Hentz v. State*, 489 So. 2d 1386 (Miss. 1986).

The statutes making the receiving of stolen goods a substantive offense are not intended to punish the thief by way of a double penalty but are directed against those who would make theft easy or profitable, and it is elementary that one who steals property cannot be convicted of receiving, concealing or aiding in concealing the property stolen. *Anderson v. State*, 232 So. 2d 364 (Miss. 1970), but see *Knowles v. State*, 341 So. 2d 913 (Miss. 1977).

Where, pursuant to an offer by the defendant to theft victim to obtain the return of his stolen property for a payment of \$200, the defendant met the victim in a place where he was under the observation of a police detective, produced the stolen articles and received the \$200 which the detective took from defendant's hand when he placed him under arrest for receiving stolen property, there was no violation of defendant's right of privacy or right of due process, and a search warrant was unnecessary for the stolen articles were seen in defendant's possession prior to his arrest. *Bennett v. State*, 211 So. 2d 520 (Miss. 1968), appeal dismissed, cert. denied, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 515 (1969).

Where defendant was punished under a statute providing generally for punishment upon conviction of receiving stolen goods and the indictment charged receipt of stolen property alleging the value of \$21, the defendant should have been sentenced under statute providing for pun-

ishment of such offense as petit larceny. *Jones v. State*, 215 Miss. 355, 60 So. 2d 805 (1952).

Where defendant received a ring and put it in hiding, and thereby exercised control and dominion over it, this was sufficient under the terms of this section [Code 1942, § 2249] of receiving stolen property, even though the defendant had the ring in his manual possession for a very short time. *Daniel v. State*, 212 Miss. 223, 54 So. 2d 272 (1951).

One who receives stolen car from thief, knowing it was stolen, and after assuring thief that if he would steal and bring him a good car defendant would receive and pay for it, is not guilty of larceny but of receiving stolen goods. *Harper v. State*, 207 Miss. 733, 43 So. 2d 183 (1949).

This section [Code 1942, § 2249] and Code 1942, § 2538 are inconsistent, and since the legislature has seen fit to amend the latter section, such section is controlling as the last pronouncement of the legislature. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

One convicted of receiving stolen property, consisting of an automobile tire of the value of less than \$25, cannot be sentenced to a term in the state penitentiary but can only be punished as for petit larceny. *Crowell v. State*, 195 Miss. 427, 15 So. 2d 508 (1943).

In view of the phrase "buy or receive," either the buying or receiving of property, knowing it to be stolen, is an offense under the statute. *Claxton v. State*, 185 Miss. 426, 187 So. 877 (1939).

The distinction between a felony and a misdemeanor, dependent upon the value of the property involved, does not exist under the statute denouncing the offense of receiving stolen property. *Claxton v. State*, 185 Miss. 426, 187 So. 877 (1939).

The value of the goods is immaterial under this section [Code 1942, § 2249] so that a person receiving stolen property knowing it to be such, in the manner denounced by the statute, is guilty of a felony, regardless of the value of such property; although the punishment, in the discretion of the court, may be a sentence to the penitentiary, or by imprisonment in the county jail, or by a fine named in the statute. *Claxton v. State*, 185 Miss. 426, 187 So. 877 (1939).

16. Guilty knowledge.

The evidence was sufficient to present a jury issue on whether the defendant knew that property was stolen when he received it, where the defendant initially falsely denied to the arresting officer that he had received the property. *Minter v. State*, 583 So. 2d 973 (Miss. 1991).

The evidence was insufficient to establish that the defendant received stolen property with knowledge that it was stolen from another, where a stolen tool box and tools were recovered from the defendant's residence, the only proof relevant to the issue of guilty knowledge was testimony that the name of the farm from which the tools were stolen was located underneath the lid of the tool box and that a few of the tools left inside the box were marked with the name of one of the farm's employees, neither the tools nor the tool box were identified and introduced into evidence and therefore the jury did not have an opportunity to observe the nature of the markings, nothing in the official record suggested that the defendant could have read the markings, and there was no proof that any one or more of the tools contained in the box at the time it was recovered were a part and parcel of the tools originally stolen. *Tubwell v. State*, 580 So. 2d 1264 (Miss. 1991).

Defendant had been erroneously adjudicated delinquent child under Youth Court Act, for receipt of stolen property, where evidence offered by state showed only that defendant acquired possession of property from friend, and failed to prove either defendant's knowledge, or such circumstances that would constitute defendant's knowledge that property was stolen when defendant received it. *In re W.B.*, 515 So. 2d 1175 (Miss. 1987).

Guilty knowledge is the gist of the offense of receiving stolen property. *Whately v. State*, 490 So. 2d 1220 (Miss. 1986).

Defendant was entitled to a reversal of his conviction under former § 97-17-69 of knowingly possessing stolen property, where the only proof the State presented that went to guilty knowledge was the argument that a postal receipt located in a storeroom in which some the stolen merchandise was located meant that the defendant must have known that the receipt

represented stolen merchandise, in that the State failed to meet its burden of proof in establishing that the defendant knew that the merchandise was stolen. *Thompson v. State*, 457 So. 2d 953 (Miss. 1984).

In order for the state to prove guilty knowledge, as required by this section in a prosecution for receiving stolen property, it must be established that defendant received the property under circumstances that would lead a reasonable person to believe it to be stolen. *Ellett v. State*, 364 So. 2d 669 (Miss. 1978).

In order to be convicted for receiving stolen property it is not necessary that the accused personally witnessed the theft of the property in question, and if a person has knowledge from facts and circumstances which should convince a reasonable person that property has been stolen, in such situation the rule is that in a legal sense he knew the property was stolen. *Brown v. State*, 281 So. 2d 924 (Miss. 1973).

A judgment of conviction for receiving stolen property would be reversed where the testimony in the light most favorable to the state proved that the defendant had in his possession property that was recently stolen, but there was no evidence that he received it knowing it to have been stolen, for guilty knowledge is the gist of the offense of receiving stolen goods, and such knowledge must be both alleged and proved. *Johnson v. State*, 247 So. 2d 697 (Miss. 1971).

Where the transaction between one charged with receiving stolen goods and another is such as to convince him, or should do so, that the articles were stolen, and he received them, he has knowledge to make him guilty of the offense charged. *Bennett v. State*, 211 So. 2d 520 (Miss. 1968), appeal dismissed, cert. denied, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 515 (1969).

Where the defendant knew where the ring was hidden and led the officers to it and gave it to them, and from this the jury would have been justified in finding that he had it in his possession and, there being no explanation as to why he had it in his possession, the statements to the officers and actions of defendant in the matter were sufficient to make an issue

for decision by the jury on the question whether the defendant had knowledge of the stolen character of the property. *Daniel v. State*, 212 Miss. 223, 54 So. 2d 272 (1951).

Word "knowing" means if person has information which should convince him property has been stolen. *Francis v. State*, 154 Miss. 176, 122 So. 372 (1929).

By knowing them to be stolen is not meant that the defendant should have witnessed the theft. If the transaction is such as to convince him that the property was stolen and he receives it, he has knowledge to make him guilty. *Sartorius v. State*, 24 Miss. 602 (1852); *Frank v. State*, 67 Miss. 125, 6 So. 842 (1889).

17. Accessories.

A man who agreed to purchase goods which others intended to steal, who supplied a tractor to be used during the theft, who was not present during the commission of the crime, but who received stolen goods, could be convicted both as an accessory before the fact and as a receiver of stolen property (ovrlg *Anderson v. State* (Miss) 232 So. 2d 364, to the extent that it holds that an accessory before the fact to larceny not present at the actual caption and asportation of the stolen goods may not be convicted of knowingly receiving stolen property). *Knowles v. State*, 341 So. 2d 913 (Miss. 1977).

Where it was shown that the defendant made arrangements for two cows to be clandestinely taken from the owner's property, the defendant was an accessory before the fact of larceny and thus was deemed and considered to be a principal and could not be convicted on a charge of receiving stolen property, knowing the same to have been stolen, notwithstanding that the defendant received the cows into his possession after the taking. *Anderson v. State*, 232 So. 2d 364 (Miss. 1970), but see *Knowles v. State*, 341 So. 2d 913 (Miss. 1977).

One who steals property, or who is accessory before fact to grand larceny cannot be convicted of receiving, concealing, or aiding in concealing, the property stolen. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272 (1949).

One who drives his car to seed house door, after midnight, and assists in load-

ing fertilizer in car after two other persons have unlocked door, entered seed house and brought fertilizer to door, is actually present, aiding, abetting, and participating in theft of fertilizer and is a principal guilty of larceny and not of receiving stolen property. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272 (1949).

Verdict finding defendant guilty as "accessor to the crime" was too vague, uncertain and indefinite to support a conviction of grand larceny, where the evidence pointed strongly to another who actually took the money, since it could not be ascertained whether the jury meant, by "accessor," that defendant was guilty as accessor before or after the larceny or that the defendant had received the money from another knowing it to have been stolen, and the defects of the verdict were not cured by statute pertaining to jeofails. *McDougal v. State*, 199 Miss. 39, 23 So. 2d 920 (1945).

Son was not guilty of receiving stolen property above the value of \$25 for helping his father in unloading the property and subsequently, after the theft was discovered and an investigation begun, in assisting his father in carrying the property to some nearby woods, notwithstanding that the father was guilty of such offense. *Reese v. State*, 198 Miss. 843, 23 So. 2d 694 (1945).

18. Inference from possession of stolen goods.

In a prosecution for the offense of receiving stolen goods, it was reversible error for the state to obtain an instruction that if the evidence showed that the goods were found in the defendant's possession, and he gave no satisfactory explanation of such possession, there arose a presumption or inference of fact that the defendant received said goods knowing the same to have been lately taken, stolen and carried away. *Mansfield v. State*, 231 So. 2d 774 (Miss. 1970).

Where circumstances warrant the conclusion that certain specified articles were stolen by another, and they are traced to the possession of the defendant under circumstance sufficient to make him believe they were stolen, this is sufficient to uphold a conviction, for knowledge that the articles were stolen does not mean

that the defendant should personally have witnessed the theft. *Bennett v. State*, 211 So. 2d 520 (Miss. 1968), appeal dismissed, cert. denied, 393 U.S. 320, 89 S. Ct. 555, 21 L. Ed. 2d 515 (1969).

Presumption of guilt held to arise from unexplained possession of goods recently stolen. *Autman v. State*, 126 Miss. 629, 89 So. 265 (1921).

19. Indictment.

Indictment which fairly tracked language of statute was not fatally defective in failing to allege ownership of allegedly stolen property, where defendant was convicted of receiving stolen property. *Cummins v. State*, 515 So. 2d 869 (Miss. 1987), overruled on other grounds, *Morgan v. State*, 703 So. 2d 832 (Miss. 1977).

It is unnecessary to allege any specific or unlawful intent in an indictment drawn under this section [Code 1942, § 2249] and following its wording. *Chavers v. State*, 215 So. 2d 880 (Miss. 1968).

Where defendant was charged with unlawfully receiving six sacks of ammonium nitrate, indictment stating the words "six sacks of ammonium nitrate," was sufficient in designation and describing the property charged to have been stolen. *Jones v. State*, 215 Miss. 355, 60 So. 2d 805 (1952).

Where an amendment to an indictment charging the receipt of stolen property did not vary the description but merely supplemented it, the amendment did not constitute a new case or a new description which would prevent the accused from understanding the offense with which he was charged. *Jones v. State*, 215 Miss. 355, 60 So. 2d 805 (1952).

An indictment charging the receipt of stolen property, which described the property as a certain diamond ring, a better description of said diamond ring being to the grand jurors unknown, was sufficient. *Daniel v. State*, 212 Miss. 223, 54 So. 2d 272 (1951).

The use of the words "buy or obtain" in an indictment, and the omission of the word "taken" in connection with the allegation that the defendant knew the property to be feloniously taken, sufficiently charged the offense under the statute, the words used in the indictment being synonymous with the words used in the stat-

ute. *Claxton v. State*, 185 Miss. 426, 187 So. 877 (1939).

Indictment charging receiving stolen goods held sufficient without alleging unlawful intent. *Renfrow v. State*, 154 Miss. 523, 122 So. 750 (1929).

Indictment for receiving stolen property, which fails to describe the property with the same particularity as is required in an indictment for larceny, is bad on demurrer. *Wells v. State*, 90 Miss. 516, 43 So. 610 (1907).

20. Evidence.

False testimony of confessed thief, who was only witness who could establish elements of indictment which alleged that property was stolen, was of such importance that suppression of evidence with which defendant could have impeached thief's testimony denied defendant right to fair trial. *Cummins v. State*, 515 So. 2d 869 (Miss. 1987), overruled on other grounds, *Morgan v. State*, 703 So. 2d 832 (Miss. 1977).

Evidence of flight by defendant's coindictor and of alleged false statements made by coindictor to police concerning identity are inadmissible in trial of defendant on charge of receiving stolen property in absence of proof of conspiracy or concerted action. *Van v. State*, 477 So. 2d 1350 (Miss. 1985).

Admission of testimony in a grand larceny prosecution of a witness, who had been indicted for receiving the property involved in the theft, which was not contradicted, was not improbable, and was reasonable, was not error, even though the witness testified that he had an agreement with the state that if he told the truth the charges against him would be dropped. *Hoke v. State*, 232 Miss. 329, 98 So. 2d 886 (1957).

Defendant charged with receiving stolen goods cannot be convicted of that offense on evidence which shows that he is guilty of larceny of the goods received. *Thomas v. State*, 205 Miss. 653, 39 So. 2d 272 (1949).

If two persons be jointly indicted and tried together for receiving stolen property, evidence of a separate receiving by one without the knowledge or consent of the other is not admissible over the objec-

tion of that other. *Wheeler v. State*, 76 Miss. 265, 24 So. 310 (1898).

21. —Sufficiency.

Trial court's decision to deny defendant's motion for a directed verdict of acquittal during a receiving stolen property trial was proper because several witnesses testified that defendant attempted to cash a large amount of irregular money orders over the period of a few days; it was up to the jury to weigh this testimony with defendant's explanation of events. *Massey v. State*, 863 So. 2d 1019 (Miss. Ct. App. 2004).

The evidence was insufficient to support a conviction of receiving stolen property where the State proved that the stolen skidder was in a heavily wooded area which no one other than the defendant and the co-defendant entered during three days of police surveillance, that the defendant had some control and dominion over the skidder, and that he intended to sell parts from it, but did not show how the defendant came into possession of the skidder. The State failed to prove the defendant's "guilty knowledge" in that there was no evidence that the defendant received the stolen skidder knowing it to be stolen. *Lewis v. State*, 573 So. 2d 713, 29 A.L.R.5th 766 (Miss. 1990).

Defendant was entitled to directed verdict where the evidence merely established that he had had possession of a recently stolen generator, which was worth more than \$100, and which had been sold or pawned by him for \$20. *Whately v. State*, 490 So. 2d 1220 (Miss. 1986).

In a prosecution under this section [Code 1942, § 2249], testimony of witnesses that they stole cotton, took it to defendant's house late at night, and advised him that it was stolen, is adequately corroborated by the testimony of one from whom it was stolen that he followed tracks from his cotton house to the home of the witnesses, and that at fences pieces of cotton were on the ground. *Fielder v. State*, 235 Miss. 44, 108 So. 2d 590 (1959).

In a prosecution for receiving stolen property at a value of over \$25.00, where the defendant did not object to testimony relative to his oral confession made to a deputy sheriff and another, on the ground

that there was no corroborative evidence of the corpus delicti aside from the confession, the confession was properly admitted, and, when considered along with existing corroborative evidence, amply warranted a verdict of guilty. *Allen v. State*, 230 Miss. 740, 93 So. 2d 844 (1957).

Testimony of three accomplices, which was reasonable, and was not improbable, or self contradictory, or substantially impeached, was sufficient to sustain a conviction. *Walker v. State*, 229 Miss. 540, 91 So. 2d 548 (1956).

A conviction for receiving stolen goods, based on evidence showing defendant guilty of larceny, cannot be sustained. *Manning v. State*, 129 Miss. 179, 91 So. 902 (1922).

Ownership must be proven as laid in indictment. *McAlpin v. State*, 123 Miss. 528, 86 So. 339 (1920).

Under an indictment for receiving stolen goods, proof that the defendant himself stole them will not convict. *Sartorius v. State*, 24 Miss. 602 (1852); *Frank v. State*, 67 Miss. 125, 6 So. 842 (1889).

22. Instructions.

Although former § 97-17-69 implicitly requires felonious intent, record reflected that jury instruction was not improper where it sufficiently tracked statute and there was ample evidence of defendant's wrongful intent. *Cummins v. State*, 515 So. 2d 869 (Miss. 1987), overruled on other grounds, *Morgan v. State*, 703 So. 2d 832 (Miss. 1977).

Instruction regarding offense of receiving stolen property may not assume as true that defendant was acting in concert with alleged accomplices and that property sold by defendant was feloniously stolen. *Van v. State*, 477 So. 2d 1350 (Miss. 1985).

An instruction which assumes as true a material fact, the truth of which is for the determination of the jury, is erroneous. *Church v. State*, 288 So. 2d 855 (Miss. 1974).

In a prosecution for receiving stolen property, a requested instruction that the persons from whom it was received are subject to prosecution for grand larceny is properly refused. *Fielder v. State*, 235 Miss. 44, 108 So. 2d 590 (1959).

In a prosecution for receiving stolen property an instruction to the jury that unexplained flight is a circumstance from which an inference of guilt may be drawn and considered with all other facts and circumstances connected with the case was in error where the accused gave an entirely plausible and uncontradicted explanation of the reason why he had been absent from the county. *Eubanks v. State*, 227 Miss. 162, 85 So. 2d 805 (1956).

An instruction that, if property is shown to have been recently stolen, or if the property was of a nature which would indicate or from which to a reasonable man would indicate its being stolen, or if the property bore marks sufficient to give the defendant a knowledge of its ownership when received by him, there is a presumption that the defendant had knowledge of its being stolen, is fatally

erroneous. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946).

Refusal of the court to instruct the jury that it must find the value of the property in a prosecution for receiving stolen property was not error, although the state in its instructions treated the matter as though the value, in order to become a felony, must exceed \$25. *Claxton v. State*, 185 Miss. 426, 187 So. 877 (1939).

23. Miscellaneous.

A Negro convicted of feloniously receiving stolen property was not entitled to a new trial upon the ground of unproven allegations of prejudice against members of his race by the jurors, which tried him, where no objection had been made to the qualifications of the juror before the jury had been impaneled and sworn. *Walker v. State*, 229 Miss. 540, 91 So. 2d 548 (1956).

RESEARCH REFERENCES

ALR. Receiving property stolen in another state or country as receiving stolen property. 67 A.L.R.2d 752.

Attempts to receive stolen property. 85 A.L.R.2d 259.

Sufficiency of description of stolen property in indictment or information for receiving it. 99 A.L.R.2d 813.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 A.L.R.3d 727.

Receipt of public documents taken by another without authorization as receipt of stolen property. 57 A.L.R.3d 1211.

Receiver of stolen goods as accomplice of thief for purposes of corroboration. 74 A.L.R.3d 560.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination. 88 A.L.R.3d 1178.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property. 89 A.L.R.3d 1202.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property. 30 A.L.R.4th 488.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control. 72 A.L.R.4th 838.

Defendant indicted only for receipt of stolen government property under 18 USCS § 641 as subject to conviction for that offense when he in fact stole the property. 43 A.L.R. Fed. 847.

Am Jur. 66 Am. Jur. 2d, Receiving Stolen Property §§ 1 et seq.

CJS. 76 C.J.S., Receiving Stolen Goods §§ 1 et seq.

§ 97-17-71. Receiving stolen property; junk dealers to keep records of purchases of certain materials; content of records; report of purchase to police required; interstate transportation of certain materials; penalties.

(1) Every owner, keeper or proprietor of a junk shop, junk store or yard,

junk cart or other vehicle or boat, or collector of or dealer in junk or other secondhand property of the types and kinds hereinafter described, shall keep a book or register in which he shall enter the following information: the name, address, age and driver's license number of the person or persons from whom any railroad track materials, any copper wire, cable, bars, rods or tubing, any aluminum construction materials or any aluminum irrigation equipment, material or supplies are purchased or otherwise acquired; the date and place of each acquisition of such materials; the description and quantity of such materials purchased or otherwise acquired; and the name and address of the person or persons from whom the seller acquired such materials. For the purposes of this section the words "railroad track materials" shall mean any rail, switch component, spike, angle bar, tie plate or bolt of the type used in constructing railroads. For the purposes of this section the words "copper materials" shall mean copper or brass materials, either hard drawn or soft drawn, copper wire or cable of the type used by public utilities or common carriers or brass pipe or fitting or any combination of these. For the purposes of this section the words "aluminum construction materials" shall mean any cable, bars, rods or tubing of the type used to construct utility or broadcasting towers, or any aluminum siding materials of the type used in the construction of houses and mobile homes, or any irrigation pipes or tubing and appurtenances thereof, whether mobile or stationary. Such book or register shall be made available to any law enforcement officer for inspection at any time. The purchaser of any such copper materials or aluminum construction materials shall, if the quantity of the purchase be fifty (50) pounds or greater, hold same separate and apart from other purchases for a period of not less than five (5) days from the date of purchase and shall permit any law enforcement officer to make an inspection of such copper materials or aluminum construction materials during the five-day holding period. The purchaser shall report all purchases of such copper materials or aluminum construction materials to the sheriff of the county in which such purchases are made, as well as to the sheriff of the county in which his business is located, within forty-eight (48) hours after any such purchase is made in every instance where the quantity of the purchase shall be fifty (50) pounds or greater. The report shall contain all of the information required to be maintained in the book or register provided for herein. If the quantity of the purchase of aluminum irrigation equipment, material or supplies be one hundred (100) pounds or greater, or if the quantity of the purchase of railroad track materials be five hundred (500) pounds or greater, the purchaser shall hold same separate and apart from other purchases for a period of not less than five (5) days from the date of purchase and shall permit any law enforcement officer to make an inspection of such railroad track materials.

(2) Failure by one acquiring any such materials to maintain the book or register or, (a) in a case where the quantity of the purchase be fifty (50) pounds or greater of copper materials or aluminum construction materials, or (b) in a case where the quantity of the purchase be five hundred (500) pounds or greater of railroad track materials, to hold such materials for not less than five

(5) days from date of purchase, as required under the provisions of this section, shall be prima facie evidence that the person receiving such copper wire, cable, bars, rods or tubing, aluminum construction materials, or railroad track materials received it knowing it to be stolen in violation of Section 97-17-70.

(3) It shall be unlawful for any person or entity to transport or cause to be transported for himself or another from any point within this state to any point outside this state any materials of the types described in subsection (1) of this section, except such person or entity first report to the sheriff of the county from which he or it departs this state transporting such materials the same information that a purchaser in this state would be required to obtain and keep in a book or register as set forth in subsection (1) hereof where a sale or transfer of such type materials is made within this state. In such a case the sheriff receiving such report shall keep such information in a book or register maintained in his office as a public record available for inspection by any person at all reasonable times. Provided, this section shall not apply to a public utility as that term is defined in Section 77-3-3, Mississippi Code of 1972, engaged in carrying on utility operations or to a railroad as that term is defined in Section 77-9-5, Mississippi Code of 1972.

(4) All purchases made from any person or firm which sells or disposes of railroad track materials or copper, brass or aluminum construction materials as an ordinary and usual part of its business, or from any person or firm which is engaged in business as a secondhand metal dealer shall be exempt from the provisions of this section provided the purchaser obtains a bill of sale from the seller at the time of the purchase. All purchases of metal beverage containers shall be exempt from the provisions of this section.

(5) Any person violating the provisions of subsection (1), (2) or (3) hereof shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) per offense.

SOURCES: Codes, 1942, § 2249.5; Laws, 1966, ch. 390, §§ 1-3, 1971, ch. 474, §§ 1-5; Laws, 1989, ch. 578, § 1; Laws, 1993, ch. 359, § 2, eff from and after July 1, 1993.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination. 88 A.L.R.3d 1178.

Am Jur. 66 Am. Jur. 2d, Receiving Stolen Property §§ 1 et seq.

CJS. 76 C.J.S., Receiving Stolen Goods §§ 1 et seq.

§ 97-17-73. Removing agricultural products subject to lien from premises where produced.

Any person who, with notice of an employer's, employee's, laborer's, cropper's, part-owner's, or landlord's lien on any agricultural products, and

with intent to defeat or impair the lien shall remove from the premises on which it was produced, or shall conceal, or aid or assist to remove or conceal, anything subject to such lien, and upon which any other person shall have such lien, without the consent of such person, shall, upon conviction, be punished by a fine of not more than five hundred dollars, and by imprisonment in the county jail not more than six months, or by either.

SOURCES: Codes, 1880, § 1362; 1892, § 1183; Laws, 1906, § 1261; Hemingway's 1917, § 991; Laws, 1930, § 1019; Laws, 1942, § 2251.

Cross References — Lien of executions, see § 13-3-139.
Removing property levied upon, see § 97-9-69.

JUDICIAL DECISIONS

1. In general.
2. Malicious prosecutions.

1. In general.

Tenant without his landlord's permission could not remove from leased premises products of place and property furnished him by landlord, on which products and furnishings a landlord's lien existed. *Scarborough v. Lucas*, 119 Miss. 128, 80 So. 521 (1919).

In a prosecution for removing from the premises garden produce, subject to a landlord's lien, intent to defeat or impair the lien is the gravamen of the charge. *Dolph v. State*, 111 Miss. 668, 71 So. 911 (1916).

Evidence is admissible to prove defendant's understanding that lien applied only to corn and cotton, not to the produce removed. *Dolph v. State*, 111 Miss. 668, 71 So. 911 (1916).

2. Malicious prosecutions.

Where the landlord's agent in prosecuting a tenant's widow for removing agricultural products from the premises was acting without the scope of his employment, in that he was employed only to collect the balance due the landlord on the tenant's note, and if necessary to enforce the lien claimed by the landlord on agricultural products, produced by the tenant on the leased premises, and a criminal prosecution was not the appropriate means to accomplish such purpose, the landlord could not be held liable in an action for malicious prosecution. *State Life Ins. Co. v. Hardy*, 189 Miss. 266, 195 So. 708 (1940).

The fact that the affidavit on which the plaintiff was prosecuted under this section [Code 1942, § 2251] failed to charge a crime thereunder, did not relieve the maker of the affidavit from liability in an action for malicious prosecution. *State Life Ins. Co. v. Hardy*, 189 Miss. 266, 195 So. 708 (1940).

While a defective affidavit in a prosecution before a justice of the peace under this section [Code 1942, § 2251] could have been amended at the trial so as to allege facts constituting a crime hereunder, such affidavit could not be amended after the trial and acquittal, and affiant would not be permitted, as a defense to a subsequent action for malicious prosecution, to say that he would have amended it by alleging facts constituting a crime. *State Life Ins. Co. v. Hardy*, 189 Miss. 266, 195 So. 708 (1940).

Conceding that a defective affidavit hereunder could be treated in a malicious prosecution action as amended so as to charge a crime hereunder, affiant could not escape liability in an action for malicious prosecution where the person accused had no "intent to defeat or impair" the landlord's lien in view of the facts that the statutory lien for the debt in question had been discharged and such person had no knowledge of the conventional lien contained in the note given by her deceased husband to the landlord, affiant's principal, for the debt in question. *State Life Ins. Co. v. Hardy*, 189 Miss. 266, 195 So. 708 (1940).

Conceding that a defective affidavit could be treated in an action for malicious

prosecution against the affiant as amended so as to charge a crime hereunder, affiant should not escape liability where the statutory lien on the cotton allegedly removed by the plaintiff had been discharged and plaintiff had no notice of the conventional lien contained in her husband's note to the landlord, affiant's principal, especially in view of the custom of her husband, without objection of the landlord, to remove cotton raised by him on the plantation, and to store it in a warehouse in a different county before paying the rent due by him, and in view of the request of the landlord that the plaintiff send him the warehouse receipt for sufficient cotton to pay the balance of her husband's debt, which he could only do by removing the property from the premises to a warehouse. *State Life Ins. Co. v.*

Hardy, 189 Miss. 266, 195 So. 708 (1940).

Where the landlord's agent as defendant in an action for malicious prosecution growing out of his prosecution of the tenant's wife hereunder for removing agricultural products subject to a conventional lien contained in the tenant's note to the landlord, relied on the defense that he acted on the advice of an attorney at law, such defense was unavailing in view of the agent's failure to make full disclosure of the facts, especially that the tenant's wife had no knowledge of such conventional lien and that she was acting on the theory that since the rent for the last year was paid, there was no statutory lien on the agricultural products. *State Life Ins. Co. v. Hardy*, 189 Miss. 266, 195 So. 708 (1940).

RESEARCH REFERENCES

ALR. Farmland cultivation arrangement as creating status of landlord-tenant or landowner-cropper. 95 A.L.R.3d 1013.

§ 97-17-75. Removing personal property subject to lien from county, or selling same.

Any person who shall remove, or cause to be removed, or aid or assist in removing from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, conditional sales contract, lien of a lessor of lands, or lien by judgment, or any other lien of which such party has notice, without the consent of the holder of such encumbrance or lien, or who shall conceal or secrete such property, or who shall sell or dispose of the same or any part thereof without the consent of the mortgagee or beneficiary, or conditional vendor, with intent to defraud the holder of the encumbrance or lien, whether any of these acts shall be done before or after the maturity of the debt secured by the lien, and shall not immediately discharge such encumbrance or lien or pay to the holder of such lien or encumbrance the value of such property in event same is less than the amount of such lien or encumbrance, shall, upon conviction, be imprisoned in the custody of the Department of Corrections not more than three (3) years, or be fined not more than Five Thousand Dollars (\$5,000.00), or both.

SOURCES: Codes, 1871, § 2659; 1880, § 2909; 1892, § 1184; Laws, 1906, § 1262; Hemingway's 1917, § 992; Laws, 1930, § 1020; Laws, 1942, § 2252; Laws, 1954, ch. 237, § 2; Laws, 2005, ch. 511, § 5, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment inserted “with intent to defraud the holder of the encumbrance or lien” preceding “whether any of these acts shall be done before” near the middle of the paragraph; and substituted “custody of the Department of Corrections not more than three (3) years or be fined not more than Five Thousand Dollars (\$5,000)” for “county jail not more than one year or be fined not exceeding the value of such property” near the end of the paragraph.

Cross References — Affidavit of attachment against debtor about to convert or dispose of property to defraud creditors, see § 11-33-9.

Lien of executions, see § 13-3-139.

Purchase money security interests, see §§ 75-9-107, 75-9-301, 75-9-312.

Removing property levied upon, see § 97-9-69.

Removal of agricultural products subject to lien, see § 97-17-73.

Removal of property subject to lien out of state, see § 97-17-77.

Sale of property previously sold or subject to lien as obtaining property by false pretenses, see § 97-19-51.

JUDICIAL DECISIONS

1. In general.

Privilege against self-incrimination cannot be relinquished by contract prior to development of circumstances which would make its exercise appropriate; accordingly, where a judgment debtor by written agreement bound himself by all the provisions of an application for a surety bond, wherein he promised the surety access to all books and records, and agreed to furnish financial statements and pledged all of his assets to indemnify the surety in the event of loss, and thereby induced the surety to write a performance and payment bond in excess of \$2,000,000, the judgment debtor was not estopped from claiming the privilege as a ground for refusing to furnish a financial statement, where there was some question whether he had concealed or removed from the state assets subject to a judgment lien, and the debtor's refusal to furnish the statement in compliance with a Mississippi chancery court decree justified an adjudication of civil contempt. *Morgan v. Thomas*, 321 F. Supp. 565 (S.D.

Miss. 1970), rev'd on other grounds, 448 F.2d 1356 (5th Cir. 1971), cert. denied, 405 U.S. 920, 92 S. Ct. 948, 30 L. Ed. 2d 790 (1972).

In a creditor's suit seeking disclosure of certain assets, the chancellor did not commit error in holding that the judgment debtor was entitled to assert his privilege against self-incrimination, under statutes making it a crime to remove property subject to liens out of the state or out of the county without consent or with intent to defraud. *Ferguson v. Johnson Implement Co.*, 222 So. 2d 820 (Miss. 1969).

Prosecution cannot be maintained under this section [Code 1942, § 2252] where the mortgage debt was not due when the alleged sale was made. *State v. Sullivan*, 80 Miss. 596, 32 So. 55 (1902).

Under Code 1880, removing or secreting the property and failing promptly to discharge the lien together constituted the offense. The sale of the property in the county without more did not make out the crime. *Polk v. State*, 65 Miss. 433, 4 So. 540 (1888).

ATTORNEY GENERAL OPINIONS

Criminal Code section forbidding sale of mortgaged goods applies to person who disposes of property subject to judgment

lien. Kopf, July 22, 1992, A.G. Op. #92-0533.

RESEARCH REFERENCES

CJS. 52B C.J.S., Larceny §§ 57 et seq.

§ 97-17-77. Removing personal property subject to lien out of state.

If any person shall move, or cause to be removed, to any place beyond the jurisdiction of this state, any personal property which shall at the time of such removal be under written pledge, or mortgage, or deed of trust, or conditional sales contract, or lien by judgment, or any other lien in this state, with intent to defraud the pledgee, mortgagee, trustee, cestui que trust, conditional vendor, or creditor, he shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned in the county jail not more than twelve (12) months, or both. The removal with intent to defraud of such property valued at four hundred dollars (\$400.00) or more shall be a felony punishable upon conviction by a fine of not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00), or by imprisonment in the penitentiary not less than one (1) nor more than three (3) years, or by both.

SOURCES: Codes, 1871, § 2658; 1880, § 2908; 1892, § 1182; Laws, 1906, § 1260; Hemingway's 1917, § 990; Laws, 1930, § 1018; Laws, 1942, § 2250; Laws, 1954, ch. 237, § 1; Laws, 1975, ch. 459, eff from and after July 1, 1975.

Cross References — Affidavit of attachment against debtor about to remove self or property out of state, see § 11-33-9.

Lien of executions, see § 13-3-139.

Purchase money security interests, see §§ 75-9-107, 75-9-301, 75-9-312.

Removing property levied upon, see § 97-9-69.

Removal of property subject to lien out of county, see § 97-17-75.

Sale of property previously sold or subject to lien as obtaining property by false pretenses, see § 97-19-51.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Indictment.

1. In general.

In a creditor's suit seeking disclosure of certain assets, the chancellor did not commit error in holding that the judgment debtor was entitled to assert his privilege against self-incrimination, under statutes making it a crime to remove property subject to liens out of the state or out of the county without consent or with intent to defraud. *Ferguson v. Johnson Implement Co.*, 222 So. 2d 820 (Miss. 1969).

This section [Code 1942, § 2250] is not limited in its application to the person who has given the deed of trust on the property which he removes beyond the jurisdiction of the state, but is also directed against any person who shall move, or cause the same to be removed, with intent to defraud cestui que trust. *State v. Michael*, 201 Miss. 246, 29 So. 2d 117 (1947).

Crime of obstructing justice is not constituent part of crime of removing property subject to lien, and they are not same

offense. *McGraw v. State*, 157 Miss. 675, 128 So. 875 (1930).

2. Indictment.

Indictment reciting that the owner of a certain automobile executed a trust deed thereon in favor of a bank to secure an indebtedness, and that thereafter, while said indebtedness was outstanding and unpaid and the deed of trust in full force and effect, defendant with full knowledge in the premises, unlawfully, wilfully, and knowingly removed such automobile be-

yond the jurisdiction of the state, without the consent of such bank, with unlawful intent to defraud the bank, was not subject to demurrer because it was not directed against the owner of the automobile. *State v. Michael*, 201 Miss. 246, 29 So. 2d 117 (1947).

Indictment charging defendants with fraudulently moving out of state truck in sheriff's hands under levy made in landlord's lien proceeding held bad for duplicity. *McGraw v. State*, 157 Miss. 675, 128 So. 875 (1930).

RESEARCH REFERENCES

CJS. 52B C.J.S., Larceny §§ 57 et seq.

§ 97-17-79. Trees; boxing pine trees.

If any person shall box for turpentine, or cut or cause to be cut, a box or boxes in a pine tree growing on land known to belong to another, without the consent of the owner, he shall, on conviction, be fined not less than five dollars nor more than twenty dollars for each tree so cut or boxed, or be imprisoned in the county jail not exceeding three months, or both.

SOURCES: Codes, 1892, § 1317; Laws, 1906, § 1391; Hemingway's 1917, § 1134; Laws, 1930, § 1165; Laws, 1942, § 2408; Laws, 1890, p. 70.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Statutory penalty for boxing pine trees, see § 95-5-15.

JUDICIAL DECISIONS

1. In general.

An affidavit under this section [Code 1942, § 2408] must allege that the defendant knew that the land upon which the trees were growing belonged to another. *Davis v. State*, 80 Miss. 376, 31 So. 742 (1902).

In a prosecution under this section [Code 1942, § 2408] title to the trees or possession thereof must be shown to be in

another than the defendant and such title can only be shown by evidence such as would prove title to real estate. *Davis v. State*, 80 Miss. 376, 31 So. 742 (1902).

Where the number of trees boxed is not alleged in the affidavit, the sentence can be imposed for boxing two trees only no matter how many the evidence may show defendant to have boxed. *Davis v. State*, 80 Miss. 376, 31 So. 742 (1902).

§ 97-17-81. Trees; cutting or rafting upon lands of another.

If any person shall cut or raft any cypress, pine, oak, gum, hickory, pecan, walnut, mulberry, poplar, cottonwood, sassafras, or ash trees or timber upon any lands belonging to any other person or corporation, without permission from the owner thereof, or his agent duly authorized, such person shall, on

conviction, be imprisoned in the county jail not more than five months, or fined not less than ten dollars nor more than one thousand dollars, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 12, art. 6(7); 1857, ch. 64, art. 231; 1871, § 2685; 1880, § 2956; 1892, § 1305; Laws, 1906, § 1379; Hemingway's 1917, § 1119; Laws, 1930, § 1149; Laws, 1942, § 2386.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

Prohibition on removal of pecans falling from private orchards onto public rights-of-way during harvesting season, see §§ 69-33-1 et seq.

Tampering with timber, etc., to injure owner, see §§ 97-3-89 et seq.

Cutting or rafting of timber on state lands, see § 97-7-65.

Stealing timber, see § 97-17-59.

JUDICIAL DECISIONS

1. In general.

One who assumes to sell timber on another's land may be liable to the true owner for trespass by the purchaser in cutting the timber, especially where he points out the exact trees cut, even though the seller, due to a surveyor's mistake, believed himself to be the owner of the land. *Hutto v. Kremer*, 222 Miss. 374, 76 So. 2d 204 (1954).

Defendant whose employees cut trees on lands of another without consent of owner and without authority or direction from defendant is not criminally liable for fine and jail sentence under civil doctrine of respondeat superior, but proof must show that defendant himself willfully and knowingly cut and removed timber of another, or that he authorized his employees to do so. *Smith v. State*, 205 Miss. 170, 38 So. 2d 698 (1949).

In prosecution under statute punishing trespass in cutting trees on another's land without his consent, defendant was entitled to directed verdict, where state failed to show that trees, which were cut on land of another where boundary line was not clearly marked, were not cut by defendant in good faith. *Draughn v. State*, 178 Miss. 646, 174 So. 564 (1937).

To constitute trespass in cutting trees on another's land without his consent, cutting must be knowingly or wilfully done. *Twitty v. State*, 159 Miss. 593, 132 So. 746 (1931); *Draughn v. State*, 178 Miss. 646, 174 So. 564 (1937).

Criminal responsibility is limited to "timber" described in statute [Code 1942, § 2386]. *Barnett v. State*, 124 Miss. 884, 87 So. 421 (1921).

RESEARCH REFERENCES

ALR. Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed. 26 A.L.R.2d 1194.

Am Jur. 52 Am. Jur. 2d, Logs and Timber § 113.

Law Reviews. Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-17-83. Trees; injuring or destroying shade or ornamental tree.

If any person shall wilfully injure or destroy any shade tree or any ornamental tree not his own, on any highway or street, or in any yard, garden, or park, he shall, on conviction, be fined not less than five dollars nor more

than twenty dollars for each tree so injured or destroyed, or shall be imprisoned in the county jail not less than ten days nor more than thirty days for each offense.

SOURCES: Codes, 1892, § 1319; Laws, 1906, § 1393; Hemingway's 1917, § 1136; Laws, 1930, § 1167; Laws, 1942, § 2410.

Cross References — Authority of conservation officers of Commission on Wildlife, Fisheries and Parks to apprehend violators, see § 49-1-44.

RESEARCH REFERENCES

Am Jur. 75 **Am. Jur.** 2d, Trespass **CJS.** 87 C.J.S., Trespass § 149.
§§ 162 et seq.

§ 97-17-84. Penalty for removal of “sea oats” or “*uniola paniculata*” from shores.

Any person who removes a plant commonly known as “sea oats” or “*uniola paniculata*” from the shores of this state shall be guilty of a misdemeanor and shall, upon conviction, be fined not more than Five Hundred Dollars (\$500.00).

SOURCES: Laws, 1989, ch. 453, § 1, eff from and after July 1, 1989.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-17-85. Trespass; going upon inclosed land of another.

Except as otherwise provided in Section 73-13-103, if any person shall go upon the enclosed land of another without his consent, after having been notified by such person or his agent not to do so, either personally or by published or posted notice, or shall remain on such land after a request by such person or his agent to depart, he shall, upon conviction, be fined not more than Fifty Dollars (\$50.00) for such offense. The provisions of this section shall apply to land not enclosed where the stock law is in force.

SOURCES: Codes, 1880, § 2980; 1892, § 1320; Laws, 1906, § 1394; Hemingway's 1917, § 1137; Laws, 1930, § 1168; Laws, 1942, § 2411; Laws, 1997, ch. 425, § 2, eff from and after July 1, 1997.

JUDICIAL DECISIONS

1. In general.
2. Title or possession.
3. Indictment or affidavit charging offense.
4. Particular acts as constituting offense.
5. Lesser included offense.

1. In general.

In a case where defendants were convicted of burglary of a dwelling and simple assault, the evidence at trial did not support a lesser included offense instruction of trespass because (1) had defendants succeeded in their defense that they had

permission to enter the dwelling, they would not have been guilty of trespass; (2) once defendants realized they were not welcome on the property and that they would not receive permission to enter the home, they broke into and entered the home when they punched through the tape covering the hole by the front door in order to unlock the door from the inside; (3) the existence of the marks on the rear entrance where a tire iron was used to attempt entry supported the more serious offense of burglary rather than trespass; and (4) there was evidence of intent to commit an assault when defendants entered the home based on their previous threats made to the second victim, their use of force to enter the home, their use of violence inside the home, and one defendant's actions of hurling a large rock into the second victim's windshield when he tried to drive away. *Arbuckle v. State*, 894 So. 2d 619 (Miss. Ct. App. 2004), cert. dismissed, 904 So. 2d 184 (Miss. 2005).

Defendant to charge of burglary of inhabited dwelling house who offers testimony presenting viable explanation of presence in house as alternative to prosecution's theory that defendant intended to commit some crime in house is entitled to have jury given instruction on lesser included offense of trespass; furthermore, if instruction on trespass offered by defendant is bad, trial judge has responsibility to modify, correct, and submit to jury proper instruction. *Harper v. State*, 478 So. 2d 1017 (Miss. 1985).

A prosecution for wilful trespass does not come within this section [Code 1942, § 2411] where it is not claimed that the land in question is enclosed. *Johnston v. State*, 232 Miss. 102, 98 So. 2d 445 (1957).

Where a prosecution charging trespass upon land originated in the district of a certain justice of the peace, a justice of the peace of another district of the same county was not without jurisdiction to try the case, since the jurisdiction of every justice of the peace is co-extensive with his county, and he is authorized to issue any process in matters within his jurisdiction, to be executed in any part of his county. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Time of commission of trespass is not an element of the offense. *Card v. State*, 182 Miss. 229, 181 So. 524 (1938).

In prosecution for trespass, state was not required to prove commission of offense on date alleged in affidavit, but could prove commission on any date within two years prior to indictment. *Card v. State*, 182 Miss. 229, 181 So. 524 (1938).

Refusal of instruction which in effect would require the state to prove commission of offense on date alleged in affidavit held not reversible. *Card v. State*, 182 Miss. 229, 181 So. 524 (1938).

Discharged employee arrested after refusal to leave premises had no right of action for damages. *King v. Weaver Pants Corp.*, 157 Miss. 77, 127 So. 718 (1930).

2. Title or possession.

This section [Code 1942, § 2411] had no application, in a suit for damages for malicious prosecution on a charge of alleged criminal trespass in going to negro worker-tenants' homes on a plantation and helping them move therefrom, after having been notified by the one employed to look after the property not to do so, where it was not shown whether the land was enclosed, or if not enclosed, whether it was in a stock law district, and the tenants held such possession of the particular premises occupied by them as to entitle them to grant permission to the plaintiff to come to their homes for the purpose complained of. *Brown v. Kisner*, 192 Miss. 746, 6 So. 2d 611 (1942).

Cutting of fence wholly owned by defendant could not constitute "trespass." *Evans v. State*, 159 Miss. 870, 132 So. 455 (1931).

Business man having lawful dealings with employees of lumber company held not guilty of trespass by going to logging camp on premises leased to employees for that purpose. *Lott v. State*, 159 Miss. 484, 132 So. 336 (1931).

In prosecution for trespass on land after notice not to do so, when land is in possession of another, title thereto is not involved. *Raiford v. State*, 87 Miss. 359, 39 So. 897 (1906).

A person who pursuant to the directions of the owner of land in possession of tenants entered on the land for the purpose of driving away cattle belonging to the owner and found in a pasture used in common with the tenants is not guilty of trespassing on the land of another though

the tenants objected to his entering on the land and driving away the cattle. *Bowles v. State*, 14 So. 261 (Miss. 1894).

Actual occupancy is necessary, it is not enough that the party once occupied and intends to return to the premises. *Hester v. State*, 67 Miss. 129, 6 So. 687 (1889).

Neither title to the land nor the rightfulness of possession is to be inquired into, the statute protects actual possession. *Knight v. State*, 64 Miss. 802, 2 So. 252 (1887); *Lott v. State*, 159 Miss. 484, 132 So. 336 (1931).

3. Indictment or affidavit charging offense.

Where an affidavit set forth the facts of an alleged trespass and incorrectly stated that the trespass occurred contrary to the provisions of Code 1942, § 2411, and proof at the trial showed that the trespass occurred in an uninclosed rather than an inclosed area, the motion of the district attorney to strike from the affidavit the reference to Code 1942, § 2411 was properly granted, for the amendment changed no facts with which the defendant was charged in the affidavit and could not have prejudiced him. *Shields v. State*, 203 So. 2d 78 (Miss. 1967).

A prosecution for wilful trespass upon the land of another does not come within this section [Code 1942, § 2411], where the affidavit charging that the defendant wilfully and unlawfully cut certain trees and timber on the land after having been notified and requested not to do so, made no claim that the land was enclosed. *Johnston v. State*, 232 Miss. 102, 98 So. 2d 445 (1957).

In a prosecution on a charge of trespass on land, the affidavit of the complainant, which failed to describe the land, was at most only defective and not void, and might be amended by the furnishing of an accurate description of the land. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Where the affidavit in a prosecution for trespass upon land charged that the defendant had "wilfully and maliciously" trespassed upon the real property after he had been notified not to go thereon, the

defendant could have been tried either under the statute prohibiting wilful and malicious trespass, or under the statute prohibiting one to go upon the land of another after having been notified not to do so, since if the case was tried under the first mentioned statute, the allegation that the defendant had been notified not to go upon the property would be treated as surplusage, and on the other hand, if tried under the second statute, the language of the affidavit "wilfully and maliciously" would be disregarded. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Indictment for trespass which fails to allege that accused entered without consent of owner after notice, or that he remained after notice to depart, is insufficient. *Rube v. State*, 101 Miss. 362, 58 So. 99 (1912).

4. Particular acts as constituting offense.

Defendant could not be convicted of trespass under this section [Code 1942, § 2411], where his cow, which he had staked out on his own premises in close proximity to line fence, damaged the fence and entered upon adjoining lot of the prosecuting witness, in the absence of proof that defendant intended to wilfully damage the property of the prosecuting witness through the agency of his cow. *Wilson v. State*, 198 Miss. 828, 23 So. 2d 684 (1945).

Dipping vat inspectors going on premises and taking mules in supposed performance of duties held not guilty of criminal trespass. *Bacot v. State*, 158 Miss. 258, 130 So. 282 (1930).

5. Lesser included offense.

Trial court did not err in denying defendant a jury instruction on the lesser-included offense of trespass during his trial for business burglary because if the jury had believed defendant's testimony that he was not present when a storage locker was burglarized, it would have believed that he never entered the storage locker and had not committed trespass. *Gray v. State*, — So. 2d —, 2006 Miss. App. LEXIS 52 (Miss. Ct. App. Jan. 17, 2006).

RESEARCH REFERENCES

ALR. Injunction against repeated or continuing trespasses on real property. 60 A.L.R.2d 310.

Entry on private lands in pursuit of wounded game as criminal trespass. 41 A.L.R.4th 805.

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 seq.

CJS. 87 C.J.S., Trespass § 150.

§ 97-17-87. Trespass; willful or malicious; penalty; enhanced penalties for willful trespass upon airport operations area.

(1) Any person who shall be guilty of a willful or malicious trespass upon the real or personal property of another, for which no other penalty is prescribed, shall, upon conviction, be fined not exceeding Five Hundred Dollars (\$500.00), or imprisoned not longer than six (6) months in the county jail, or both.

(2)(a) Any person who shall willfully trespass upon any air operations area or sterile area of an airport serving the general public shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Thousand Dollars (\$1,000.00) or imprisoned in the county jail for up to one (1) year, or both.

(b) For the purposes of this subsection (2), "air operations area" means a portion of an airport designed and used for landing, taking off, or surface maneuvering of airplanes; "sterile area" means an area to which access is controlled by the inspection of persons and property in accordance with an approved security program.

SOURCES: Codes, 1880, §§ 969, 2967; 1892, § 1315; Laws, 1906, § 1389; Hemingway's 1917, § 1132; Laws, 1930, § 1163; Laws, 1942, § 2406; Laws, 2001, ch. 475, § 1, eff from and after passage (approved Mar. 23, 2001.)

Cross References — Disclaimer and tender of amends in actions for trespass on land, see § 11-7-73.

JUDICIAL DECISIONS

1. In general.
2. Malice or willfulness.
3. Affidavit charging offense.
4. Instructions.

1. In general.

Sufficient evidence existed to convict defendant of trespass in violation of Miss. Code Ann. § 97-17-87 as the evidence was uncontroverted that defendant did not have permission to enter the victim's shed, and the victim was able to positively identify him because she had seen him in the shed twice. *Hill v. State*, 929 So. 2d 338 (Miss. Ct. App. 2005).

Trespass is necessarily a component of every burglary, and where evidence was insufficient to sustain a jury verdict on the greater charge defendant was guilty of constituent offense of trespass under § 97-17-87. *Anderson v. State*, 290 So. 2d 628 (Miss. 1974).

Where a prosecution charging trespass upon land originated in the district of a certain justice of the peace, a justice of the peace of another district of the same county was not without jurisdiction to try the case, since the jurisdiction of every justice of the peace is co-extensive with

his county, and he is authorized to issue any process in matters within his jurisdiction, to be executed in any part of his county. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Cutting of fence wholly owned by defendant could not constitute "trespass." *Evans v. State*, 159 Miss. 870, 132 So. 455 (1931).

Homicide not reduced to manslaughter because deceased was a trespasser. *Atkinson v. State*, 137 Miss. 42, 101 So. 490 (1924).

Gratuitous licensor held not guilty of tearing down and removing a fence. *Card v. State*, 123 Miss. 702, 86 So. 460 (1920).

2. Malice or willfulness.

Evidence that the trespass was wilful and intentional, and that the defendant did not act in good faith and with reasonable prudence under the belief that the line was their own, warranted his conviction of wilful trespass. *Johnston v. State*, 232 Miss. 102, 98 So. 2d 445 (1957).

Defendant whose employees cut trees on lands of another without consent of owner and without authority or direction from defendant is not criminally liable for fine and jail sentence under civil doctrine of respondeat superior, but proof must show that defendant himself willfully and knowingly cut and removed timber of another, or that he authorized his employees to do so. *Smith v. State*, 205 Miss. 170, 38 So. 2d 698 (1949).

Defendant could not be convicted of trespass under this section [Code 1942, § 2406] where his cow, which he had staked out on his own premises in close proximity to line fence, damaged the fence and entered upon adjoining lot of the prosecuting witness, in the absence of proof that defendant intended to wilfully damage the property of the prosecuting witness through the agency of his cow. *Wilson v. State*, 198 Miss. 828, 23 So. 2d 684 (1945).

Dipping vat inspectors going on premises and taking mules in supposed performance of duties held not guilty of criminal trespass. *Bacot v. State*, 158 Miss. 258, 130 So. 282 (1930).

Defendant may be convicted under this section [Code 1942, § 2406] although the trespass was the direct consequence of

defendant's violation of Code 1892, § 3902 (Code 1906, § 4412), and gross negligence may supply both malice and wilfulness. *Porter v. State*, 83 Miss. 23, 35 So. 218 (1903).

One maliciously injuring real property by tearing down and removing a fence therefrom is guilty of malicious trespass. *City of Greenville v. Laurent*, 75 Miss. 456, 23 So. 185 (1898).

3. Affidavit charging offense.

Where an affidavit set forth the facts of an alleged trespass and incorrectly stated that the trespass occurred contrary to the provisions of Code 1942, § 2411, and proof at the trial showed that the trespass occurred in an unclosed rather than an inclosed area, the motion of the district attorney to strike from the affidavit the reference to Code 1942, § 2411 was properly granted, for the amendment changed no facts with which the defendant was charged in the affidavit and could not have prejudiced him. *Shields v. State*, 203 So. 2d 78 (Miss. 1967).

In a prosecution on a charge of trespass on land, the affidavit of the complainant, which failed to describe the land, was at most only defective and not void, and might be amended by the furnishing of an accurate description of the land. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Conviction for wilful and malicious trespass requires allegations and proof of ownership of property trespassed on. *Adams v. State*, 152 Miss. 220, 119 So. 189 (1928), appeal after remand, 124 So. 440 (Miss. 1929); *Johnston v. State*, 232 Miss. 102, 98 So. 2d 445 (1957).

4. Instructions.

Jury instruction for the lesser-included offense of trespass was not warranted where a lack of evidence in the record failed to show that defendant was guilty of trespass where, even if defendant was legally on the property at the request of his female friend, he was still seen peeping into a window, was chased for at least 250 yards, and was caught with his zipper down and underwear exposed. *Ledford v. State*, 874 So. 2d 995 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

A defendant in a burglary prosecution was entitled to an instruction on the lesser included offense of trespass where the person who lived in the house in question testified that the first time the defendant entered her house he did so without her knowledge or consent and she only discovered him as he came out of her bathroom, and that the second time he entered the house he kicked in the door after she closed the door and locked him out when she went to get some money the defendant claimed he had left inside the house, and another witness testified that the person who lived in the house voluntarily let the defendant in the first time.

Robinson v. State, 589 So. 2d 116 (Miss. 1991).

There is no such thing as "simple trespass" known to the laws of this state; and where in a prosecution for wilful or malicious trespass the court instructed the jury that if they found beyond a reasonable doubt that the defendants unlawfully and wilfully trespassed upon certain property they should find the defendants guilty of a simple trespass, such charge was equivalent to instructing the jury to return a verdict of not guilty even though the state proved its case beyond a reasonable doubt. Howell v. State, 183 Miss. 293, 184 So. 326 (1938).

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises. 50 A.L.R.3d 340.

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 et seq.

CJS. 87 C.J.S., Trespass § 153.

§ 97-17-89. Trespass; destruction or carrying away of vegetation, etc. not amounting to larceny.

Any person who shall enter upon the closed or unenclosed lands of another or of the public and who shall willfully and wantonly gather and unlawfully sever, destroy, carry away or injure any trees, shrubs, flowers, moss, grain, turf, grass, hay, fruits, nuts or vegetables thereon, where such action shall not amount to larceny, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars (\$500.00), or be imprisoned not exceeding six (6) months in the county jail, or both; and a verdict of guilty of such action may be rendered under an indictment for larceny, if the evidence shall not warrant a verdict of guilty of larceny, but shall warrant a conviction under this section.

SOURCES: Codes, 1942, § 2411.5; Laws, 1958, ch. 264; Laws, 1962, ch. 323, § 3.

Cross References — Prohibition on removal of pecans falling from private orchards onto public rights-of-way during harvesting season, see §§ 69-33-1 et seq.

Going upon enclosed land of another, see § 97-17-85.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 et seq.

CJS. 87 C.J.S., Trespass § 150.

Law Reviews. Ogletree, A primer con-

cerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

§ 97-17-91. Trespass; defacing, altering or destroying notices posted on land.

Any person who shall deface, remove, alter or destroy any notice placed upon any lands by the owner thereof or his agent posting or otherwise prohibiting the entrance upon any lands in this state shall, upon conviction, be fined not more than fifty dollars (\$50.00) for each such notice defaced, removed, altered or destroyed.

SOURCES: Codes, 1942, § 2409.3; Laws, 1962, ch. 323, § 2.

Cross References — Entering upon lands of another without permission, see § 97-17-93.

RESEARCH REFERENCES

Am Jur. 75 Am. Jur. 2d, Trespass **CJS.** 87 C.J.S., Trespass § 151.
§§ 162 et seq.

§ 97-17-93. Entering lands of another without permission; enforcement; relation to other statutes; dismissal of prosecution.

(1) Any person who knowingly enters the lands of another without the permission of or without being accompanied by the landowner or the lessee of the land, or the agent of such landowner or lessee, shall be guilty of a misdemeanor and, upon conviction, shall be punished for the first offense by a fine of not less than One Hundred Fifty Dollars (\$150.00) nor more than Two Hundred Fifty Dollars (\$250.00). Upon conviction of any person for a second or subsequent offense, the offenses being committed within five (5) years of the last offense, such person shall be punished by a fine of not less than Two Hundred Fifty Dollars (\$250.00) nor more than Five Hundred Dollars (\$500.00), and may be imprisoned in the county jail for a period of not less than ten (10) nor more than thirty (30) days, or by both such fine and imprisonment. This section shall not apply to the landowner's or lessee's family, guests, or agents, to a surveyor as provided in Section 73-13-103, or to persons entering upon such lands for lawful business purposes.

(2)(a) It shall be the duty of sheriffs, deputy sheriffs, constables and conservation officers to enforce this section.

(b) Such officers shall enforce this section by issuing a citation to those charged with trespassing under this section.

(3) The provisions of this section are supplementary to the provisions of any other statute of this state.

(4) A prosecution under the provisions of this section shall be dismissed upon the request of the landowner, lessee of the land or agent of such landowner or lessee, as the case may be.

SOURCES: Codes, 1892, § 1318; Laws, 1906, § 1392; Hemingway's 1917, § 1135; Laws, 1930, § 1166; Laws, 1942, § 2409; Laws, 1962, ch. 323, § 1; Laws, 1976, ch. 404; Laws, 1978, ch. 417, § 1; Laws, 1984, ch. 504; Laws, 1987, ch. 331; Laws, 1997, ch. 425, § 3, eff from and after July 1, 1997.

Cross References — Enforcement of this section by conservation officers, see § 49-1-13.

Hunting or fishing on the Sabbath, see § 49-7-61.

When it is unlawful to hunt on lands of others, see § 49-7-79.

Removing, damaging, or destroying notices on land, see § 97-17-91.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Testimony of conservation official that official observed defendant's vehicle traveling on, and ultimately exiting from, property which has been properly posted for at least 3 months, that official found evidence that deer had been dragged from property and put into truck, and that defendant's vehicle was only one which could have been in area on night in question is sufficient to support conviction for trespass. *Pharr v. State*, 465 So. 2d 294 (Miss. 1984).

This section [Code 1942, § 2409] does not limit right to post lands to owner of property and in any event this section would not be applicable to establish that defendant having been given permission to fence pasture land had exceeded his license by posting lands and thus became a trespasser ab initio so as to start running of statute of limitations. *Anderson v. Anderson-Tully Co.*, 196 F.2d 684 (5th Cir. 1952).

ATTORNEY GENERAL OPINIONS

Employees of the Mississippi Institute for Forest Inventory or persons performing under contract to the Institute should acquire landowner permission before en-

tering the land to perform data collection duties. *Tucker*, Sept. 16, 2004, A.G. Op. 04-0414.

RESEARCH REFERENCES

ALR. Entry on private lands in pursuit of wounded game as criminal trespass. 41 A.L.R.4th 805.

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 et seq.

CJS. 87 C.J.S., Trespass § 151.

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 97-17-95. Trespass; entry on premises where atomic machinery, rockets and other dangerous devices are manufactured, etc.

It shall be unlawful for any person to wilfully enter or trespass within the premises of any person, firm or corporation manufacturing or constructing or erecting or assembling or maintaining or repairing or operating any nuclear powered machinery, equipment or vessels, or rockets, missiles, propulsion systems, explosives or other dangerous devices, or parts thereof, with the

intent to commit any crime under the laws of this state, or of the United States, or pursuant to a conspiracy to commit any such crime or in an attempt to commit any such crime. Any person convicted of a violation of this section shall be adjudged guilty of a felony, and punished by a fine not to exceed five thousand dollars (\$5,000.00) or by imprisonment in the state penitentiary not to exceed five (5) years, or both such fine and imprisonment, in the discretion of the court. Any person wilfully entering or trespassing within such premises, if found within any area designated as a restricted area therein, shall be guilty of a violation of this section.

SOURCES: Codes, 1942, § 2406.5; Laws, 1962, ch. 324, eff from and after passage (approved May 31, 1962).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 75 **Am. Jur. 2d,** Trespass §§ 162 et seq. **CJS.** 87 C.J.S., Trespass § 150.

§ 97-17-97. Trespass; going into or upon, or remaining in or upon, buildings, premises or lands of another after being forbidden to do so.

(1) Except as otherwise provided in Section 73-13-103, if any person or persons shall without authority of law go into or upon or remain in or upon any building, premises or land of another, including the premises of any public housing authority after having been banned from returning to the premises of the housing authority, whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing including any sign hereinafter mentioned, by any owner, or lessee, or custodian, or other authorized person, or by the administrators of a public housing authority regardless of whether or not having been invited onto the premises of the housing authority by a tenant, or after having been forbidden to do so by such sign or signs posted on, or in such building, premises or land, or part, or portion, or area thereof, at a place or places where such sign or signs may be reasonably seen, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2409.7; Laws, 1960, ch. 246, §§ 1, 2; Laws, 1997, ch. 471, § 1; Laws, 1997, ch. 425, § 4, eff from and after July 1, 1997.

Joint Legislative Committee Note — Section 4 of ch. 425, Laws, 1997, effective July 1, 1997, amended this section. Section 1 of ch. 471, Laws, 1997, effective March 27, 1997, also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision, and Publication authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision, and Publication ratified the integration of these amendments as consistent with the legislative intent at the May 8, 1997 meeting of the Committee.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Particular acts as constituting offense.

1. In general.

Probable cause existed to arrest the defendant for a violation of this section where he was found on a driveway behind a county jail, the driveway was owned by the county and was never dedicated as a public thoroughfare, and he was on notice that the area was off-limits because he had previously been forbidden from coming into the area. *Bigham v. Huffman*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 16542 (N.D. Miss. Oct. 9, 1999), *aff'd*, 218 F.3d 744 (5th Cir. 2000), *cert. denied*, 531 U.S. 958, 121 S. Ct. 381, 148 L. Ed. 2d 294 (2000).

An employee of a corporation had probable cause to file an affidavit charging plaintiff with trespass where the uncontradicted evidence showed that he had entered upon the corporation's lands not only on the logging trail over which there was a claim of proscriptive easement, but also along the pipeline right of way after he had been orally forbidden to do so; thus, even though plaintiff was acquitted on the trespass charge, he could not maintain a cause of action against the corporation and its employee for malicious prosecution. *Ray Geophysical Div. of Mandrel Induss., Inc. v. O'Quin*, 365 So. 2d 641 (Miss. 1978).

A substantial charge of the offense is sufficient. *Mitchell v. State*, 240 Miss. 308, 127 So. 2d 394 (1961).

2. Particular acts as constituting offense.

Premises liability action was dismissed on summary judgment because newly discovered evidence clearly established a customer's status as a trespasser at the time of her alleged abduction from a store's parking lot where the store was authorized to ban her from the store under Miss. Code Ann. § 97-23-17 after a prior shoplifting incident, the customer failed to show that store breached its duty to a trespasser, and store was immune from liability pursuant to Miss. Code Ann. § 97-17-103(2) where the customer had committed a criminal trespass under Miss. Code Ann. § 97-17-97 at the time of the incident. *Bates v. Wal-Mart Stores*, 413 F. Supp. 2d 763 (S.D. Miss. 2006).

Plaintiff father's false arrest claim failed because there was probable cause to arrest for providing false information to police under Miss. Code Ann. § 97-35-47, as the father lied in stating that his daughter's boyfriend, who was under a no-contact order as to the daughter, had broken into the father's house, and telling the officers about the no-contact order could be construed as claiming that the boyfriend had violated the criminal trespass statute. *Granger v. Slade*, 361 F. Supp. 2d 588 (S.D. Miss. 2005).

ATTORNEY GENERAL OPINIONS

A constable has authority to carry a weapon on private property where property owner has restricted possession of

weapons on the property only if he enters in performance of his official duties. *Null*, Dec. 12, 1997, A.G. Op. #97-0783.

RESEARCH REFERENCES

ALR. Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises. 41 A.L.R.4th 773.

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 et seq.

48 Am. Jur. Proof of Facts 2d 153, Damages for Unauthorized Geophysical Exploration.

CJS. 87 C.J.S., Trespass § 151.

§ 97-17-99. Trespass; inciting or soliciting etc., persons to go into or upon, or remain in or upon, buildings, premises or lands of another.

(1) If any person or persons shall incite, or solicit, or urge, or encourage, or exhort, or instigate, or procure any other person or persons to go into or upon or to remain in or upon any building, or premises, or land of another whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, knowing such other person or persons to have been forbidden, either orally or in writing including any sign hereinafter mentioned, to do so by any owner, or lessee, or custodian, or other authorized person, or knowing such other person or persons to have been forbidden to do so by a sign or signs posted in or upon such building, or premises, or land, or part, or portion thereof, at a place or places where it or they may be reasonably seen, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2409.5; Laws, 1960, ch. 245, §§ 1, 2.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 75 Am. Jur. 2d, Trespass §§ 162 et seq.

CJS. 87 C.J.S., Trespass § 155.

§ 97-17-101. Repealed.

Repealed by Laws, 1989, ch. 469, § 9, eff from and after July 1, 1989.
[Laws, 1980, ch. 368]

Editor's Note — Former Section 97-17-101 related to the mutilation of motor vehicle or farm implement identification numbers.

Laws, 1989, ch. 469, § 10, provides as follows:

“SECTION 10. If any section, paragraph, sentence, clause, phrase or any part of this act shall be held invalid or unconstitutional, such holding shall not affect any other section, paragraph, sentence, clause, phrase or part of this act which is not in and of itself invalid or unconstitutional. Moreover, if the application of this act, or of any portion of it, to any person or circumstance is held invalid, the invalidity shall not affect the application of this act to other persons or circumstances which can be given effect without the invalid provision or application.”

§ 97-17-103. Prohibition of recovery for injuries sustained during criminal trespass.

(1) As used in this section:

(a) “Perpetrator” means a person who has engaged in criminal trespass and includes a person convicted of trespass under applicable state law;

(b) “Victim” means a person who was the object of another’s criminal trespass and includes a person at the scene of an emergency who gives reasonable assistance to another person who is exposed to or has suffered grave physical harm;

(c) “Course of criminal conduct” includes the acts or omissions of a victim in resisting criminal conduct;

(d) “Convicted” includes a finding of guilt, whether or not the adjudication of guilt is stayed or executed, an unwithdrawn judicial admission of guilt or guilty plea, a no contest plea, a judgment of conviction, an adjudication as a delinquent child, an admission to a juvenile delinquency petition, or a disposition as an extended jurisdiction juvenile; and

(e) “Trespass” means an offense named in Sections 97-17-1 through 97-17-97, Mississippi Code of 1972, or any attempt to commit any of these offenses. Trespass includes crimes in other states or jurisdictions which would have been within the definition set forth in this subdivision if they had been committed in this state.

(2) A perpetrator assumes the risk of loss, injury or death resulting from or arising out of a course of criminal trespass, as defined in this section, engaged in by the perpetrator or an accomplice, and the crime victim is immune from and not liable for any civil damages as a result of acts or omissions of the victim.

(3) Notwithstanding other evidence which the victim may adduce relating to the perpetrator’s conviction of the crime involving the parties to the civil action, a certified copy of a guilty plea, a court judgment of guilt, a court record of conviction or an adjudication as a delinquent child is conclusive proof of the perpetrator’s assumption of the risk.

(4) In a civil action that is subject to this section, the court shall award reasonable expenses, including attorney’s fees and disbursements, to the prevailing party.

(5) Except to the extent needed to preserve evidence, any civil action in which the defense set forth in subsection (2) is raised shall be stayed by the court on the motion of the defendant during the pendency of any criminal action against the plaintiff based on the alleged trespass.

SOURCES: Laws, 1997, ch. 471, § 2, eff from and after passage (approved March 27, 1997).

JUDICIAL DECISIONS

1. Victim immune from liability to trespasser.

Premises liability action was dismissed on summary judgment because newly discovered evidence clearly established a customer's status as a trespasser at the time of her alleged abduction from a store's parking lot where the store was authorized to ban her from the store under Miss. Code Ann. § 97-23-17 after a prior

shoplifting incident, the customer failed to show that store breached its duty to a trespasser, and store was immune from liability pursuant to Miss. Code Ann. § 97-17-103(2) where the customer had committed a criminal trespass under Miss. Code Ann. § 97-17-97 at the time of the incident. *Bates v. Wal-Mart Stores*, 413 F. Supp. 2d 763 (S.D. Miss. 2006).

DEFENDANT'S LIABILITY FOR VALUE OF PROPERTY DAMAGED, DESTROYED, TAKEN OR CONVERTED [REPEALED]

SEC.

97-17-121 through 97-17-127. Repealed.

§§ 97-17-121 through 97-17-127. Repealed.

Repealed by Laws, 1978, ch. 400, § 11, eff from and after July 1, 1978.
[Laws, 1977, ch. 403, §§ 1-4]

Editor's Note — Former §§ 97-17-121 through 97-17-127 made any person convicted of a crime against property, as set out in chapter 17, title 97, Mississippi Code of 1972, liable for restitution to any person having a property interest in any property damaged, destroyed, taken or converted in the commission of such crime.

Restitution to victims of crimes is now governed by the provisions of §§ 99-37-1 et seq.

CHAPTER 19

False Pretenses and Cheats

SEC.

- 97-19-1. Repealed.
- 97-19-3. Repealed.
- 97-19-5. Citation of Sections 97-19-5 through 97-19-29.
- 97-19-7. Credit cards; construction of provisions.
- 97-19-9. Credit cards; definitions.
- 97-19-11. Credit cards; procuring issuance by false statements.
- 97-19-13. Credit cards; acquisition by theft or artifice; unlawful sales and purchases; receipt of cards issued in another's name.
- 97-19-15. Credit cards; controlling card as security for debt.
- 97-19-17. Credit cards; forgery.
- 97-19-19. Credit cards; signing with intent to defraud.
- 97-19-21. Credit cards; use to obtain things of value or to operate automatic cash dispensing machines with intent to defraud; penalties.
- 97-19-23. Credit cards; furnishing things of value on forged or unlawfully obtained card; failing to give value represented as given.
- 97-19-25. Credit cards; possession of incomplete cards or plates and devices for their reproduction.
- 97-19-27. Credit cards; receipt of things of value in violation of law.
- 97-19-29. Credit cards; penalty for violation of Sections 97-19-5 through 97-19-29.
- 97-19-31. Credit cards; use of credit numbers or other credit device to obtain credit, goods, property or services.
- 97-19-33. False personation; personating another to marry, become bail or surety, confess judgment, acknowledge recorded instrument, or act in suit.
- 97-19-35. False personation; personating another to receive money or property.
- 97-19-37. False personation; masquerading as deaf person.
- 97-19-39. Obtaining signature or thing of value with intent to defraud.
- 97-19-41. Obtaining signature or thing of value with intent to defraud; penalty for using false negotiable instrument.
- 97-19-43. Patriotic and fraternal organizations; unauthorized use of membership buttons, insignia, etc.
- 97-19-45. Producing child with intent to intercept inheritance.
- 97-19-47. Receiving deposits when bank is insolvent.
- 97-19-49. Registering animal falsely; giving false pedigree.
- 97-19-51. Selling property previously sold or encumbered.
- 97-19-53. Substituting child to deceive parent or guardian.
- 97-19-55. Bad checks and insufficient funds.
- 97-19-57. Bad checks; presumption of fraudulent intent; notice that check has not been paid; notice returned undelivered as evidence of intent to defraud; transactions involving motor vehicles.
- 97-19-59. Repealed.
- 97-19-61. Bad checks; when notice need not be given.
- 97-19-62. Bad checks; evidence of identity of party issuing, uttering or delivering check.
- 97-19-63. Bad checks; statement of reason for dishonor.
- 97-19-65. Bad checks; each violation constitutes a separate offense.
- 97-19-67. Bad checks; penalties; restitution.
- 97-19-69. Bad checks; non-liability for causing arrest or imprisonment of drawer.
- 97-19-71. Fraud in connection with state or federally funded assistance programs; penalty.
- 97-19-73. District attorney authorized to assist in recovery and distribution of

- restitution from persons issuing bad checks; construction of Sections 97-19-73 through 97-19-79.
- 97-19-75. Bad check complaint procedures; restitution procedures.
- 97-19-77. Accounting and distribution of monies received with respect to bad check complaint.
- 97-19-79. District attorney to file court complaint upon failure of accused to make restitution.
- 97-19-81. Right of lender to add fee to amount of loan when payment on loan made with bad check.
- 97-19-83. Fraud by mail or other means of communication.
- 97-19-85. Fraudulent use of identity, Social Security number, credit card or debit card number or other identifying information to obtain thing of value.

§ 97-19-1. Repealed.

Repealed by Laws, 1972, ch. 476, § 10, eff from and after July 1, 1972.

[Codes, 1942, § 2153; Laws, 1932, ch. 299; 1948, ch. 403; 1950, ch. 316; 1958, ch. 282; 1970, ch. 342, § 1]

Editor's Note — Former § 97-19-1 related to bad checks. For similar provisions, see §§ 97-19-55 et seq.

§ 97-19-3. Repealed.

Repealed by Laws, 1982, ch. 423, § 27, eff from and after March 31, 1982.

[Codes, 1930, § 925; 1942, § 2154; Laws, 1924, ch. 172; 1981, ch. 471, § 53]

Editor's Note — Former § 97-19-3 was entitled: Bad checks; form of affidavit in case of non-payment. For similar provisions, see §§ 97-19-55 et seq.

§ 97-19-5. Citation of Sections 97-19-5 through 97-19-29.

Sections 97-19-5 through 97-19-29 shall be known as the "Mississippi Credit Card Crime Law of 1968."

SOURCES: Codes, 1942, § 2148.7-01; Laws, 1968, ch. 345, § 1, eff 60 days after passage (approved August 8, 1968).

Cross References — Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

Use of credit numbers or other devices to obtain credit, goods, etc., see § 97-19-31.

RESEARCH REFERENCES

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender). Mississippi Penal Code Annotated (Michie).

Mississippi Criminal and Traffic Law Manual (Michie).

§ 97-19-7. Credit cards; construction of provisions.

Sections 97-19-5 through 97-19-29 shall not be construed so as to preclude the applicability of any other provision of the criminal law of this state which presently applies or may in the future apply to any transaction which violates said sections, unless such provision is inconsistent with the terms of said sections.

SOURCES: Codes, 1942, § 2148.7-13; Laws, 1968, ch. 345, § 13, eff 60 days after passage (approved August 8, 1968).

Cross References — Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

§ 97-19-9. Credit cards; definitions.

The following words and phrases as used in Sections 97-19-5 through 97-19-29 shall have the following meanings ascribed to them, unless a different meaning is plainly required by the context:

(a) "Cardholder" is defined as the person or organization named on the face of a credit card, as defined hereinafter, to whom or for whose benefit the credit card is issued by an issuer.

(b) "Credit card" is defined as any instrument or device, whether known as a credit card, credit plate or by any other name, issued with or without fee by an issuer for the use of the cardholder or one authorized by him in obtaining money, goods, property, services or anything else of value on credit or in consideration of an undertaking or guaranty of the issuer of the payment of a check or draft drawn by the cardholder or one authorized by him, and shall include a card issued by a financial institution to be used in operating an automatic unmanned cash dispensing machine.

(c) "Expired credit card" means a credit card which is no longer valid because the term shown on its face has elapsed.

(d) "Issuer" is defined as any business organization or financial institution, including but not limited to merchants, state and national banks, and any and all other persons, firms, corporations, trusts, and organizations, or any duly authorized agent thereof, which issues a credit card.

(e) "Receives" or "receiving" is defined as acquiring possession of or control of or accepting as security for a loan a credit card.

(f) "Revoked credit card" is defined as a credit card which is no longer valid because permission to use it has been suspended or terminated by the issuer.

(g) A credit card is "incomplete" if part of the matter other than the signature of the cardholder which an issuer requires to appear on the credit card before it can be used by a cardholder has not been stamped, embossed, imprinted or written on said card.

(h) A person "falsely makes" a credit card when he makes or draws in whole or in part a device or instrument which purports to be the credit card

of a named issuer, but which is not in fact such a credit card because the issuer did not authorize the making or drawing of said card; or when one materially alters a credit card which was validly issued.

(i) A person "falsely embosses" a credit card when, without the authorization of the named issuer, he completes a credit card by adding any other matter than the signature of the cardholder which an issuer requires to appear on the credit card before it can be used by a cardholder.

SOURCES: Codes, 1942, § 2148.7-02; Laws, 1968, ch. 345, § 2; Laws, 1979, ch. 402, § 1, eff from and after July 1, 1979.

Cross References — Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29. Computer crimes, see § 97-45-1.

RESEARCH REFERENCES

Am Jur. 7 Am. Jur. Legal Forms 2d, Credit Cards §§ 78:11 et seq. (issuer-merchant transactions); §§ 78:21 et seq. (issuer-card holder transactions).

§ 97-19-11. Credit cards; procuring issuance by false statements.

Any person who makes or causes to be made either directly or indirectly any false statement in writing with intent that it be relied upon with respect to his identity or that of any other person, firm or corporation, for the purpose of procuring the issuance of a credit card is guilty of a misdemeanor.

SOURCES: Codes, 1942, § 2148.7-03; Laws, 1968, ch. 345, § 3, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigations, see § 7-5-59.

Acquisition of credit cards by theft or artifice, etc., see § 97-19-13.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

ALR. What constitutes violation of § 134 of Consumer Credit Protection Act (15 USCS § 1644), prohibiting fraudulent use of credit card. 72 A.L.R. Fed. 65.

CJS. 35 C.J.S., False Pretenses § 26.

§ 97-19-13. Credit cards; acquisition by theft or artifice; unlawful sales and purchases; receipt of cards issued in another's name.

A person who takes a credit card from the person, possession, custody or control of another by acts constituting statutory larceny, common law larceny

by trespassory taking, common law larceny by trick, embezzlement, false pretense or extortion, or by any other method known to the criminal law of this state, without the cardholder's consent, or who, with knowledge that a credit card has been so taken, receives the credit card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder or one authorized by him to receive it is guilty of credit card theft.

A person other than the issuer who sells a credit card or a person who buys a credit card from a person other than the issuer violates Sections 97-19-5 to 97-19-29.

Any person other than the issuer or cardholder or members of his immediate family who, during any consecutive twelve-month period, receives two (2) or more credit cards not issued in his name and which cards he has reason to know were taken or retained under circumstances which constitute credit card theft under this section or a violation of Section 97-19-11 is considered to be in violation of Sections 97-19-5 through 97-19-29.

SOURCES: Codes, 1942, § 2148.7-04; Laws, 1968, ch. 345, § 4, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigations, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

ALR. Criminal liability for unauthorized use of credit card. 24 A.L.R.3d 986.

Am Jur. 20 Am. Jur. 2d, Credit Cards and Charge Accounts § 28.

§ 97-19-15. Credit cards; controlling card as security for debt.

Any person, who, with intent to defraud the issuer, a person or organization providing money, goods, property, services or anything else of value, or any other person, obtains control of a credit card as security for debt is guilty of a misdemeanor.

SOURCES: Codes, 1942, § 2148.7-05; Laws, 1968, ch. 345, § 5, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigations, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

§ 97-19-17. Credit cards; forgery.

Every person who, with intent to defraud a purported cardholder, issuer, or a person or organization providing money, goods, property, services or anything else of value, falsely makes or alters or embosses a card purporting to be a credit card or other such credit device is guilty of credit card forgery.

SOURCES: Codes, 1942, § 2148.7-06; Laws, 1968, ch 345, § 6, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigation, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

Forgery, generally, see §§ 97-21-1 et seq.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Credit Cards and Charge Accounts § 27.

§ 97-19-19. Credit cards; signing with intent to defraud.

Any person other than the cardholder or a person authorized by him, who, with intent to defraud the cardholder, issuer, or a person or organization providing money, goods, property, services, or anything else of value, signs a credit card, violates Sections 97-19-5 through 97-19-29.

SOURCES: Codes, 1942, § 2148.7-07; Laws, 1968, ch. 345, § 7, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigation, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

ALR. What constitutes violation of § 134 of Consumer Credit Protection Act (15 USCS § 1644), prohibiting fraudulent use of credit card. 72 A.L.R. Fed. 65.

Am Jur. 20 Am. Jur. 2d, Credit Cards § 35.

§ 97-19-21. Credit cards; use to obtain things of value or to operate automatic cash dispensing machines with intent to defraud; penalties.

(1) It is unlawful for any person, with intent to defraud the cardholder, the issuer, a person or organization providing money, goods, property, services or anything else of value, or any other person, (a) to use a credit card or credit card number obtained or retained in violation of Sections 97-19-5 through 97-19-29, or a credit card which he knows is forged, for the purpose of obtaining money, goods, property, services or anything else of value, or (b) to obtain money, goods, property, services or anything else of value (i) by representing without the consent of the cardholder that he is the holder of a specified card, or (ii) by representing that he is the holder of a card when he has reason to know that such card has not in fact been issued, or (iii) by representing that he has been authorized to use the credit card or credit card number.

(2) It is unlawful for any person, with intent to defraud the cardholder or issuer of a credit card used in the operation of an automatic unmanned cash dispensing machine, to use such card for the purpose of obtaining money from such machine.

(3) Any person convicted for a violation of subsection (1) or (2) of this section shall be punished as follows:

(a) For a first offense of violating subsection (1) or (2) of this section, whenever the value of the money, goods, property, services or other thing of value obtained or attempted to be obtained is less than One Hundred Dollars (\$100.00), the person committing the offense shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for a term not to exceed one (1) year, or by both such fine and imprisonment.

(b) For a second or subsequent offense of violating subsection (1) or (2) of this section, whenever the value of the money, goods, property, services or other thing of value obtained or attempted to be obtained is less than One Hundred Dollars (\$100.00), the person committing the offense shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00), or by imprisonment in the State Penitentiary for a term not to exceed three (3) years, or by both such fine and imprisonment.

(c) Whenever the value of the money, goods, property, services or other thing of value obtained or attempted to be obtained is One Hundred Dollars (\$100.00) or more, the person committing the offense, whether the offense is a first, second or subsequent offense, shall be guilty of a felony and such person, upon conviction, shall be punished as provided in paragraph (3)(b) of this section.

(4) For the purpose of determining the punishment to be imposed under subsection (3) of this section, the value of all money, goods, property, services and other things of value obtained or attempted to be obtained by two (2) or more uses of the same credit card shall be aggregated.

SOURCES: Codes, 1942, § 2148.7-08; Laws, 1968, ch. 345, § 8; Laws, 1979, ch. 402, § 2; Laws, 1992, ch. 384, § 1, eff from and after July 1, 1992.

Cross References — White-collar crime investigation, see § 7-5-59.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29. Obtaining goods, etc., by use of credit devices, see § 97-19-31.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Credit Cards § 36.

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 74.1 (complaint, pe-

tition, or declaration by bank customer, robbery of customer while using automated teller machine).

CJS. 35 C.J.S., False Pretenses § 26.

§ 97-19-23. Credit cards; furnishing things of value on forged or unlawfully obtained card; failing to give value represented as given.

Any person or any agent of said person who is authorized to furnish money, goods, property, services, or anything else of value upon presentation of a credit card by the cardholder or one authorized by him, who, with intent to defraud the issuer, furnishes money, goods, property, services, or anything of value upon presentation of a credit card which he knows to have been obtained in violation of Sections 97-19-5 through 97-19-29 or a credit card which he knows to be forged, is considered to be in violation of said sections.

Any person or any agent of said person who is authorized by an issuer to furnish money, goods, property, services, or anything else of value upon presentation of a credit card by the cardholder or one authorized by him, who with intent to defraud the issuer or the cardholder, fails to furnish money, goods, property, services, or anything else of value which he represents in writing to the issuer to have been furnished, is guilty of violation of Sections 97-19-5 through 97-19-29.

SOURCES: Codes, 1942, § 2148.7-09; Laws, 1968, ch. 345, § 9, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigation, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Credit Cards
§ 36.

§ 97-19-25. Credit cards; possession of incomplete cards or plates and devices for their reproduction.

Any person other than the cardholder or one authorized by him possessing two (2) or more incomplete credit cards, with the intent to complete them without the consent of the issuer or the cardholder, or a person possessing, with knowledge of their character, machinery, plates, or any other contrivance designed to reproduce instruments purporting to be credit cards of an issuer who has not in fact consented to the preparation of such credit cards, is guilty of a misdemeanor.

SOURCES: Codes, 1942, § 2148.7-10; Laws, 1968, ch. 345, § 10, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigation, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Credit Cards
 §§ 14 et seq.

§ 97-19-27. Credit cards; receipt of things of value in violation of law.

Any person who receives money, goods, property, services, or anything else of value obtained in violation of Sections 97-19-5 through 97-19-29 and knowing or believing that it was so obtained violates said sections.

SOURCES: Codes, 1942, § 2148.7-11; Laws, 1968, ch. 345, § 11, eff 60 days after passage (approved August 8, 1968).

Cross References — White-collar crime investigation, see § 7-5-59.

Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Violation of this section as misdemeanor, and punishment therefor, see § 97-19-29.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Credit Cards
 § 36.

§ 97-19-29. Credit cards; penalty for violation of Sections 97-19-5 through 97-19-29.

Except as otherwise provided in Section 97-19-21, any person who violates any of the provisions of Sections 97-19-5 through 97-19-29 or commits any of the offenses described therein shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed One Thousand Dollars (\$1,000.00), or to imprisonment for a term not to exceed one (1) year, or both.

SOURCES: Codes, 1942, § 2148.7-12; Laws, 1968, ch. 345, § 12; Laws, 1992, ch. 384, § 2, eff from and after July 1, 1992.

Cross References — Unlawful to use credit card or credit card number, obtained or retained in violation of this section, to obtain a thing of value, see § 97-19-21.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-19-31. Credit cards; use of credit numbers or other credit device to obtain credit, goods, property or services.

(1) It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, counterfeit or expired telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any

telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued.

(2) It shall be unlawful for any person to use or to assist another to use a credit number or other credit device in connection with any fraudulent scheme, means or method with intent to defraud the issuer of such credit number or other credit device.

(3) It shall be unlawful for any person to obtain or attempt to obtain by the use of any false or fraudulent scheme, device, means or method, telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities.

(4) The word "notice" as used in subsection (1) of this section shall be construed to include either notice given in person or notice given in writing to the person to whom the number or device was issued. The sending of a notice in writing personally signed by the issuer or his duly authorized agent or employee by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie evidence that such notice was duly received.

(5) Any person who violates any provision of subsections (1), (2) or (3) of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00) or imprisonment for not more than one (1) year, or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2148.5; Laws, 1960, ch. 248, §§ 1-5; Laws, 1968, ch. 345, § 15; Laws, 1986, ch. 326, eff from and after July 1, 1986.

Cross References — Fraudulent use of credit cards, see §§ 97-19-5 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The enactment of Code 1942, § 2148.5 dealing specifically with fraudulent use of credit cards does not pre-empt the field and does not preclude prosecution under the general forgery statute of a defendant

charged with using a stolen credit card to obtain goods and signing the credit card owner's name to the credit card slip or invoice. *McCrary v. State*, 210 So. 2d 877 (Miss. 1968).

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 1 et seq.

CJS. 35 C.J.S., False Pretenses §§ 1 et seq.

§ 97-19-33. False personation; personating another to marry, become bail or surety, confess judgment, acknowledge recorded instrument, or act in suit.

Every person who shall falsely represent or personate another, and in such assumed character shall marry another, or become bail or surety for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety; or confess any judgment, or acknowledge the execution of any conveyance of real estate, or of any other instrument which by law may be recorded; or do any other act in the course of any suit, proceeding, or prosecution, whereby the person so represented or personated might be made liable in any event to the payment of any debt, damages, costs, or sum of money, or his rights or interests in any manner be affected if the same were legal shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding ten years. An indictment under this section for marrying shall not be found unless on the complaint of the injured party, before cohabitation, after knowledge of the fraud.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(48, 49); 1857, ch. 64, arts. 100, 101; 1871, §§ 2564, 2565; 1880, §§ 2806, 2807; 1892, § 1082; Laws, 1906, § 1162; Hemingway's 1917, § 889; Laws, 1930, § 915; Laws, 1942, § 2145.

Cross References — Limitations of prosecutions generally, see § 99-1-5.

JUDICIAL DECISIONS

1. In general.

Where allegation that defendant represented to one F that he was agent of the state educational department in issuing teachers' licenses is not supported by any

evidence, and F himself testified that no such representation was made, a judgment of conviction cannot be sustained. *Carter v. State*, 120 Miss. 294, 82 So. 146 (1919).

RESEARCH REFERENCES

ALR. Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses. 20 A.L.R.2d 1266.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense. 53 A.L.R.2d 1215.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions. 78 A.L.R.2d 1359.

Reasonable expectation of payment as affecting offense under "worthless check" statutes. 9 A.L.R.3d 719.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim. 10 A.L.R.3d 572.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage. 50 A.L.R.3d 1295.

Am Jur. 32 Am. Jur. 2d, False Personation §§ 1 et seq.

CJS. 35 C.J.S., False Personation §§ 1 et seq.

Mississippi Criminal and Traffic Law Manual (Michie).

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Penal Code Annotated (Michie).

§ 97-19-35. False personation; personating another to receive money or property.

Every person who shall falsely represent or personate another, and, in such assumed character, shall receive any money or valuable property of any description, intended to be delivered to the individual so personated, shall, upon conviction, be punished in the same manner and to the same extent as for feloniously stealing the money or property so received.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(50); 1857, ch. 64, art. 102; 1871, § 2566; 1880, § 2808; 1892, § 1083; Laws, 1906, § 1163; Hemingway's 1917, § 890; Laws, 1930, § 916; Laws, 1942, § 2146.

JUDICIAL DECISIONS

1. In general.

If possession of property is obtained by fraud and the owner intends to part with his title as well as his possession, the crime is that of obtaining property by false pretenses, provided the means by which it is acquired comply therewith, but if possession of property is fraudulently obtained with present intent on the part of the person obtaining it to convert the property to his own use, and the owner intends to part with possession merely and not with the title, the offense is larceny. *Wilkinson v. State*, 215 Miss. 327, 60 So. 2d 786 (1952).

Where an accused urges employer to falsely represent to possessor of stray cat-

tle that such cattle belong to the employer, thereby obtaining possession and selling such cattle and sharing the proceeds of the sale, he was properly prosecuted under the grand larceny statute. *Wilkinson v. State*, 215 Miss. 327, 60 So. 2d 786 (1952).

Where allegation that defendant represented to one F that he was agent of the state educational department in issuing teachers' licenses is not supported by any evidence, and F himself testified that no such representation was made, a judgment of conviction cannot be sustained. *Carter v. State*, 120 Miss. 294, 82 So. 146 (1919).

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Personation §§ 1 et seq.

23 Am. Jur. Proof of Facts, Confidence Games and Swindles §§ 1 et seq.

CJS. 35 C.J.S., False Personation §§ 1 et seq.

§ 97-19-37. False personation; masquerading as deaf person.

No person in this state shall engage in the business of peddling finger alphabet cards or printed matter stating that the person is deaf or use finger alphabet cards or such printed matter or masquerade as a deaf person in any way as a means of inducement in the sale of merchandise. Any person who peddles finger alphabet cards or such printed matter or uses the same or

masquerades as a deaf person in any way as a means of inducement in the sale of merchandise in this state shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed two hundred fifty dollars (\$250.00) or imprisoned for a term not to exceed three (3) months, or in the discretion of the court, shall be subject to both such fine and imprisonment.

SOURCES: Codes, 1942, § 2314.5; Laws, 1962, ch. 313, eff from and after June 1, 1962.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Personation §§ 1 et seq.

CJS. 35 C.J.S., False Personation §§ 1 et seq.

§ 97-19-39. Obtaining signature or thing of value with intent to defraud.

(1) Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of less than Five Hundred Dollars (\$500.00), upon conviction thereof, shall be guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding six (6) months, and by fine not exceeding One Thousand Dollars (\$1,000.00).

(2) Every person, who with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of Five Hundred Dollars (\$500.00) or more, upon conviction thereof shall be guilty of a felony and punished by imprisonment in the State Penitentiary not exceeding ten (10) years, and by a fine not exceeding Ten Thousand Dollars (\$10,000.00).

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(53); 1857, ch. 64, art. 105; 1871, § 2569; 1880, § 2811; 1892, § 1086; Laws, 1906, § 1166; Hemingway's 1917, § 893; Laws, 1930, § 919; Laws, 1942, § 2149; Laws, 2003, ch. 499, § 5, eff from and after July 1, 2003.

Cross References — Obtaining board and lodging with intent to defraud, see §§ 75-73-9, 75-73-11.

Fraudulent use of credit cards, see §§ 97-19-5 et seq.

Extension of penalty in case of negotiable instruments, see § 97-19-41.

JUDICIAL DECISIONS

1. In general.
2. Larceny distinguished.
3. Indictment, generally.
4. —Name of party defrauded required.
5. —Where false pretense is a writing.
6. —Sufficiency.
7. Commission of crime.
8. Burden and degree of proof.

1. In general.

In the context of a fraudulent future promise to pay, a false pretense charge under Miss. Code Ann. § 97-19-39 does not encompass such facts. A wire fraud charge, under Miss. Code Ann. § 97-19-83, does. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Convictions for substantive Racketeer Influenced and Corrupt Organizations Act (RICO) violations were supported by evidence showing defendants' involvement in enterprise, that enterprise operated cheating scheme at Mississippi casino, and that defendants facilitated cheating, one by placing marked cards on table for play and other by organizing cheating crews. *United States v. Vaccaro*, 115 F.3d 1211 (5th Cir. 1997), cert. denied, 522 U.S. 1047, 118 S. Ct. 689, 139 L. Ed. 2d 635 (1998).

Defendant's conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) arising from alleged scheme to defraud Mississippi casino did not violate ex post facto clause to extent that underlying offenses occurred prior to Mississippi's enactment of statutes that prohibited cheating at gambling games and marking or altering of gaming equipment or devices, given absence of showing that cheating at gambling was legal in Mississippi prior to statutes' enactment. *United States v. Vaccaro*, 115 F.3d 1211 (5th Cir. 1997), cert. denied, 522 U.S. 1047, 118 S. Ct. 689, 139 L. Ed. 2d 635 (1998).

Absent a showing of intent to defraud, the elements of the crime of false pretenses are not fully satisfied; thus, the evidence was insufficient to support a conviction on charges of false pretenses pursuant to this section, stemming from the

defendant's failure to properly repair a leaking roof, where the State presented evidence only of shoddy workmanship but failed to present any evidence that the defendant acted with an intent to defraud. *Allred v. State*, 605 So. 2d 758 (Miss. 1992).

In order to sustain a conviction under this section, there must be a showing that the pretenses were false, that the defendant knew them to be false, and that the pretenses were the moving cause by which the money was obtained; accordingly, where the State failed to present any evidence that a company was injured or suffered any detriment as a result of the issuance of seven rebate checks, the evidence was insufficient to sustain a conviction of receiving money by false pretenses (among conflicting authorities on other grounds noted in *Tanner v. State* (1989, Miss.) 556 So. 2d 681). *Gordon v. State*, 458 So. 2d 739 (Miss. 1984).

In a prosecution for false pretenses, the trial court properly refused to quash the indictment, despite defendant's contention that the indictment charged only conspiracy, a crime not excepted from the two year statute of limitations, and that the prosecution was thus barred; conspiracy is a complete offense in itself and does not merge with the underlying crime, and the fact that a conspiracy is committed along with the crime does not change the nature of the offense nor lessen exposure to punishment. Furthermore, the prosecution was not time barred even though defendant was charged with being an accessory only, which is a separate crime not excepted from the statute, since an accessory before the fact to an excepted felony is treated as a principal. *Harrigill v. State*, 381 So. 2d 619 (Miss. 1980), cert. denied, 446 U.S. 939, 100 S. Ct. 2159, 64 L. Ed. 2d 792 (1980).

Where an officer knew that the defendant had committed a misdemeanor and had also run up a large bill at a motel under a fictitious name, it was more likely that the defendant had committed the felony of false pretenses; Thus there was probable cause to arrest, based upon the misdemeanor charge. *United States v. At-*

kinson, 450 F.2d 835 (5th Cir. 1971), cert. denied, 406 U.S. 923, 92 S. Ct. 1790, 32 L. Ed. 2d 123 (1972).

A false pretense may be either express or by implication and it may consist of any act, word, symbol, doctrine, or in some instances concealment, calculated and intended to deceive. *Neece v. State*, 210 So. 2d 657 (Miss. 1968).

Acts or conduct, without words, may constitute a false pretense. *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962).

To show false pretense, a felonious intent to cheat and defraud must be proved. *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962).

Where defendant was convicted of obtaining buyer's money under false pretenses by selling property on which defendant had previously given a lien without informing the buyer of the lien, in violation of Code 1942, § 2151 which states that the punishment shall be the same as for obtaining goods under false pretenses, the defendant would be sentenced under this section [Code 1942, § 2149]. *Jones v. State*, 226 Miss. 535, 84 So. 2d 799 (1956).

In a prosecution for false pretenses it is necessary to charge that the pretenses were false, that the defendant knew them to be false, that he obtained from another certain money or other valuable things, and that the pretenses were the moving cause by which the money or things were obtained. *State v. Cohran*, 226 Miss. 212, 83 So. 2d 827 (1955).

A false pretense may consist in any act, word, symbol, or token calculated and intended to deceive and it may be made either expressly or by implication. *Fuller v. State*, 221 Miss. 247, 72 So. 2d 454 (1954).

Where defendant negotiated to named person, without any representation as to his identity, a check which was genuine and duly indorsed in blank by the payee named therein, defendant could not be convicted of obtaining money under false pretenses, even though the defendant was not rightfully in possession of the check. *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953).

Word "obtain" within statute providing penalty for obtaining money under false pretenses means acquisition of title to

property or ownership thereof, and does not include mere acquisition of possession. *Courtney v. State*, 174 Miss. 147, 164 So. 227 (1935).

Intent to return money, or actual return, no defense. *Odom v. State*, 130 Miss. 643, 94 So. 233 (1922), error overruled, 132 Miss. 3, 95 So. 253 (1923).

It is not an offense to obtain money by false pretenses, unaccompanied by an intent to defraud. *Pittman v. State*, 101 Miss. 553, 58 So. 532 (1912).

It is not necessary that the false pretenses should have been the sole inducement for parting with the property. It is sufficient if the pretenses constituted a material part of the inducement, even though other considerations entered into it, if without the false pretenses, the goods would not have been delivered. *Smith v. State*, 55 Miss. 513 (1878).

The pretenses need not be such as would deceive a man of ordinary prudence. The statute was passed for the protection of the weak and unsuspecting as well as the wary and cautious. *Smith v. State*, 55 Miss. 513 (1878).

The state must show not only that the pretenses were false, but also that they were made with the design of obtaining the money, and that the money was paid in consequence of the pretenses. *Bowler v. State*, 41 Miss. 570 (1867).

2. Larceny distinguished.

When personal property is fraudulently obtained under such circumstances that owner intends that no title shall pass, offense is grand larceny, but when he intends that ownership or legal title shall pass offense is that of obtaining money under false pretenses. *Garvin v. State*, 207 Miss. 751, 43 So. 2d 209 (1949).

Obtaining and keeping of money under practice known as "pigeon-dropping," victim delivering money of his own to pretended finder of large sum to establish right to participate in division of money found, constitutes crime of grand larceny instead of obtaining money under false pretenses. *Garvin v. State*, 207 Miss. 751, 43 So. 2d 209 (1949).

3. Indictment, generally.

Where defendant defrauded furniture sellers by telephone, wire communica-

tions, or mail, defendant's second indictment for wire fraud did not conflict with double jeopardy rules, because wire fraud charge was a distinct offense, and required proof of different elements than the initial charge of false pretenses, which had been dismissed. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Indictment charging three individuals with obtaining loan in name of one of them and dividing loan among themselves with intent to cheat lender by not repaying loan failed to adequately charge crime of false pretense, having alleged no factual representation regarding present for past fact. *State v. Allen*, 505 So. 2d 1024 (Miss. 1987).

Under an indictment charging that the defendants knowing a conditional sales contract was a false contract and not representing evidence of a valid purchase and sale transaction between the defendant and a third party, and by virtue of this said false representation and false pretence, the defendant did with intent to cheat and defraud a bank, sell the conditional sales contract to the bank, the prosecution was limited to establishing as false in fact the alleged false representation set out in the indictment which charged that the contract was false without specifying any respect in which it was false except to say that it had not represented a bona fide purchase and sales agreement, and the prosecution could not seek to develop that the equipment covered by the conditional sales contract did not exist. *Westmoreland v. State*, 286 So. 2d 807 (Miss. 1973).

Where the defendant obtained money and property from another in exchange for an automobile which he falsely represented he owned, the name of the owner of the vehicle was immaterial, and the indictment returned against him was not defective for failing to allege the owner's name. *Young v. State*, 209 So. 2d 189 (Miss. 1968).

Where an indictment charged that the defendants obtained paint by false pretenses and there was evidence that the seller delivered the paint to the buyers charging it to an account of a certain person in reliance on representations

made by buyers that they were working for such persons, the evidence and indictments were not in variance. *Fuller v. State*, 221 Miss. 247, 72 So. 2d 454 (1954).

An indictment for false pretenses must allege that the pretenses were false, accused knew them to be false, and obtained something of value because of making such false pretenses. *State v. Freeman*, 103 Miss. 764, 60 So. 774 (1913).

Indictment secured by an attorney for person defrauded through testimony of his relatives is properly quashed. *State v. Barnett*, 98 Miss. 812, 54 So. 313 (1911).

Indictment alleging that "by means and color of which false pretense," defendant obtained the property in question of prosecutor, was not demurrable. *State v. Dodenhoff*, 88 Miss. 277, 40 So. 641 (1906).

4. —Name of party defrauded required.

In prosecution for obtaining property by false pretenses, the indictment must allege the name of party defrauded and proof must sustain the allegation. *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953).

In an indictment for false pretenses the name of party defrauded must be given. *Pippin v. State*, 126 Miss. 146, 88 So. 502 (1921).

Christian and surname of individuals composing partnership alleged to be defrauded must be given or proper excuse for the omission. *State v. Tatum*, 96 Miss. 430, 50 So. 490 (1909).

5. —Where false pretense is a writing.

Facts extrinsic to the writing relied upon as having been a false token in writing must be stated in the indictment. *Westmoreland v. State*, 286 So. 2d 807 (Miss. 1973).

When the false pretense charged in an indictment is in writing, the writing need not be set out in specific words, but it is sufficient to set out the purport thereof, unless some question turns on the form or construction of the instrument or some other legal description is given in the indictments, the accuracy of which may be material for the court to determine. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

An indictment charging that by means and color of false writings, in stated words and figures, the defendant had obtained a sum of money from a partnership, was defective because of the absence of extrinsic facts in explanation of the pretense and wherein it consisted, and it was also defective because it failed to charge that the defendants knew that the writings were false. *State v. Cohran*, 226 Miss. 212, 83 So. 2d 827 (1955).

Writing constituting false pretense need not be set out in indictment in *haec verba*, unless some question turns on form of construction of instrument, or accuracy of some legal description of it is material. *State v. Tatum*, 96 Miss. 430, 50 So. 490 (1909).

6. —Sufficiency.

Indictment failed to charge facts which constitute crime of false pretenses where finance company official had been paid to secure loan on basis of false information; whatever bad intent defendants evidenced, that intent did not include plan to deprive finance company of money or property; indictment did not suggest that loan was not legally binding obligation, nor did it refute clear inference that finance company obtained account receivable asset through transaction; crime of false pretenses occurs when one makes false representation of past or existing fact with intent to deceive and with result that accused obtains something of value from party deceived, and in order for one to be guilty of obtaining money under false pretenses, he must obtain property of another by false pretenses and to detriment or injury of person from who he obtained that property. *State v. Rivenbark*, 509 So. 2d 1047 (Miss. 1987).

An indictment sufficiently charged facts which constituted the crime of false pretense under Code 1942, § 2149, and was not defective because it also recited the words of Code 1942, § 2150 dealing with the use of a promissory note or other negotiable evidence of debt in committing the offense, but it was error to impose a sentence under the latter section which carries a harsher penalty, where the facts charged in the indictment and established in the proof did not show commission of the offense under circumstances bringing

it within that statute. *Westmoreland v. State*, 246 So. 2d 487 (Miss. 1971), cert. denied, 404 U.S. 1038, 92 S. Ct. 702, 30 L. Ed. 2d 729 (1972), reh'g denied, 405 U.S. 948, 92 S. Ct. 931, 30 L. Ed. 2d 818 (1972).

The requirements of specificity with respect to an allegation of ownership in an indictment charging false pretense, demand neither a derangement of title nor a statement in direct terms showing perfect title, where ownership of the money or property obtained reasonably appears from the whole indictment, and there is nothing in the indictment to support or suggest any other reasonable conclusion. *Westmoreland v. State*, 246 So. 2d 487 (Miss. 1971), cert. denied, 404 U.S. 1038, 92 S. Ct. 702, 30 L. Ed. 2d 729 (1972), reh'g denied, 405 U.S. 948, 92 S. Ct. 931, 30 L. Ed. 2d 818 (1972).

An indictment which charged that the pretenses employed by the defendants were false and known by the defendants to be false, that money was thereby obtained from the state, and that the pretenses were the means by which the money was obtained, sufficiently stated the offense of obtaining money of state in violation of the false pretense statute, and adequately informed the defendants of the charges therein laid against them. *Mississippi State Hwy. Comm'n v. Herrin*, 241 So. 2d 346 (Miss. 1970).

An indictment which charged that the defendant, intending to defraud, did pretend that he was entitled to receive a certain sum of money evidenced by a customer's draft and did falsely pretend that said draft would be honored and by means of such false pretense did obtain from a named bank a sum of money was sufficient; and it was unnecessary that the indictment charge that the pretenses were the moving cause whereby money was obtained. *Neece v. State*, 210 So. 2d 657 (Miss. 1968).

In an indictment charging the accused with the crime of attempting to commit false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, a statement that certain named individuals involved in the scheme bought insurance contracts to indemnify themselves from loss occa-

sioned by personal injuries received in automobile accidents, and that another person, also involved, had bought an insurance contract of indemnity for loss occasioned by acts of negligence committed by him in the operation of the automobiles, sufficiently described the insurance policies by designation and type and thereby indicated their purport within the meaning of Code 1942, § 2453. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

Language of indictment was sufficient to charge that prosecuting witness was moved to and did part with its goods by false pretenses. *Odom v. State*, 130 Miss. 643, 94 So. 233 (1922), error overruled, 132 Miss. 3, 95 So. 253 (1923).

Indictment alleging that accused intending to cheat and defraud R of \$10.00 did wilfully, etc., pretend to R that he was duly authorized to represent a loan company and by means of said fraudulent representation procured the money from R, held bad on demurrer for failure to allege the moving cause by which the money was obtained. *State v. Freeman*, 103 Miss. 764, 60 So. 774 (1913).

Indictment charging accused fraudulently pretended to insurer that he was the beneficiary in a life policy by means of which he obtained from insurer a specified sum, is fatally bad for failing to charge the ownership of the money paid, and to allege that the beneficiary in the policy had not assigned it to accused. *State v. Hubanks*, 99 Miss. 775, 56 So. 163 (1911).

Allegations that defendant obtained from prosecutor \$600 by certain false contentions sufficiently alleged value of property. *State v. Tatum*, 96 Miss. 430, 50 So. 490 (1909).

7. Commission of crime.

Evidence was sufficient to sustain a conviction where: (1) several windows were taken from an apartment complex under construction; (2) later that day, the defendant's wife returned five windows to the retail store from which they were purchased, in exchange for \$437.58; (3) in presenting the windows to the store, the defendant and his wife claimed that they were the rightful owners of the property, that they purchased the property from the store and wanted to return it for a refund;

and (4) the defendant admitted his involvement in the transaction, and he stated that his wife actually returned the windows to the store because he did not have any identification. *Anderson v. State*, 738 So. 2d 253 (Miss. Ct. App. 1998).

In a prosecution for false pretense arising out of defendant's securing of a second deed of trust on property owned by a third party which later became the subject of a loan from a savings and loan association, the evidence failed to establish the offense outlined in this section where defendant, although he was chairman of the board of the association's parent corporation, took no part in the loan process, never recorded the deed of trust, and received no benefits from the transactions in question, while the association gained a profit from a joint venture suggested by defendant and entered into by the association with the third party for the purpose of selling lots and sharing the proceeds. *Carter v. State*, 386 So. 2d 1102 (Miss. 1980).

Conviction under this section was reversed where evidence was clear that sheriff's deputy bought oil from defendants voluntarily and without relying upon their representations that it would cure his arthritis or "undress" his truck. *Sturgis v. Jordan*, 326 So. 2d 469 (Miss. 1976).

As bearing upon felonious intent in obtaining a deed, it is permissible to show that the grantee procured the forgery of the notary's certificate of acknowledgment. *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962).

Evidence, including the testimony of eight accomplices who testified for the state, sustained the conviction of an attorney for an attempt to commit the crime of false pretenses or cheats by organizing a group of people who attempted to defraud insurance companies by staging a fake or false wreck with automobiles, after having obtained hospitalization insurance on the participants and liability insurance on the offending vehicle. *Prisock v. State*, 244 Miss. 408, 141 So. 2d 711 (1962).

Where the defendants falsely represented to seller of paint that they were working for a certain person and wanted paint purchased charged to his account, the defendants by implication falsely rep-

resented that they were authorized to have the paint so charged and where after receiving the paint they deposited as a security for a loan thereby establishing an intent to defraud, this was sufficient to support conviction of both buyers for obtaining property by false pretenses. *Fuller v. State*, 221 Miss. 247, 72 So. 2d 454 (1954).

Though there is in force a bad check statute, and prosecutions may be lodged thereunder, the giving of a bad check may under certain circumstances constitute the offense of obtaining property under false pretenses. *Blakeney v. State*, 216 Miss. 211, 62 So. 2d 313 (1953).

Where purchasers of cattle at auction sales were required before obtaining the possession of cattle to pay for them in cash and where the accused after purchasing cattle issued his check and subsequently the cattle were delivered and then the check was dishonored because of insufficient funds, the accused could be prosecuted for obtaining property under false pretenses. *Blakeney v. State*, 216 Miss. 211, 62 So. 2d 313 (1953).

In order to establish the crime of false pretenses, the pretense must be a representation as to an existing fact or past event, and not as to something to take place in the future; and it must be a representation as to a material fact. *Button v. State*, 207 Miss. 582, 42 So. 2d 773 (1949).

The falsity of the representation is a part of the corpus delicti of obtaining property under false pretenses; and a conviction, based alone upon a confession as to falsity of the pretense, is insufficient without other proof of the corpus delicti. *Button v. State*, 207 Miss. 582, 42 So. 2d 773 (1949).

Evidence that defendant obtained money from another by promise to use it for a specific purpose and then to return it, together with portion of money found, held insufficient to warrant conviction for obtaining money under false pretenses, but evidence disclosed crime of larceny, provided money was obtained with intent to steal. *Courtney v. State*, 174 Miss. 147, 164 So. 227 (1935).

Where testimony of prosecuting witness failed to show any false pretenses, it was insufficient to sustain allegations of in-

dictment. *Dunbar v. State*, 130 Miss. 317, 94 So. 224 (1922).

It is not sufficient to sustain conviction for obtaining money under false pretenses to prove merely that the representation was false in fact, but proof must show that statement was known to be false by the person making it, or he must state the fact in such way as to carry assurance to the party that he is dealing with that the representation is true of his knowledge, and the representation must have been the efficient cause of the money being paid to such party. *King v. State*, 124 Miss. 477, 86 So. 874 (1921).

This section [Code 1942, § 2149] applies where defendant represented that he owned a cow and would give it to a physician for medical services, and the services were rendered, and defendant owned no cow, since a physician's services are a "valuable thing" within the statute. *State v. Ball*, 114 Miss. 505, 75 So. 373 (1917).

Inducing another to sign a deed by false and fraudulent representatives does not constitute forgery at common law, nor under Code 1892, § 1093, but does constitute a crime under Code 1892, § 1086, defining false pretenses and cheats. *Johnson v. State*, 87 Miss. 502, 39 So. 692 (1906).

It is necessary that the money obtained, or some part thereof, should be obtained by the prisoner or for him. If obtained wholly by a third person there can be no conviction. *Bracey v. State*, 64 Miss. 26, 8 So. 165 (1890).

8. Burden and degree of proof.

Proof of false pretenses must be beyond a reasonable doubt. *Lee v. State*, 244 Miss. 813, 146 So. 2d 736 (1962).

The burden is on the state to prove falsity of representation as to an existing fact beyond every reasonable doubt. *Button v. State*, 207 Miss. 582, 42 So. 2d 773 (1949).

Under an indictment for obtaining goods under false pretenses, it devolves on the state to prove the falsity of the pretenses, unless the facts lie peculiarly within the knowledge of the defendant. When the pretense is that the accused "is a minister of the Baptist church in good standing," the burden of proving its falsity is on the state. *Bowler v. State*, 41 Miss. 570 (1867).

ATTORNEY GENERAL OPINIONS

This section and 97-19-41 are a possible charge against an individual who writes a check with the intent to stop payment prior to the check being honored, even if

the account has sufficient funds to cover the check. See also Section 97-19-55. Smith, November 8, 1996, A.G. Op. #96-0784.

RESEARCH REFERENCES

ALR. Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses. 20 A.L.R.2d 1266.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim. 10 A.L.R.3d 572.

Procuring signature by fraud as forgery. 11 A.L.R.3d 1074.

Changing of price tags by patron in self-service store as criminal offense. 60 A.L.R.3d 1293.

Fraud in connection with franchise or distributorship relationship. 64 A.L.R.3d 6.

Criminal offenses under statutes and ordinances regulating charitable solicitations. 76 A.L.R.3d 924.

Embezzlement, larceny, false pretenses or allied criminal fraud by a partner. 82 A.L.R.3d 822.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act. 19 A.L.R.4th 959.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 41-48.

23 Am. Jur. Proof of Facts, Confidence Games and Swindles §§ 1 et seq.

CJS. 35 C.J.S., False Pretenses §§ 24 et seq.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-19-41. Obtaining signature or thing of value with intent to defraud; penalty for using false negotiable instrument.

If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in Section 97-19-39, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any person, banking company, or moneyed corporation not in existence, the person convicted of such cheat shall be punished by imprisonment in the penitentiary not exceeding seven years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(54); 1857, ch. 64, art. 106; 1871, § 2570; 1880, § 2812; 1892, § 1087; Laws, 1906, § 1167; Hemingway's 1917, § 894; Laws, 1930, § 920; Laws, 1942, § 2150.

JUDICIAL DECISIONS

1. In general.

An indictment sufficiently charged facts which constituted the crime of false pretense under Code 1942, § 2149, and was not defective because it also recited the words of Code 1942, § 2150 dealing with

the use of a promissory note or other negotiable evidence of debt in committing the offense, but it was error to impose a sentence under the latter section which carries a harsher penalty, where the facts charged in the indictment and established

in the proof did not show commission of the offense under circumstances bringing it within that statute. *Westmoreland v. State*, 246 So. 2d 487 (Miss. 1971), cert.

denied, 404 U.S. 1038, 92 S. Ct. 702, 30 L. Ed. 2d 729 (1972), reh'g denied, 405 U.S. 948, 92 S. Ct. 931, 30 L. Ed. 2d 818 (1972).

ATTORNEY GENERAL OPINIONS

Sections 97-19-39 and this section are a possible charge against an individual who writes a check with the intent to stop payment prior to the check being honored,

even if the account has sufficient funds to cover the check. See also Section 97-19-55. Smith, November 8, 1996, A.G. Op. #96-0784.

RESEARCH REFERENCES

ALR. Procuring signature by fraud as forgery. 11 A.L.R.3d 1074.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 1 et seq.

CJS. 35 C.J.S., False Pretenses § 56.

§ 97-19-43. Patriotic and fraternal organizations; unauthorized use of membership buttons, insignia, etc.

Any person not being a member of the Confederate Veterans, of the Daughters of the Confederacy, of the Sons of Confederate Veterans, of the Sons of the American Revolution, of the Daughters of the American Revolution, of the Colonial Dames, of the Grand Army of the Republic, of the Sons of Veterans, of the Woman's Relief Corps, of the Military Order of the Foreign Wars of the United States, or the American Legion, of the American Legion Auxiliary, Veterans of Foreign Wars, Veterans of Foreign Wars Auxiliary, Disabled American Veterans, Disabled American Veterans Auxiliary, American Veterans of World War II, American Veterans of World War II Auxiliary, of the Masons, of the Woodmen of the World, of the Knights of Pythias, or of any other patriotic or fraternal organization, who shall wilfully wear the insignia, distinctive ribbons or membership rosette or button or any imitation thereof, shall be punished by a fine of not more than twenty dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment. Provided however that these emblems may be worn, by consent, by those nearest of kin.

SOURCES: Codes, 1930, § 899; Laws, 1942, § 2125; Laws, 1922, ch. 272; Laws, 1948, ch. 507.

§ 97-19-45. Producing child with intent to intercept inheritance.

Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would have been entitled to a share of any personal estate, or to inherit any real estate, with the intent of intercepting the inheritance of any such real estate, or the distribution of any such personal property from any person lawfully entitled thereto, shall, upon

conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(51); 1857, ch. 64, art. 103; 1871, § 2567; 1880, § 2809; 1892, § 1084; Laws, 1906, § 1164; Hemingway's 1917, § 891; Laws, 1930, § 917; Laws, 1942, § 2147.

Cross References — Descent of land, see § 91-1-3.

Disqualification of slayer to inherit from victim, see § 91-1-25.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 1 et seq.

CJS. 35 C.J.S., False Pretenses §§ 1 et seq.

§ 97-19-47. Receiving deposits when bank is insolvent.

The officers or employees of any bank or branch bank who shall receive any deposit knowing or having reason to believe that such bank or branch bank is insolvent, and the owners of any bank or branch bank who shall receive any deposit knowing that such bank or branch bank is insolvent, shall be deemed guilty of a felony and punished, upon conviction therefor, by a fine not exceeding one thousand dollars (\$1,000.00) or imprisonment in the state penitentiary for not more than two years, nor less than one year, or by both such fine and imprisonment at the discretion of the court, for each offense.

SOURCES: Codes, 1880, § 2814; 1892, § 1089; Laws, 1906, § 1169; Hemingway's 1917, § 896; Laws, 1930, § 922; Laws, 1942, §§ 2152, 5239; Laws, 1914, ch. 124, § 52; Laws, 1934, ch. 146.

Cross References — Receipt of deposits in insolvent bank as ground for attachment, see § 11-33-9.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Miscellaneous.

1. In general.

Gross negligence of bank director in discharging his duties as such alone does not warrant conviction. *Buckley v. State*, 121 Miss. 66, 83 So. 403 (1920).

Code 1906, § 1169, as amended, repealed by State Banking Law. *State v. McLean*, 109 Miss. 526, 68 So. 772 (1915).

Cashier did not violate statute [Code 1942, § 2152] by keeping deposits received in separate fund so that identical

money could be returned to depositor. *Sively v. State*, 107 Miss. 118, 65 So. 118, Am. Ann. Cas. 1917B,1075 (1914).

This section [Code 1942, § 2152] is designed to protect general public in making deposits. *State v. Rawles*, 103 Miss. 806, 60 So. 782 (1913).

There may be a conviction of a director, the bank having been kept open by the directors with knowledge of its status, though he did not manually receive deposit. *State v. Mitchell*, 96 Miss. 259, 51 So. 4, Am. Ann. Cas. 1912B,309 (1910).

Where statute makes existence of certain facts a crime, such facts must exist to

constitute crime. *Stewart v. State*, 95 Miss. 627, 49 So. 615 (1909).

Accused must have actually known or have had good reason to believe bank was insolvent. *Stewart v. State*, 95 Miss. 627, 49 So. 615 (1909).

National bank officers are punishable under this section [Code 1942, § 2152] since congress has not made the precise conduct denounced by this section [Code 1942, § 2152] a crime. *State v. Bardwell*, 72 Miss. 535, 18 So. 377 (1895).

2. Indictment.

For form of indictment, see *State v. Bridgforth*, 112 Miss. 221, 72 So. 922 (1916).

Indictment must allege accused officers knew bank to be insolvent. *State v. McLean*, 109 Miss. 526, 68 So. 772 (1915).

Indictment charging defendant was president of bank and received \$75.00 deposit knowing it insolvent, sufficient. *State v. Taylor*, 106 Miss. 850, 64 So. 740 (1914).

Words "Seventy-Five dollars" denotes money and not other property. *State v. Taylor*, 106 Miss. 850, 64 So. 740 (1914).

Indictment not bad for failure to state kind and character of money deposited. *State v. Taylor*, 106 Miss. 850, 64 So. 740 (1914).

Indictment held demurrable where it did not show how any pecuniary obligation was to be affected. *State v. Starling*, 90 Miss. 252, 42 So. 203 (1906).

Indictment held demurrable for joinder of separate offenses in single count. *State v. Walker*, 88 Miss. 592, 41 So. 8 (1906).

It is essential under this section [Code 1942, § 2152] to charge that the bank was

insolvent. *State v. Bardwell*, 72 Miss. 535, 18 So. 377 (1895).

3. Evidence.

In prosecution of banker for receiving money on deposit knowing bank was insolvent, state's evidence that assets consisting of deposit certificates issued under deposit guaranty law were worth much less than face value held improperly excluded, notwithstanding statute authorizing issuance of bonds to pay outstanding certificates, where such bonds had not been sold. *State v. Johnson*, 166 Miss. 591, 148 So. 389 (1933).

4. Miscellaneous.

Under this section [Code 1942, § 2152] no conviction could be had for violations committed between the first and second decisions of the court where the court first held the statute did not apply to a particular state of facts; to convict of an offense committed after a decision of the courts holding a criminal statute not applicable to the facts and before its reversal would be to violate the constitutional provision against the infliction of cruel and unusual punishment, and the statute as a legislative enactment. *State v. Longino*, 109 Miss. 125, 67 So. 902, Am. Ann. Cas. 1916E,371 (1915).

Under the law as it formerly existed, a violation of the statute in receiving a deposit by a banker does not necessarily make him liable to attachment for having "fraudulently contracted the debt;" but such guilt may be considered in determining that issue. The court stating that the statute was intended for the protection of the public, and it has no regard to the intent or purpose of the person receiving the deposit. *Hughes v. Lake*, 63 Miss. 552 (1886).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks §§ 456 et seq.

CJS. 9 C.J.S., Banks and Banking §§ 740 et seq.

§ 97-19-49. Registering animal falsely; giving false pedigree.

If any person shall, by any false pretense whatever, obtain from any person, club, association, society, or company for improving the breed of cattle, horses, sheep, swine, or goats, or other domestic animal, the registration of any animal in the herd register, or other register of such person, club, association,

society, or company, or a transfer of any such registration, and every person who shall knowingly publish or give to any person, club, association, society, or company a false pedigree of any animal, shall be guilty of a misdemeanor, and, on conviction, shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both.

SOURCES: Codes, 1892, § 1090; Laws, 1906, § 1170; Hemingway's 1917, § 899; Laws, 1930, § 926; Laws, 1942, § 2155; Laws, 1888, p. 90.

Cross References — Registration of livestock brands, see §§ 69-29-101 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 1 et seq.

CJS. 3A C.J.S., Animals §§ 31 et seq.
35 C.J.S., False Pretenses §§ 1 et seq.

§ 97-19-51. Selling property previously sold or encumbered.

If any person shall sell, barter, or exchange or mortgage, or give deed of trust on, any property, real or personal, which he had before sold, bartered, or exchanged, or obligated himself to sell, barter, or exchange, or which he had mortgaged, or in any manner encumbered, or on which he knows there is a lien of any kind by contract or by law, without informing the person to whom he so sells, barter, exchanges, or bargains, or mortgages or gives deed of trust on it, of the exact state of the property as affected by said acts or of the lien or incumbrance thereon, he shall be guilty of obtaining under false pretenses whatever he received from the person dealing with him, and shall, on conviction, be punished therefor, as for obtaining goods under false pretenses.

SOURCES: Codes, 1880, § 2813; 1892, § 1088; Laws, 1906, § 1168; Hemingway's 1917, § 895; Laws, 1930, § 921; Laws, 1942, § 2151; Laws, 1900, ch. 96.

Cross References — Lien of executions, see § 13-3-139.

Purchase money security interests, see §§ 75-9-107, 75-9-301, 75-9-312.

Removal of property levied upon, see § 97-9-69.

Removal of property subject to lien, generally, see §§ 97-17-73 et seq.

JUDICIAL DECISIONS

1. In general.
2. Bulk transfers.
3. Indictment.
4. Jurisdiction over offense.
5. Punishment.

1. In general.

Where accused was convicted of the crime of selling three bales of cotton on which there was a lien, without informing the purchaser of the exact status of the

cotton as affected by the lien, and where in the past years the accused sold such cotton and brought money to the lienor and also had sold other cotton subject to such liens and deposited proceeds to lienor's account, lien on the bales had been waived and the conviction would be reversed. *Dickerson v. State*, 224 Miss. 305, 80 So. 2d 74 (1955).

One of the material elements of obtain-

ing money under false pretenses is knowledge on the part of the seller. *Breland v. State*, 222 Miss. 792, 77 So. 2d 300 (1955).

A material element of the crime of obtaining money under false pretenses is that the false representation must have been relied on by the party defrauded. *Breland v. State*, 222 Miss. 792, 77 So. 2d 300 (1955).

Where a purchaser employed an attorney because he did not rely upon the vendor's statement that there was nothing against the land except for indebtedness owed to the bank and the attorney had not discovered the existence of a federal tax lien, the vendor could not have been convicted of having obtained money under false pretenses because the purchaser did not rely upon the representation. *Breland v. State*, 222 Miss. 792, 77 So. 2d 300 (1955).

In a prosecution charging false pretenses in that the defendant mortgaged a parcel of land to the prosecuting witness after he had already conveyed most of his interest therein to another, the indictment charging that defendant in consideration thereof received a sum of money was not supported by proof of the receipt of property other than money, and consequently a conviction thereof constituted reversible error. *Hales v. State*, 186 Miss. 413, 191 So. 273 (1939).

Gist of offense of obtaining money or property through false pretenses based on failure to notify purchaser of lien or incumbrance held intent of seller to cheat and defraud purchaser. *Simmons v. State*, 160 Miss. 582, 135 So. 196 (1931).

Where purchaser of automobile had good title against mortgagee, and therefore was not defrauded, mortgagor or seller was not guilty of obtaining money by false pretenses. *Simmons v. State*, 160 Miss. 582, 135 So. 196 (1931).

Vendor not informing purchaser of lien not guilty where purchaser knew of it. *Overall v. State*, 128 Miss. 59, 90 So. 484 (1922).

Sale of property under a lien coupled with a failure to disclose the fact to the seller, constitutes the statutory crime. *State v. Mitchell*, 109 Miss. 91, 67 So. 853 (1915).

This section [Code 1942, § 2151] does not apply to a case where mortgaged per-

sonal property is exchanged for other property and money does not pass. *State v. Austin*, 23 So. 34 (Miss. 1898).

2. Bulk transfers.

Since the Bulk Sales Law [Code 1942, § 274], voiding sale of entire stock of merchandise in gross as to creditors not furnished with required information does not expressly or by implication declare its violation to be a crime, nor purport to impose a criminal penalty therefore, the court in determining whether a party could be indicted under this section [Code 1942, § 2151] must construe the statutes strictly. *Fox v. State*, 207 Miss. 538, 42 So. 2d 740 (1949).

Seller could not be indicted under this section for violation of Bulk Sales Act (Code 1942, § 274), making sale of entire stock of merchandise in gross void for failure to give notice to creditors, in absence of any proof that any of the property was impressed at the time of the sale with a purchase money lien for the unpaid purchase price thereof. *Fox v. State*, 207 Miss. 538, 42 So. 2d 740 (1949).

3. Indictment.

An indictment charging that the accused sold a bale of cotton on which he had given a deed of trust and a lien and without informing the purchaser of the cotton of the existence of the lien, was full and complete and did not charge more than one offense in a single count. *Jones v. State*, 226 Miss. 535, 84 So. 2d 799 (1956).

Under this statute [Code 1942, § 2151], the indictment must describe the property obtained or received with the same reasonable certainty as is required in prosecutions for larceny, and the proof must correspond to the allegations, in order that the accused may be informed of the charge against him so that he may prepare to defend against such charge, and that he may not be subject to a second prosecution for the same offense. *Hales v. State*, 186 Miss. 413, 191 So. 273 (1939).

What constitutes property under this section [Code 1942, § 2151] is a very material element of the indictment. *State v. Collins*, 186 Miss. 448, 191 So. 126 (1939).

An indictment charging the defendant with obtaining money by false pretenses, by mortgaging previously mortgaged

property and describing the property as it was described in the deed of trust given by the defendant as being "his entire interest in any and all crops of cotton, corn, and all other agricultural products raised by him, and any hand he may employ during the year 1935 and raised on land belonging to himself or any other land he may cultivate during said year, together with any and all cotton or corn that may be due the said defendant as rent for said year 1935," insufficiently describes the property to sustain a conviction thereunder, even in view of Code 1930, § 2130, which provides for the mortgaging of after-acquired property, since such statutory provision is limited to chattels of the character described or limited as to localities or at the time of the execution of the instrument. *State v. Collins*, 186 Miss. 448, 191 So. 126 (1939).

Indictment charging defendant unlawfully and feloniously sold property on which there was a valid lien, without informing the purchaser of its existence,

defendant then and there well knowing the existence of the lien, and that defendant did in that manner obtain \$15,000.00 from the purchaser, held sufficient. *State v. Fetterman*, 115 Miss. 828, 76 So. 673 (1917).

4. Jurisdiction over offense.

Where acts material and essential to a crime are committed partly in one county and partly in another, the first of the counties which prosecutes has jurisdiction. *Murray v. State*, 98 Miss. 594, 54 So. 72 (1911).

5. Punishment.

A defendant convicted of obtaining a buyer's money under false pretenses by selling property on which defendant had previously given a lien without informing the buyer of the lien, would be sentenced under Code 1942, § 2149 which prescribes three years' imprisonment as maximum. *Jones v. State*, 226 Miss. 535, 84 So. 2d 799 (1956).

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses § 28.

CJS. 35 C.J.S., False Pretenses §§ 1 et seq.

§ 97-19-53. Substituting child to deceive parent or guardian.

Every person to whom an infant, under the age of six years, shall be confided for nursing, education, or any other purpose, who shall, with intent to deceive any parent or guardian of such child, substitute and produce to such parent or guardian another child in the place of the one so confided, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding seven years.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4(52); 1857, ch. 64, art. 104; 1871, § 2568; 1880, § 2810; 1892, § 1085; Laws, 1906, § 1165; *Hemingway's* 1917, § 892; Laws, 1930, § 918; Laws, 1942, § 2148.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 1 et seq.

CJS. 35 C.J.S., False Pretenses §§ 1 et seq.

§ 97-19-55. Bad checks and insufficient funds.

It shall be unlawful for any person with fraudulent intent:

(a) To make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person,

knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding;

(b) To close an account without leaving sufficient funds to cover all outstanding checks written on such account.

SOURCES: Codes, 1942, § 2153-01; Laws, 1972, ch. 476, § 1; Laws, 1983, ch. 523, § 1; Laws, 1998, ch. 477, § 1; Laws, 2002, ch. 311, § 1, eff from and after July 1, 2002.

Editor's Note — Laws, 1972, ch. 476, § 11, provides as follows:

"SECTION 11. Nothing herein shall be construed to abate or discontinue any prosecution now pending or hereafter commenced for offenses committed prior to the passage of this act upon the statute or statutes hereby repealed, and any and all such prosecutions may be commenced, continued and prosecuted to conclusion under the statute or statutes hereby repealed to the same extent as though this act had not been passed."

Cross References — Recovery of civil penalty for violation of this section, see § 11-7-12.

Prima facie evidence of identity of party issuing, uttering or delivering check, see § 97-19-62.

Monetary penalties or restitution imposed upon person convicted of violating this section, see § 97-19-67.

District attorney authorized to assist in recovery and distribution of restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

JUDICIAL DECISIONS

I. UNDER PRESENT LAW.

1. In general.
2. Sufficiency of evidence.
3. Fraudulent Intent.
4. Implementation.
- 4.-14. [Reserved for future use.]

II. Under Former § 97-19-1.

15. In general.
16. Obtaining property under false pretense.
17. Check given for pre-existing debt.
18. Instructions.
19. Malicious prosecution.
20. Decisions under earlier bad check laws.
21. Indictment.
22. Malicious prosecution.

I. UNDER PRESENT LAW.

1. In general.

Appellate court affirmed the denial of an inmate's petition for post-conviction relief where the inmate admitted that he passed a bad check in an amount that exceeded \$100, and therefore committed a felony in violation of Miss. Code Ann. § 97-19-55. *Dobbs v. State*, — So. 2d —, 2006 Miss. App. LEXIS 153 (Miss. Ct. App. Mar. 7, 2006).

An agreement that a check would be cashed on a future date at most obligated the payor that there would be sufficient funds on deposit on that date, which represents a future obligation as to payment of the check not contemplated by the false pretenses statute, this section. *Henderson v. State*, 534 So. 2d 554 (Miss. 1988).

Evidence presented a jury issue as to whether manufacturer's parting with furniture was in exchange for check given by defendant, or in furtherance of an agreement between the parties that the manufacturer would always be one load of furniture behind in receiving payment, which was resolved by the jury's finding defendant guilty of false pretenses by delivery of a bad check. *Parker v. State*, 484 So. 2d 1033 (Miss. 1986).

In prosecution for false pretenses by delivery of a bad check, it was not error for the state to cross-examine a witness who had once been married to defendant and to whom defendant had been furnishing child support. *Parker v. State*, 484 So. 2d 1033 (Miss. 1986).

Defendant was improperly convicted of obtaining valuable services by false pretenses where defendant, who had promised to pay the prosecuting witness \$300 if she would emcee a bridal show, gave the victim a bad check after the show was completed; reliance on the check must have been the efficient inducement for the services, and since the services were performed before the check came into existence, the check was given in payment of a debt, thus taking the transaction outside the scope of this section. *Hindman v. State*, 378 So. 2d 663 (Miss. 1980).

2. Sufficiency of evidence.

Evidence presented to the jury was legally sufficient and the guilty verdict was not against the overwhelming weight of the evidence because (1) the witness provided sufficient testimony to identify defendant as the man who passed the forged check, and recounted at trial why defendant stood out in the witness's memory and (2) the witness recalled accepting the check for over the amount in question from defendant in exchange for the groceries. *Brown v. State*, 829 So. 2d 93 (Miss. 2002).

3. Fraudulent Intent.

In wife's contempt action against former husband, the wife presented no evidence that the husband issued the checks for child support, which the wife did not present to the bank for months, with fraudulent intent. Therefore, there was no justification for the chancellor to award

any statutory damages under Miss. Code Ann. § 11-7-12 regarding the checks that were returned for insufficient funds, and for which the husband's efforts to make good on the amounts were rebuffed by the wife. *Broome v. Broome*, 832 So. 2d 1247 (Miss. Ct. App. 2002).

4. Implementation.

District court's award of attorney's fees to prevailing parties was reversed and vacated, where plaintiffs were originally prosecuted under Miss. Code Ann. § 97-19-55, and had signed waivers of their right to counsel under a District Attorney policy for implementing § 97-19-55 which defendants challenged successfully. Nonetheless, the district court's award of attorney's fees to plaintiffs was an abuse of discretion. *Bailey v. Mississippi*, 407 F.3d 684 (5th Cir. 2005).

4.-14. [Reserved for future use.]

II. Under Former § 97-19-1.

15. In general.

One indispensable element of the crime of false pretense in giving a bad check, is the receiving of value for the check at the very time it is delivered, that is the seller must part with something of value on the belief that the check is good at that particular time. *Pollard v. State*, 244 So. 2d 729 (Miss. 1971).

The fact that under the statute a prima facie case of false pretenses is made by proof of the fact that a person has given a check for value and at a time when he had no or insufficient funds on deposit to pay the check, did not render the statute invalid on the ground that it compelled a defendant to testify against himself. *Ray v. State*, 229 So. 2d 579 (Miss. 1969).

The conviction of a defendant for violation of this section [Code 1942, § 2152], on an indictment which affirmatively alleged that at the time he issued the check he knew he did not have sufficient funds in the bank with which the check could be paid, must be reversed where the state's evidence showed affirmatively that, at the time the check was issued, the defendant had sufficient funds in his bank account to pay it. *Edwards v. State*, 217 So. 2d 14 (Miss. 1968).

In order for this section [Code 1942, § 2153] to apply it must be shown that the property was then and there delivered to the accused in exchange for his check and on the faith that the check was presently good. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

The maker of a check given in payment of debt for services rendered, which was returned marked "no acct.", could not be convicted under this section [Code 1942, § 2153], since conviction would violate § 30 of the Constitution prohibiting imprisonment for debt. *Blakeney v. State*, 206 Miss. 85, 39 So. 2d 767 (1949).

Affidavit which follows precisely the form set out in Code 1942, § 2154, and charges that check was issued with intent to defraud is sufficient to charge defendant with violation of this section [Code 1942, § 2153]. *Moore v. State*, 205 Miss. 151, 38 So. 2d 693 (1949).

Where a check was drawn by the agent of the defendant, and the evidence does not disclose that the defendant knew of the issuance of the check, but negatives his presence or participation in its execution, a conviction is not authorized, since where there is no knowledge of the act there can be no intent as to its effect. *Lovelace v. State*, 191 Miss. 62, 2 So. 2d 796 (1941).

16. Obtaining property under false pretense.

Where the defendant received three used cars on Thursday, and his check, which was returned for insufficient funds, was deposited the following Tuesday, the defendant having asked the dealer to hold the check until the following week, and the seller frequently allowed dealers to take a car one day and mail in a check several days later, the sale of the cars was a credit sale and not an exchange for value based on the belief that the check was good at the moment it was delivered, and the judgment of conviction of false pretense in the giving of a bad check would be reversed. *Pollard v. State*, 244 So. 2d 729 (Miss. 1971).

The common-law rule that one who obtained goods by means of worthless check is not guilty of cheating is changed by this section, as amended in 1948. *Kitchens v.*

Barlow, 250 Miss. 121, 164 So. 2d 745 (1964).

Though there is in force a bad check statute, and prosecutions may be lodged thereunder, the giving of a bad check may under certain circumstances constitute the offense of obtaining property under false pretenses. *Blakeney v. State*, 216 Miss. 211, 62 So. 2d 313 (1953).

Where purchasers of cattle at auction sales were required before obtaining the possession of cattle to pay for them in cash and where the accused after purchasing cattle issued his check and subsequently the cattle were delivered and then the check was dishonored because of insufficient funds, the accused could be prosecuted for obtaining property under false pretenses. *Blakeney v. State*, 216 Miss. 211, 62 So. 2d 313 (1953).

17. Check given for pre-existing debt.

An essential element of the offense under this section [Code 1942, § 2153] is the making and delivering of the check to another person for value, and thereby obtaining from such other person money, goods, or other property of value, but this section [Code 1942, § 2153] does not cover the obtaining of goods where they have already been delivered and have passed completely out of the seller's possession. *Jackson v. State*, 251 Miss. 529, 170 So. 2d 438 (1965).

This section [Code 1942, § 2153] does not cover the obtaining of goods where the goods have already been delivered, have passed completely out of the possession of the seller and away from his hands and premises in a previously completed transaction or transactions, although those transactions may have been at previous hours on the same day. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

This section [Code 1942, § 2153] has no application to check given in discharge of pre-existing debt. *Broadus v. State*, 205 Miss. 147, 38 So. 2d 692 (1949).

This law is not to be extended by construction to include past deliveries of property for check. *Broadus v. State*, 205 Miss. 147, 38 So. 2d 692 (1949).

Under this section [Code 1942, § 2153], there must be an exchange of goods for check at time of delivery of check, and there is no violation of law, if at time

purchaser delivers check to seller, the goods for which check is given have been delivered, and have passed completely out of possession of seller and away from his hands and premises. *Broadus v. State*, 205 Miss. 147, 38 So. 2d 692 (1949).

18. Instructions.

Granting of instruction that state has made prima facie case of intent to defraud payee if check is presented to bank on which drawn within thirty days after delivery and there is insufficient funds in bank in maker's name to pay check is error, where all facts are in evidence and sharp issue between prosecution and defense is drawn. *Moore v. State*, 205 Miss. 151, 38 So. 2d 693 (1949).

Obtaining of money and issuance and delivery of check constituted one transaction and peremptory instruction in favor of defendant charged with violation of this section [Code 1942, § 2153] is properly refused when defendant obtained \$20 from one refusing to make loan but agreeing to cash check and not more than five minutes elapsed between delivery of money and delivery of check, parties were together during this interval, and money was delivered upon faith that check was good. *Moore v. State*, 205 Miss. 151, 38 So. 2d 693 (1949).

19. Malicious prosecution.

The institution of a criminal proceeding under this section [Code 1942, § 2153], if merely for the purpose of collecting a debt, may render the prosecution malicious. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

A declaration alleging that, for the purpose of collecting a debt, an agent, while acting on behalf of the store to which the check had been given, made an affidavit charging the plaintiff with the issuance of a bad check was sufficient in an action against the store and the agent for malicious prosecution and abuse of criminal process. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

20. Decisions under earlier bad check laws.

Worthless Check Act, not requiring intent to defraud or knowledge of insufficiency of funds, and providing for dismis-

sal of prosecution on payment of check violates constitutional provision prohibiting imprisonment for debt. *State v. Johnson*, 163 Miss. 521, 141 So. 338 (1932).

Statute [Code 1942, § 2153] not violated where defendant told prosecuting witness he did not have money in bank to cover check given him but promised to deposit it to protect the check. *Hammack v. State*, 114 Miss. 611, 75 So. 436 (1917).

21. Indictment.

Indictment must allege defendant's knowledge of insufficiency of funds to meet check. *State v. Puckett*, 127 Miss. 415, 90 So. 113 (1921).

Indictment for false pretenses alleging nonpayment of bank check held insufficient. *State v. Puckett*, 127 Miss. 415, 90 So. 113 (1921).

Intention to defraud must be alleged in indictment for obtaining money by bad check. *Herron v. State*, 118 Miss. 420, 79 So. 289 (1918); *McBride v. State*, 141 Miss. 186, 104 So. 454 (1925).

22. Malicious prosecution.

McBride v. State, 141 Miss. 186, 104 So. 454 (1925).

Institution of criminal proceeding under "bad check law" would render prosecution malicious, where check was issued for goods already delivered, notwithstanding such transactions were completed at previous hours of day on which check was issued. *Grenada Coco Cola Co. v. Davis*, 168 Miss. 826, 151 So. 743 (1934).

Malice or wantonness held established in malicious prosecution, where corporation through its acting general manager instituted criminal prosecution under "bad check law" and check was issued for goods delivered prior to issuance of check. *Grenada Coco Cola Co. v. Davis*, 168 Miss. 826, 151 So. 743 (1934).

Corporation's acting general manager who signed blank affidavit for prosecution under "bad check law" held charged with corporation's knowledge that goods for which check was issued had been delivered prior to issuance of check. *Grenada Coco Cola Co. v. Davis*, 168 Miss. 826, 151 So. 743 (1934).

Where corporation's acting general manager signed blank affidavit for prosecution under "bad check law" and sent

affidavit to justice of peace who instituted prosecution, justice of peace became agent of corporation which became responsible for subsequent arrest and prosecution. *Grenada Coco Cola Co. v. Davis*, 168 Miss. 826, 151 So. 743 (1934).

When creditors resort to criminal processes and to arrests under criminal charges for collection of their debts, courts will not be diligent in interfering with

amounts of damages fixed by juries for malicious prosecution. *Grenada Coco Cola Co. v. Davis*, 168 Miss. 826, 151 So. 743 (1934).

Institution of criminal proceeding under Bad Check Law, if merely for purpose of collecting debt, would render prosecution malicious. *Odom v. Tally*, 160 Miss. 797, 134 So. 163 (1931).

ATTORNEY GENERAL OPINIONS

Judge is mandated to issue arrest warrant for violator if and when judge is satisfied there exists probable cause to believe that crime has been committed and defendant has committed it; issuance of bad check with intent to defraud is crime, even though it may have been passed by non-resident and even though it may be for less than \$100.00. *Horan*, Nov. 18, 1992, A.G. Op. #92-0868.

Check to be submitted for payment at future date, and not at time of giving of check, would not support conviction under this section if check at future time proved worthless. *Martin*, Jan. 12, 1994, A.G. Op. #93-0834.

The Justice Court Clerk is required to accept any affidavit charging a crime which a person wishes to file with the Court, including affidavits charging allegations of the bad check statutes. See § 97-19-55 et seq. *Ammons*, June 28, 1995, A.G. Op. #95-0284.

The participation of the District Attorney's office is not necessary for a person to be prosecuted under Sections 97-19-67 and this section. *Ammons*, June 28, 1995, A.G. Op. #95-0284.

Under § 97-19-67, the prosecution of a person for violation of this section (bad check violation) is commenced by the filing of a complaint by the district attorney's office (pursuant to 97-19-79), the court must impose a fee up to eight-five percent of the face value of the check. However, if the prosecution of a person for bad check violation was not commenced by the filing of a complaint by the district attorney, then the court should not impose the fee. *Carter*, August 2, 1995, A.G. Op. #95-0388.

If there is no fraudulent intent on the part of the maker or drawer of the check

at the time the check was issued, then a stop payment order would not constitute a violation of this section. *Smith*, November 8, 1996, A.G. Op. #96-0784.

If the circumstances are such that the maker or drawer of the check knew at the time the check was issued that the account had insufficient funds to cover the check, and later issued a stop payment order with intent to defraud, then a violation of Section 97-19-55 may well have occurred. *Smith*, November 8, 1996, A.G. Op. #96-0784.

Sections 97-19-39 and 97-19-41 are a possible charge against an individual who writes a check with the intent to stop payment prior to the check being honored, even if the account has sufficient funds to cover the check. See also Section 97-19-55. *Smith*, November 8, 1996, A.G. Op. #96-0784.

Prosecution under the forgery and counterfeiting statutes, Sections 97-21-1 et seq., should occur when a person attempts to cash a check by forging another's name, not for knowingly writing a check with insufficient funds to cover the amount. *Stricklin*, March 27, 1998, A.G. Op. #98-0158.

Once a district attorney files a complaint and proceeds with prosecution under the statute, the defendant should be arrested on the warrant that has been issued and prosecution should continue as in any other criminal case. *Mark*, May 15, 1998, A.G. Op. #98-0262.

A person who post-dates a check may not be prosecuted under this section if the check is later dishonored. *Hudson*, February 5, 1999, A.G. Op. #99-0028.

The issuer of a bad check may be charged under the statute unless the full

amount of the check is paid to the receiver of the check. O'Bryant, Mar. 22, 2002, A.G. Op. #02-0101.

This section does not override Section

75-67-515(10) and allow a check casher to pursue criminal charges against the maker of insufficient fund checks. James, July 7, 2003, A.G. Op. 03-0291.

RESEARCH REFERENCES

ALR. Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt. 59 A.L.R.2d 1159.

Criminal liability of corporate officer who issues worthless checks in corporate name. 68 A.L.R.2d 1269.

Reasonable expectation of payment as affecting offense under "worthless check" statutes. 9 A.L.R.3d 719.

Application of "bad check" statute with respect to postdated checks. 52 A.L.R.3d 464.

Cashing check at bank at which account is maintained as violation of bad check statutes. 75 A.L.R.3d 1080.

Constitutionality of "bad check" statute. 16 A.L.R.4th 631.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses §§ 16, 17.

Practice References. Reitman and Weisblatt, Checks, Drafts, and Notes (Matthew Bender).

McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-19-57. Bad checks; presumption of fraudulent intent; notice that check has not been paid; notice returned undelivered as evidence of intent to defraud; transactions involving motor vehicles.

(1) As against the maker or drawer thereof, the making, drawing, issuing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, corporation, firm or person, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with a service charge of Forty Dollars (\$40.00), within fifteen (15) days after receiving notice that such check, draft or order has not been paid by the drawee.

(2) For purposes of Section 11-7-12, the form of the notice provided for in subsection (1) of this section shall be sent by regular mail and shall be substantially as follows: "This statutory notice is provided pursuant to Section 97-19-57, Mississippi Code of 1972. You are hereby notified that a check, draft or order numbered _____, apparently issued by you on _____ (date), drawn upon _____ (name of bank), and payable to _____, has been dishonored. Pursuant to Mississippi law, you have fifteen (15) days from receipt of this notice to tender payment of the full amount of such check, draft or order, plus a service charge of Forty Dollars (\$40.00), the total amount due being \$_____. Failure to pay this amount in full within the time specified above shall be prima facie evidence of and create a presumption of both the intent to defraud and the knowledge of insufficient funds in, or on deposit with, such bank in violation of Section 97-19-55."

(3) For purposes of Section 97-19-67, the form of the notice provided for in subsection (1) of this section shall be sent by regular mail, supported by an affidavit of service by mailing, and shall be substantially as follows: "This statutory notice is provided pursuant to Section 97-19-57, Mississippi Code of 1972. You are hereby notified that a check, draft or order numbered _____, apparently issued by you on _____ (date), drawn upon _____ (name of bank), and payable to _____, has been dishonored. Pursuant to Mississippi law, you have fifteen (15) days from receipt of this notice to tender payment of the full amount of such check, draft or order, plus a service charge of Forty Dollars (\$40.00), the total amount due being \$_____. Unless this amount is paid in full within the time specified above, the holder may assume that you delivered the instrument with intent to defraud and may turn over the dishonored instrument and all other available information relating to this incident to the proper authorities for criminal prosecution."

(4) If any notice is returned undelivered to the sender after such notice was mailed to the address printed on the check, draft or order, or to the address given by the accused at the time of issuance of the instrument, such return shall be prima facie evidence of the maker's or drawer's intent to defraud.

(5) Affidavit of service by mail shall be adequate if made in substantially the following form:

"STATE OF _____
COUNTY OF _____

_____, being first duly sworn on oath, deposes and states that he/she is at least eighteen (18) years of age and that on (date) _____, 2_____, he/she served the attached Notice of Dishonor by placing a true and correct copy thereof securely enclosed in an envelope addressed as follows:

and deposited the same, postage prepaid, in the United States mail at _____, _____.

(signature)

Subscribed to and sworn before me, this the _____ day of _____, 2_____.

(Notary Public)

My commission expires:
(SEAL) "

(6) Without in any way limiting the provisions of this section, this section shall apply to a draft for the payment of money given for a motor vehicle even if such payment is conditioned upon delivery of documents necessary for transfer of a valid title to the purchaser.

SOURCES: Codes, 1942, § 2153-02; Laws, 1972, ch. 476, § 2; Laws, 1983, ch. 523, § 2; Laws, 1992, ch. 513, § 1; Laws, 1999, ch. 436, § 1; Laws, 2000, ch. 364, § 2; Laws, 2001, ch. 328, § 1; Laws, 2002, ch. 312, § 1; Laws, 2004, ch. 374, § 1, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment substituted “service charge of Forty Dollars (\$40.00)” for “service charge of Thirty Dollars (\$30.00)” throughout the section.

Cross References — Civil penalty recoverable for violation of bad check statute, see § 11-7-12.

Dispensing of notice provided for by this section, see § 97-19-61.

Non-liability for causing arrest or imprisonment of drawer, see § 97-19-69.

District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

JUDICIAL DECISIONS

1.-10. [Reserved for future use.]

11. Under Former § 97-19-3.

1.-10. [Reserved for future use.]

11. Under Former § 97-19-3.

Affidavit charging violation of Code 1942, § 2153, which follows precisely the

form set out in this section [Code 1942, § 2154], and charges that check was issued with intent to defraud is sufficient to charge defendant with violation of Code 1942, § 2153. *Moore v. State*, 205 Miss. 151, 38 So. 2d 693 (1949).

ATTORNEY GENERAL OPINIONS

Ten Dollar (\$10.00) service charge is one which maker or drawer can voluntarily pay to holder to avoid certain criminal presumptions, and does not constitute part of said debt, nor does this fee meet definition of “pecuniary damages” for which restitution may be ordered by court; however, Justice Court Judge may require convicted defendant to pay fee where it was made part of restitution agreement. *Little*, Feb. 21, 1990, A.G. Op. #90-0106.

This section creates evidentiary presumption upon failure of defendant to pay \$30; it does not create right in form of civil penalty belonging to victim for \$30; such is already provided for at Miss. Code Section 11-7-12. *Horan*, Apr. 14, 1993, A.G. Op. #93-0220.

The service charge which is set out in this section is one which the maker or

drawer can voluntarily pay to the holder to avoid certain criminal presumptions, and does not constitute part of the said debt, nor does this fee meet the definition of “pecuniary damages” for which restitution may be ordered by a court, pursuant to Section 97-19-67(4). *Cotten*, April 6, 1995, A.G. Op. #95-0176.

A Municipal Court Judge may require a convicted defendant to pay the holder the fee set out in this section where said fee was made part of the restitution agreement under Section 97-19-75(6). *Cotten*, April 6, 1995, A.G. Op. #95-0176.

Giving a notice of dishonor to the drawer imposes upon or adds to the amount of the check a service charge not to exceed \$30, although this service charge cannot be obtained if suit is filed pursuant to § 11-7-12. *Ross*, May 15, 1998, A.G. Op. #98-0261.

RESEARCH REFERENCES

ALR. Application of "bad check" statute with respect to post-dated checks. 29 A.L.R.2d 1181.

Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt. 59 A.L.R.2d 1159.

Reasonable expectation of payment as affecting offense under "worthless check" statutes. 9 A.L.R.3d 719.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses §§ 16, 17, 50.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 19:19.

§ 97-19-59. Repealed.

Repealed by Laws, 1983, ch. 523, §§ 7, 9, eff from and after January 1, 1984.

[Codes, 1942, § 2153-03; Laws, 1972, ch. 476, § 3]

Editor's Note — Former § 97-19-59 provided for notice that a check, draft or order was not paid by the drawee. For current notice provisions, see § 97-19-57.

§ 97-19-61. Bad checks; when notice need not be given.

Such notice as is provided for in Section 97-19-57 is dispensed with: (a) in the event the situs of the drawee is not in the state of Mississippi; (b) if the drawer is not a resident of the state of Mississippi or has left the state of Mississippi at the time such check, draft or order is dishonored; or (c) if the drawer of such check, draft or order did not have an account with the drawee of such check, draft or order at the time the same was issued or dishonored, or payment of the check is denied because the account was closed at the time the check, draft or order was issued or dishonored.

SOURCES: Codes, 1942, § 2153-04; Laws, 1972, ch. 476, § 4; Laws, 1983, ch. 523, § 3; Laws, 2001, ch. 328, § 2, eff from and after July 1, 2001.

Cross References — District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

§ 97-19-62. Bad checks; evidence of identity of party issuing, uttering or delivering check.

(1) In any prosecution or action under the provisions of Section 97-19-55, a check, draft or order for which the information required in subsections (2) and (3) of this section is available at the time of issuance, utterance or delivery shall constitute prima facie evidence of the identity of the party issuing, uttering or delivering the check, draft or order and that such person was a party authorized to draw upon the named account.

(2) To establish prima facie evidence of the identity of the party presenting such check, draft or order, the following information regarding such identity shall be requested by the party receiving such instrument: The presenter's name, residence address and home phone number. Such information may be provided in the following manner:

(a) The information may be recorded upon the check, draft or order itself; or

(b) The number of a check-cashing identification card issued by the receiving party may be recorded on the check, draft or order. Such check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(3) In addition to the information required in subsection (2) of this section, the party receiving the check, draft or order shall witness the signature or endorsement of the party presenting such instrument and, as evidence of such, the receiving party shall initial the instrument.

SOURCES: Laws, 1983, ch. 523, § 4, eff from and after January 1, 1984.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 78-83.

CJS. 35 C.J.S., False Pretenses §§ 50-52.

§ 97-19-63. Bad checks; statement of reason for dishonor.

It shall be the duty of the drawee of any check, draft or other order for the payment of money, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed, or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal of the same. In all prosecutions under Sections 97-19-55 through 97-19-69, the introduction in evidence of any unpaid and dishonored check, draft or other order for the payment of money, having the drawee's refusal to pay stamped or written thereon or attached thereto, with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check, draft or other order for the payment of money and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored check, draft or other such order for the payment of money.

SOURCES: Codes, 1942, § 2153-05; Laws, 1972, ch. 476, § 5, eff from and after July 1, 1972.

Cross References — District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

§ 97-19-65. Bad checks; each violation constitutes a separate offense.

Each making, drawing, issuing, uttering or delivering of any such check, draft or order as aforesaid shall constitute a separate offense.

SOURCES: Codes, 1942, § 2153-07; Laws, 1972, ch. 476, § 7, eff from and after July 1, 1972.

Cross References — District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

§ 97-19-67. Bad checks; penalties; restitution.

(1) Except as may be otherwise provided by subsection (2) of this section, any person violating Section 97-19-55, upon conviction, shall be punished as follows:

(a) For the first offense of violating said section, where the check, draft or order involved be less than One Hundred Dollars (\$100.00), the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Twenty-five Dollars (\$25.00), nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for a term of not less than five (5) days nor more than six (6) months, or by both such fine and imprisonment, in the discretion of the court;

(b) Upon commission of a second offense of violating said section, where the check, draft or order involved is less than One Hundred Dollars (\$100.00), the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Fifty Dollars (\$50.00) nor more than One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment, in the discretion of the court;

(c) Upon commission of a third or any subsequent offense of violating said section, regardless of the amount of the check, draft or order involved, and regardless of the amount of the checks, drafts or orders involved in the prior convictions, the person committing such offense shall be guilty of a felony and, upon conviction, shall be punished by imprisonment in the State Penitentiary for a term of not less than one (1) nor more than five (5) years.

(d) Where the check, draft or order involved shall be One Hundred Dollars (\$100.00) or more, the person committing such offense, whether same be a first or second offense, shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00), or by imprison-

ment in the State Penitentiary for a term of not more than three (3) years, or by both such fine and imprisonment, in the discretion of the court. Upon conviction of a third or any subsequent offense, the person convicted shall be punished as is provided in the immediately preceding paragraph hereof.

(2) Where the conviction was based on a worthless check, draft or order given for the purpose of satisfying a pre-existing debt or making a payment or payments on a past-due account or accounts, no imprisonment shall be ordered as punishment, but the court may order the convicted person to pay a fine of up to the applicable amounts prescribed in paragraphs (1)(a)(b) and (d) of this section.

(3) In addition to or in lieu of any penalty imposed under the provisions of subsection (1) or subsection (2) of this section, the court may, in its discretion, order any person convicted of violating Section 97-19-55 to make restitution in accordance with the provisions of Sections 99-37-1 through 99-37-23 to the holder of any check, draft or order for which payment has been refused.

(4) Upon conviction of any person for a violation of Section 97-19-55, when the prosecution of such person was commenced by the filing of a complaint with the court by the district attorney under the provisions of Section 97-19-79, the court shall, in addition to any other fine, fee, cost or penalty which may be imposed under this section or as otherwise provided by law, and in addition to any order as the court may enter under subsection (3) of this section requiring the offender to pay restitution under Sections 99-37-1 through 99-37-23, impose a fee in the amount up to eighty-five percent (85%) of the face amount of the check, draft or order for which the offender was convicted of drawing, making, issuing, uttering or delivering in violation of Section 97-19-55.

(5) It shall be the duty of the clerk or judicial officer of the court collecting the fees imposed under subsection (4) of this section to monthly deposit all such fees so collected with the State Treasurer, either directly or by other appropriate procedures, for deposit in the special fund of the State Treasury created under Section 99-19-32, known as the "Criminal Justice Fund."

(6) After the accused has complied with all terms of the statute and the complainant or victim has been paid, the district attorney's check unit may dispose of the accused's file after one (1) year has expired after the last audit.

SOURCES: Codes, 1942, § 2153-06; Laws, 1972, ch. 476, § 6; Laws, 1983, ch. 523, § 5; Laws, 1988, ch. 551, § 6; Laws, 1994, ch. 389, § 1, eff from and after July 1, 1994.

Cross References — Recovery of civil penalty for violation of bad check statute, see § 11-7-12.

District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Fines.
- .5 Felonies.

1. Fines.**.5 Felonies.**

Appellate court affirmed the denial of an inmate's petition for post-conviction relief where the inmate admitted that he passed a bad check in an amount that exceeded \$100, and therefore committed a felony in violation of Miss. Code Ann. § 97-19-55. Miss. Code Ann. § 97-19-67

provided that a person found guilty of committing the offense may be fined between \$ 100 and \$ 1,000, may be imprisoned up to three years, or may face both a fine and prison sentence. *Dobbs v. State*, — So. 2d —, 2006 Miss. App. LEXIS 153 (Miss. Ct. App. Mar. 7, 2006).

A standard practice of extracting a set fine from persons accused of writing bad checks on the pain of suffering a full criminal prosecution for failure to do so violates equal protection. *Moody v. State*, 716 So. 2d 562 (Miss. 1998).

ATTORNEY GENERAL OPINIONS

Fine in bad check case could be suspended as in any other case, and offender could be sentenced to period of probation, violation of which would result in reinstatement of fine. Clark, July 3, 1991, A.G. Op. #91-0456.

Under subsection (1)(d) of this section, any bad check of \$100 or more is classified as felony, despite some confusion created by passage of law increasing amount for grand larceny from \$100 to \$250. Huckaby, Feb. 25, 1993, A.G. Op. #92-0975.

The participation of the District Attorney's office is not necessary for a person to be prosecuted under this section and Section 97-19-55. Ammons, June 28, 1995, A.G. Op. #95-0284.

Under this section, the prosecution of a person for violation of Section 97-19-55 (bad check violation) is commenced by the filing of a complaint by the district attorney's office (pursuant to 97-19-79), the court must impose a fee up to eight-five percent of the face value of the check. However, if the prosecution of a person for bad check violation was not commenced by the filing of a complaint by the district attorney, then the court should not impose the fee. Carter, August 2, 1995, A.G. Op. #95-0388.

Subsection (4) of this section does not allow the court to suspend the fee set forth in section. Carter, August 2, 1995, A.G. Op. #95-0388.

RESEARCH REFERENCES

ALR. Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent

payments made by accused to victim. 10 A.L.R.3d 572.

§ 97-19-69. Bad checks; non-liability for causing arrest or imprisonment of drawer.

In the event of the existence of prima facie evidence of fraudulent intent as defined in Section 97-19-57 and the giving of notice under Section 97-19-57, if required, any person, firm or corporation causing the arrest of the drawer of such check, draft or order shall not be criminally or civilly liable for false arrest or false imprisonment.

SOURCES: Codes, 1942, § 2153-08; Laws, 1972, ch. 476, § 8; Laws, 1983, ch. 523, § 6, eff from and after January 1, 1984.

Cross References — District attorney authorized to assist in recovery and restitution from persons issuing bad checks, see § 97-19-73.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Direction that the district attorney file a court complaint upon the failure of one accused of writing a bad check to make restitution, see § 97-19-79.

JUDICIAL DECISIONS

1.-10. [Reserved for future use.]

11. Under Former § 97-19-3.

1.-10. [Reserved for future use.]

11. Under Former § 97-19-3.

A cause of action for malicious prosecution was not stated in a declaration which did not allege that the defendant justice of the peace had any knowledge of the truth or falsity of the affidavit charging plaintiff with violation of Code 1942, § 2153 at the time of issuance of the warrant, did not

allege that the justice of the peace had any financial interest in the money obtained by plaintiff when he issued the warrant, did not allege that the justice of the peace, at the time of issuing the warrant, had personal knowledge that the prosecution was being instituted for the collection of a civil debt, and did not allege that the justice of the peace did not have territorial jurisdiction of the offense charged in the affidavit. *Kitchens v. Barlow*, 250 Miss. 121, 164 So. 2d 745 (1964).

§ 97-19-71. Fraud in connection with state or federally funded assistance programs; penalty.

(1) Any person who knowingly:

(a) Fails, by false statement, misrepresentation, impersonation, or other fraudulent means, to disclose a material fact used in making a determination as to such person's qualification to receive aid or benefits or services under any state or federally funded assistance program; or

(b) Fails to disclose a change in circumstances in order to obtain or continue to receive under any such program aid or benefits or services to which he is not entitled or in an amount larger than that to which he is entitled, or who knowingly aids and abets another person in the commission of any such act; is guilty of fraud.

(2) Any person who knowingly:

(a) Uses, transfers, acquires, traffics, alters, forges or possesses;

(b) Attempts to use, transfer, acquire, traffic, alter, forge or possess; or

(c) Aids and abets another person in the use, transfer, acquisition, traffic, alteration, forgery or possession of a food stamp, a food stamp identification card, an authorization for the purchase of food stamps, a certificate of eligibility for medical services, or a Medicaid identification card, for profit or in any manner not authorized by law or regulations issued by the agency responsible for the administration of the state or federally funded program;

is guilty of fraud.

(3) Any person having duties in the administration of a state or federally

funded assistance program who fraudulently misappropriates, attempts to misappropriate, or aids and abets in the misappropriation of, a food stamp, an authorization for food stamps, a food stamp identification card, a certificate of eligibility for prescribed medicine, a Medicaid identification card, or assistance from any other state or federally funded program with which he has been entrusted or of which he has gained possession by virtue of his position, or who knowingly fails to disclose any such fraudulent activity, is guilty of fraud.

(4) Any person who:

(a) Knowingly files, attempts to file, or aids and abets in the filing of, a claim for services to a recipient of benefits under any state or federally funded assistance program for services which were not rendered; knowingly files a false claim for nonauthorized items or services under such a program; or knowingly bills the recipient of benefits under such a program, or his family, for an amount in excess of that provided for by law or regulations; or

(b) In any way knowingly receives, attempts to receive, or aids and abets in the receipt of unauthorized payment as provided herein;
is guilty of fraud.

(5) Any person who knowingly signs, or aids and abets any person to sign, a false application for the replacement of benefits or aid to which that person is entitled claiming that person's benefits or aid was not received, is guilty of fraud.

(6) Any person convicted of the crime of fraud under this section shall be:

(a) Punished by imprisonment in the state penitentiary for a term not exceeding three (3) years, and fined not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00); or

(b) Punished by imprisonment in the county jail for a term not exceeding one (1) year, and fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00); and

(c) Ordered to make full restitution of the money or services or the value of those services unlawfully received; and

(d) Where the legislation creating a program allows, suspended from participation in the program for the length of time allowed by the legislation creating the program.

(7) This section shall not prohibit prosecution under any other criminal statute of this state or the United States.

SOURCES: Laws, 1981, ch. 530, § 1, eff from and after July 1, 1981.

Cross References — Investigation and prosecution of offenses under this section, see §§ 43-1-23, 43-1-25.

Plea of guilty or conviction under this section as constituting prima facie evidence of wrongful obtaining benefits in a civil action by department of public welfare to recover benefits paid, see § 43-1-27.

Criminal and civil liability for violations of Medicaid Fraud Control Act, see §§ 43-13-201 et seq.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Since the principal offenses of welfare fraud as defined in this section include attempts, an indictment for a principal welfare fraud offense is in no way defective because it employs the word "attempt," and the state is not limited at trial to proof only of the attempt. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

A defendant convicted of welfare fraud could be sentenced as a recidivist since her 2 earlier convictions for forgery of 2 separate checks on 2 separate dates constituted separate incidents at different times, notwithstanding that the checks had been purloined from the same person and the same name had been forged on each check. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

Indictment charging that defendant knowingly attempted to receive an unau-

thorized payment of food stamps by knowingly submitting a false affidavit regarding ATP card lost or stolen, to which the specific affidavit on which the indictment was based was attached, fairly and adequately charged an offense under this section, and fairly notified defendant of the nature and cause of the accusation against her. *McCullum v. State*, 487 So. 2d 1335 (Miss. 1986).

Proof of delivery of check made payable to 2 parties and indorsed by each of those parties, without more, is insufficient, in context of criminal prosecution for food stamp fraud, to establish that one of parties received given portion of face amount of check; accordingly, such facts are not sufficient to undergird conviction predicated thereon. *Edwards v. State*, 469 So. 2d 68 (Miss. 1985).

ATTORNEY GENERAL OPINIONS

Violation of this section is felony and justice court may not accept guilty plea to this crime. *Phillips* Sept. 9, 1993, A.G. Op. #93-0565.

A prosecution for fraud in connection with state or federally funded assistance programs under this section must be commenced within two years from the commission of such offense, but a prosecution under Miss. Code Section 97-7-42 for the fraudulent use of food coupons dispensed

by the state welfare department may begin at any time without a time limitation. *Taylor*, July 18, 1997, A.G. Op. #97-0407.

One guilty of receiving more Temporary Assistance for Needy Families than that to which he or she is entitled may be punished either as a felon under this section or as a misdemeanor under § 43-17-25. *Taylor*, November 6, 1998, A.G. Op. #98-0665.

RESEARCH REFERENCES

ALR. Criminal liability under state laws in connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

Filing of false insurance claims for medical services as grounds for disciplinary

action against dentist, physician, or other medical practitioner. 70 A.L.R.4th 132.

Am Jur. 32 Am. Jur. 2d, False Pretenses § 46.

79 Am. Jur. 2d, Welfare Laws §§ 99, 100.

§ 97-19-73. District attorney authorized to assist in recovery and distribution of restitution from persons issuing bad checks; construction of Sections 97-19-73 through 97-19-79.

(1) In addition to such powers and duties as may be otherwise provided by law, the district attorney of each circuit court district in the state is hereby authorized, in his discretion, and in accordance with the provisions of Sections

97-19-73 through 97-19-79, to assist complainants in the recovery and distribution of restitution from persons accused of violating Section 97-19-55, Mississippi Code of 1972, relating to the issuance of bad checks, whether conviction for such violation may constitute a misdemeanor or a felony.

(2) Sections 97-19-73 through 97-19-79 shall not be construed as amending or repealing the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972, nor the provisions of any other law prohibiting and prescribing penalties for similar violations, but shall be supplementary and in addition thereto.

SOURCES: Laws, 1988, ch. 551, § 1, eff from and after July 1, 1988.

Cross References — White-collar crime investigations, see § 7-5-59.

Liability of tax collector for certain taxes paid for by check that was returned because of insufficient funds, see §§ 27-1-7, 27-1-13.

Definition of "restitution" for the purpose of this section, see § 97-19-75.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

ATTORNEY GENERAL OPINIONS

A District Attorney may contract with a private individual or an agency for the collection of bad checks pursuant to Sections 97-19-73 through 97-19-79. However, the State Auditor's Office should be contacted concerning the proper manner in which such an individual or agency should be paid. Fortenberry, February 14, 1996, A.G. Op. #96-0020.

An individual who receives a bad check may file a complaint with the district attorney's office, and the district attorney's office should notify the accused that a complaint has been filed; the district attorney may also request that a warrant

be issued against the accused; if the accused responds to the notice, the district attorney should enter into a restitution agreement with the accused in order to collect the amount money owed to the complainant, but if the accused fails to respond to the notice or fails to comply with the restitution agreement, the district attorney should proceed with the criminal charges against the accused; it is not necessary for the district attorney to attach the original check in order to file the criminal complaint. Graham, Apr. 12, 2002, A.G. Op. #02-0168.

RESEARCH REFERENCES

ALR. Constitutionality of "bad check" statute. 16 A.L.R.4th 631.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses, §§ 16, 17.

§ 97-19-75. Bad check complaint procedures; restitution procedures.

(1) The holder of any check, draft or order for the payment of money which has been made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, may, after complying with the provisions of Section 97-19-57, Mississippi Code of 1972, present a complaint to the district attorney. The complaint shall be accompanied by the original check, draft or

order upon which the complaint is filed and the return receipt showing mailing of notice under Section 97-19-57, Mississippi Code of 1972. Not more than one (1) check, draft or order shall be included within a single complaint. Upon receipt of such complaint, the district attorney shall evaluate the complaint to determine whether or not the complaint is appropriate to be processed by the district attorney.

(2) If, after filing a complaint with the district attorney, the complainant wishes to withdraw the complaint for good cause, the complainant shall pay a fee of Thirty Dollars (\$30.00) to the office of the district attorney for processing such complaint. Upon payment of the processing fee and withdrawal of the complaint, the district attorney shall return the original check, draft or order to the complainant.

(3) After approval of the complaint by the district attorney, a warrant may be issued by any judicial officer authorized by law to issue arrest warrants, and the warrant may be held by the district attorney. After issuance of a warrant or upon approval of a complaint by the district attorney, the district attorney shall issue a notice to the individual charged in the complaint, informing him that a warrant has been issued for his arrest or that a complaint has been received by the district attorney and that he may be eligible for deferred prosecution for a violation of Section 97-19-55, Mississippi Code of 1972, by voluntarily surrendering himself to the district attorney within ten (10) days, Saturdays, Sundays and legal holidays excepted, from receipt of the notice. Such notice shall be sent by United States mail.

(4) If the accused voluntarily surrenders himself within the time period as provided by subsection (3) of this section, the accused shall be presented with the complaint and/or warrant and prosecution of the accused may be deferred upon payment by the accused of a service charge in the amount of Forty Dollars (\$40.00) to the district attorney and by execution of a restitution agreement as hereinafter provided.

(5) For the purposes of Sections 97-19-73 through 97-19-81, the term "restitution" shall mean and be defined as the face amount of any check, draft or order for the payment of money made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, plus a service charge payable to the complainant in the amount of Thirty Dollars (\$30.00).

(6) After an accused has voluntarily surrendered himself and paid the service charge as provided by subsection (4) of this section, the district attorney may enter into a restitution agreement with the accused prescribing the terms by which the accused shall satisfy restitution to the district attorney on behalf of the complainant. The terms of such agreement shall be determined on a case-by-case basis by the district attorney, but the duration of any such agreement shall be no longer than a period of six (6) months. No interest shall be charged or collected on restitution monies. The restitution agreement shall be signed by the accused and approved by the district attorney before it is effective. If the accused does not honor each term of the restitution agreement signed by him, the accused may be proceeded against by prosecution under the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972,

and as provided by Section 97-19-79. If the accused makes restitution and pays all charges set out by statute or if the accused enters into a restitution agreement as set out above and honors all terms of such agreement, then if requested, the original check may be returned to the accused and a photocopy retained in the check file.

(7) If the holder of any check, draft or order for the payment of money presents to the district attorney satisfactory evidence that the original check, draft or order is unavailable and satisfactory evidence of the check, draft or order is presented in the form of bank records or a photographic copy of the instrument, whether from microfilm or otherwise, then the procedures provided for in this section may be followed in the absence of the original check, draft or order.

SOURCES: Laws, 1988, ch. 551, § 2; Laws, 1990, ch. 566, § 1; Laws, 1992, ch. 513, § 2; Laws, 1999, ch. 368, § 1, eff from and after July 1, 1999.

Cross References — Construction that this section does not amend or repeal §§ 97-19-55 through 97-19-69, see § 97-19-73.

Authority of district attorneys to assist in accordance with this section in the recovery of restitution from persons issuing bad checks, see § 97-19-73.

Accounting and distribution of all funds received by the district attorney pursuant to the provisions of this section, see § 97-19-77.

Direction that district attorney file court complaint upon failure of one accused of writing bad check to make restitution, and authority of court to assess defendant service charge payable to district attorney as provided in this section, see § 97-19-79.

ATTORNEY GENERAL OPINIONS

Although subsection (5) of this section allows District Attorney to impose service charge payable to complainant in amount of \$15 as restitution, by its own terms this definition of restitution only applies to Miss. Code Sections 97-19-73 through 97-19-81. Horan, Apr. 14, 1993, A.G. Op. #93-0220.

Under this section, holder of bad check may present complaint to District Attorney, accompanied by original bad check; after receiving bad check complaint from merchant District Attorney may present complaint to judge for warrant to be issued and District Attorney may hold warrant and send notice to defendant; alternatively, under subsection (3), District Attorney may choose not to obtain warrant at that time, but may simply notify defendant that complaint has been filed. Horan, Apr. 21, 1993, A.G. Op. #93-0224.

This section specifically allows the district attorney to hold a warrant without actually serving it while attempting col-

lection of a bad check. Pacific, March 24, 1995, A.G. Op. #95-0146.

The service charge which is set out in Section 97-19-57 is one which the maker or drawer can voluntarily pay to the holder to avoid certain criminal presumptions, and does not constitute part of the said debt, nor does this fee meet the definition of "pecuniary damages" for which restitution may be ordered by a court, pursuant to Section 97-19-67(4). Cotten, April 6, 1995, A.G. Op. #95-0176.

A Municipal Court Judge may require a convicted defendant to pay the holder the fee set out in Section 97-19-57 where said fee was made part of the restitution agreement under subsection (6) of this section. Cotten, April 6, 1995, A.G. Op. #95-0176.

The statute provides for the payment by the maker of a service charge of \$15 for the collection on a bad check after notice of dishonor has been given. Ross, May 15, 1998, A.G. Op. #98-0261.

A district attorney may enter into a restitution agreement that contains a par-

tial payment plan for the restitution amount; however, such payment plan may not exceed a period of six months. Crews, July 10, 1998, A.G. Op. #98-0372.

The \$40.00 referred to in subsection (4) is not a criminal fine and is, rather, a service charge paid by the defendant to the district attorney's office for the benefit of deferring bad check charges against the defendant, and the fee should be paid by the defendant along with the execution of a restitution agreement in order to defer/forbear prosecution on the bad check; thus, as the service charge is not a court ordered fee, the court may not suspend or

reduce the amount of the service charge. Burdick, Feb. 23, 2001, A.G. Op. #2001-0104.

Criminal responsibility lies with any person including artificial persons such as corporations who, with fraudulent intent, makes, draws, issues, utters or delivers a bad check. Burdick, July 7, 2003, A.G. Op. 03-0305.

A district attorney may expend bad check funds to supplement the salary of a secretary, subject to any statutory maximum. Mitchell, Aug. 27, 2004, A.G. Op. 04-0420.

RESEARCH REFERENCES

ALR. Constitutionality of "bad check" statute. 16 A.L.R.4th 631.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses, §§ 16, 17.

§ 97-19-77. Accounting and distribution of monies received with respect to bad check complaint.

(1) All monies collected by the district attorney from any complainant under subsection (2) of Section 97-19-75 and from any accused as a service charge under subsection (4) of Section 97-19-75 may be expended by the district attorney for any of the purposes authorized for the expenditure of money under Section 25-31-8, Mississippi Code of 1972 or for any law enforcement related purpose including, but not limited to, the purchase of equipment and supplies and the payment of training costs for any local law enforcement agency within the district attorney's judicial district at the discretion of the district attorney.

(2) Each district attorney in the state shall establish a clearing account in a state depository of any county within his circuit court district in which shall be deposited all such monies which the district attorney's office shall receive from an accused pursuant to any restitution agreement executed in accordance with the provisions of Section 97-19-75. The district attorney, or his designee, shall account for all monies deposited in and disbursed from such clearing account and shall be authorized and empowered to draw and issue checks on such account to such persons, in such amounts and at such times as provided for in the restitution agreement executed by the accused.

(3) If a complainant on whose behalf a restitution agreement has been executed cannot, upon diligent efforts and after a reasonable time be located, all such restitution monies as shall have been collected on his behalf shall escheat to the state and shall be forwarded by the district attorney to the State Treasurer for deposit in the special fund of the State Treasury created under Section 99-19-32, Mississippi Code of 1972, known as the "Criminal Justice Fund."

(4) All books, documents, records and transactions relating to the receipt and expenditure of monies under the provisions of Sections 97-19-73 through 97-19-79 shall be subject to audit by the State Auditor in the same manner and in accordance with the same procedure as provided by law for other monies received and expended by the office of the district attorney.

SOURCES: Laws, 1988, ch. 551, § 3; Laws, 1994, ch. 389, § 3, eff from and after July 1, 1994.

Editor's Note — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — Construction that this section does not amend or repeal §§ 97-19-55 through 97-19-69, see § 97-19-73.

Authority of district attorneys to assist in accordance with this section in the recovery of restitution from persons issuing bad checks, see § 97-19-73.

Definition of "restitution" for the purpose of this section, see § 97-19-75.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

ATTORNEY GENERAL OPINIONS

District attorney has the authority to use bad check unit funds to pay part of the salary of the victims' assistance coordinator. Mitchell, Feb. 19, 1992, A.G. Op. #92-0027.

A district attorney may expend funds collected through a bad check unit for appropriate law enforcement use, such as the purchase of bullet proof vests or "buy

money" for undercover drug operations. Turner, August 21, 1998, A.G. Op. #98-0516.

A district attorney's office may expend funds collected through a worthless check unit to reimburse travel and other allowable expenses for witnesses who are subpoenaed to testify in criminal court. Carter, February 5, 1999, A.G. Op. #99-0032.

RESEARCH REFERENCES

ALR. Constitutionality of "bad check" statute. 16 A.L.R.4th 631.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses, §§ 16, 17.

§ 97-19-79. District attorney to file court complaint upon failure of accused to make restitution.

If, after receiving notice as provided for by subsection (3) of Section 97-19-75, the accused fails to timely surrender himself to the district attorney as prescribed in the notice or, if having timely surrendered himself, the accused fails to pay the service charge prescribed by subsection (4) of Section 97-19-75 and/or fails to execute or comply with the terms of any restitution agreement executed in accordance with the provisions of Section 97-19-75, then the district attorney shall file the complaint, along with the arrest warrant, if any, which the district attorney may be holding against the accused, with the municipal court, justice court, county court or circuit court in his district having jurisdiction, and prosecution against the accused may be commenced in accordance with the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972, or as otherwise provided by law. If such prosecution is commenced, the court may assess the defendant the service charge payable to the district attorney as provided in Section 97-19-75(4), Mississippi Code of 1972.

SOURCES: Laws, 1988, ch. 551, § 4; Laws, 1990, ch. 566, § 2; Laws, 1991, ch. 435, § 1, eff from and after July 1, 1991.

Cross References — Additional penalties for a conviction for writing a bad check when the prosecution was commenced by the filing of a complaint under the provisions of this section, see § 97-19-67.

Construction that this section does not amend or repeal §§ 97-19-55 through 97-19-69, see § 97-19-73.

Authority of district attorneys to assist in accordance with this section in the recovery of restitution from persons issuing bad checks, see § 97-19-73.

Definition of "restitution" for the purpose of this section, see § 97-19-75.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

ATTORNEY GENERAL OPINIONS

Under this section, District Attorney may file bad check complaints with municipal court. Gorrell, Mar. 3, 1993, A.G. Op. #93-0086.

If defendant who receives notice of charge fails to surrender and pay amounts due, then District Attorney can file complaint, or arrest warrant if one has already been obtained, with municipal court, justice court, county court or circuit court, and commence prosecution under this section. Horan, Apr. 21, 1993, A.G. Op. #93-0224.

Under § 97-19-67, the prosecution of a person for violation of § 97-19-55 (bad check violation) is commenced by the filing of a complaint by the district attorney's office (pursuant to this section), the court must impose a fee up to eight-five percent of the face value of the check. However, if the prosecution of a person for bad check violation was not commenced by the filing of a complaint by the district attorney, then the court should not impose the fee. Carter, August 2, 1995, A.G. Op. #95-0388.

RESEARCH REFERENCES

ALR. Constitutionality of “bad check” statute. 16 A.L.R.4th 631.

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 18, 65 et seq.

CJS. 35 C.J.S., False Pretenses, §§ 16, 17.

§ 97-19-81. Right of lender to add fee to amount of loan when payment on loan made with bad check.

When an entity that is authorized by the laws of this state to make loans or grant extensions of credit is paid by check to retire all or a part of a loan or extension of credit, and such check is returned because of insufficient funds, and the lender is charged a fee or service charge as a result of such return, the lender shall be authorized to add the actual amount of such fee or service charge up to a maximum amount of Fifteen Dollars (\$15.00) to the principal of the unpaid balance of the loan or extension of credit.

SOURCES: Laws, 1988, ch. 551, § 5, eff from and after July 1, 1988.

Cross References — Definition of “restitution” for the purpose of this section, see § 97-19-75.

Procedures for making a complaint of a bad check and for making restitution on a bad check, and the consequences of a failure to make restitution, see § 97-19-75.

RESEARCH REFERENCES

ALR. Construction and effect of “bad check” statute with respect to check in payment of pre-existing debt. 59 A.L.R.2d 1159.

Constitutionality of “bad check” statute. 16 A.L.R.4th 631.

§ 97-19-83. Fraud by mail or other means of communication.

(1) Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money, property or services, or for unlawfully avoiding the payment or loss of money, property or services, or for securing business or personal advantage by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, transmits or causes to be transmitted by mail, telephone, newspaper, radio, television, wire, electromagnetic waves, microwaves, or other means of communication or by person, any writings, signs, signals, pictures, sounds, data, or other matter across county or state jurisdictional lines, shall, upon conviction, be punished by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(2) For the purposes of venue under the provisions of this section, any violation of this section may be prosecuted in the county in which the delivery or transmission originated, the county in which the delivery or transmission was made, or the county in which any act in execution or furtherance of the scheme occurred.

(3) This section shall not prohibit the prosecution under any other criminal statute of the state.

SOURCES: Laws, 1988, ch. 511, § 3, eff from and after July 1, 1988.

JUDICIAL DECISIONS

1. Ownership of property.
2. Construction with other law.

1. Ownership of property.

While outright ownership may not need be proven, the person or entity who has been the victim of actions prohibited by the statute should have a colorable claim to the property in question. *Gatlin v. State*, 724 So. 2d 359 (Miss. 1998).

Although the seizure of money and the institution of forfeiture proceedings does not give the government ownership of the money, it does give the government a claim to the money and, therefore, a person who subsequently attempts to claim the money and attempts to defraud the government of the money can be convicted for a violation of the statute. *Gatlin v. State*, 724 So. 2d 359 (Miss. 1998).

2. Construction with other law.

Where defendant defrauded furniture sellers by telephone, wire communications, or mail, defendant's second indictment for wire fraud did not conflict with double jeopardy rules, because wire fraud charge was a distinct offense, and required proof of different elements than the initial charge of false pretenses, which had been dismissed. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

In the context of a fraudulent future promise to pay, a false pretense charge under Miss. Code Ann. § 97-19-39 does not encompass such facts. A wire fraud charge, under Miss. Code Ann. § 97-19-83, does. *McGee v. State*, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

RESEARCH REFERENCES

Practice References. McCloskey and Schoenberg, *Criminal Law Deskbook* (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

§ 97-19-85. Fraudulent use of identity, Social Security number, credit card or debit card number or other identifying information to obtain thing of value.

(1) Any person who shall make or cause to be made any false statement or representation as to his or another person's identity, Social Security account number, credit card number, debit card number or other identifying information for the purpose of fraudulently obtaining or with the intent to obtain goods, services or any thing of value, shall be guilty of a felony and upon conviction thereof for a first offense shall be fined not more than Five Thousand

Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both. For a second or subsequent offense such person, upon conviction, shall be fined not more than Ten Thousand Dollars (\$10,000.00) or imprisoned for a term not to exceed ten (10) years, or both. In addition to the fines and imprisonment provided in this section, a person convicted under this section shall be ordered to pay restitution as provided in Section 99-37-1 et seq.

(2) A person is guilty of fraud under subsection (1) who:

(a) Shall furnish false information wilfully, knowingly and with intent to deceive anyone as to his true identity or the true identity of another person;

(b) Wilfully, knowingly, and with intent to deceive, uses a Social Security account number to establish and maintain business or other records; or

(c) With intent to deceive, falsely represents a number to be the Social Security account number assigned to him or another person, when in fact the number is not the Social Security account number assigned to him or such other person; or

(d) Knowingly alters a Social Security card, buys or sells a Social Security card or counterfeit or altered Social Security card, counterfeits a Social Security card, or possesses a Social Security card or counterfeit Social Security card with intent to sell or alter it.

SOURCES: Laws, 1993, ch. 387, § 1; Laws, 1998, ch. 555, § 1, eff from and after July 1, 1998.

Federal Aspects — Social Security laws, see 42 USCS §§ 301 et seq.

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. 2d, False Pretenses §§ 17, 23, 33 et seq.

70A Am. Jur. 2d, Social Security and Medicare § 184.

CJS. 35 C.J.S., False Pretenses §§ 33, 45, 48.

Practice References. McCloskey and Schoenberg, Criminal Law Deskbook (Matthew Bender).

Mississippi Criminal and Traffic Law Manual (Michie).

Mississippi Penal Code Annotated (Michie).

CHAPTER 21

Forgery and Counterfeiting

SEC.

- 97-21-1. Account books kept in public offices.
- 97-21-3. Account books kept by corporations.
- 97-21-5. Certain instruments deemed writings.
- 97-21-7. Certificate of acknowledgment or proof of deeds and other recordable instruments.
- 97-21-9. Certificate or public security, share in public stock or indorsement thereof.
- 97-21-11. Coin operated machines; use or sale of slug or other device.
- 97-21-13. Coins; gold and silver coins and treasury notes of United States.
- 97-21-15. Coins; gold and silver coins of foreign countries.
- 97-21-17. Coins; possession of counterfeit gold or silver coin with intention to utter.
- 97-21-19. Corporate evidences of debt signed by pretended officer.
- 97-21-21. Destruction, erasure, or obliteration of writing deemed forgery.
- 97-21-23. Engraving or possessing plate for printing bank check, note or other evidence of debt; possessing impressions made from such plate.
- 97-21-25. Engraving or possessing plate for printing bank check, note or other evidence of debt; when plate deemed imitation of genuine instrument.
- 97-21-27. Intent to defraud.
- 97-21-29. Making and uttering instrument in own name under pretense that it is act of another of same name.
- 97-21-31. Parts of several genuine instruments connected to make one instrument.
- 97-21-33. Penalty for forgery.
- 97-21-35. Pleadings, process and other court papers, licenses, or written instruments generally.
- 97-21-37. Possession of counterfeit bank notes or other instrument with intention to utter.
- 97-21-39. Railroad tickets; definition.
- 97-21-41. Railroad tickets; making or altering.
- 97-21-43. Railroad tickets; possession of forged or altered tickets.
- 97-21-45. Record of will or other instrument constituting evidence, judgment or decree of court, or return on process.
- 97-21-47. Seal of state and other government and corporate seals or their impressions.
- 97-21-49. Selling or offering to sell counterfeit notes or other evidence of debt, etc.
- 97-21-51. Unauthorized use or signing of another's name to telegram, petition or related communication.
- 97-21-53. Trade-marks; counterfeiting and forging of.
- 97-21-55. Trade-marks; possession of dies, plates, printed label or any imitation for purpose of vending imitation goods.
- 97-21-57. Trade-marks; sale of goods bearing counterfeit stamp or label.
- 97-21-59. Uttering counterfeit instrument or coin.
- 97-21-61. Warrants on state treasury, United States treasury, or county, city, town or village treasury.
- 97-21-63. Will, deed, certificate of acknowledgment or proof of recordable instrument.

§ 97-21-1. Account books kept in public offices.

Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts kept in the office of the auditor of public accounts, or in the office of the treasurer of this state, or in the office of any county treasurer, or in any other public office, by which any demand or obligation, claim, right, or interest, either against or in favor of this state, or any county, city, town, or village, or any individual, shall be or purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction thereof, be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(34); 1857, ch. 64, art. 118; 1871, § 2582; 1880, § 2828; 1892, § 1107; Laws, 1906, § 1188; Hemingway's 1917, § 918; Laws, 1930, § 945; Laws, 1942, § 2174.

Editor's Note — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — State auditor's duty to keep and preserve books and records, see § 7-7-63.

State treasurer's duty to keep accounts and preserve books and records, see §§ 7-9-9, 7-9-53.

County books of account, see § 19-11-13.

Municipal books of account, see § 21-39-5.

Duty of chancery clerk to keep and preserve county books and records, see § 27-105-343.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

False report of public school purporting to be signed by one without authority to do so could not be subject of forgery. *Moore v. State*, 107 Miss. 181, 65 So. 126 (1914).

To constitute forgery, forged instrument must be one which if genuine might injure

another. *Moore v. State*, 107 Miss. 181, 65 So. 126 (1914).

An indictment is insufficient, where it fails to show how any pecuniary obligation was to be affected. *State v. Starling*, 90 Miss. 252, 42 So. 203 (1906).

It is essential under this section [Code

1942, § 2174] that there should be identification of the writing in the endorsement with the one found in defendant's possession. *Eldridge v. State*, 76 Miss. 353, 24 So. 313 (1898).

A city assessment roll is a book of accounts within the section [Code 1942, § 2174]. *Turbeville v. State*, 56 Miss. 793 (1879).

RESEARCH REFERENCES

Am Jur. 36 *Am. Jur.* 2d, *Forgery* § 33.
2 *Am. Jur.* *Trials, Investigating Particular Crimes* §§ 23-31 (*forgery*).

CJS. 37 *C.J.S.*, *Forgery* §§ 27 et seq.

§ 97-21-3. Account books kept by corporations.

Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by any corporation or its officers, and to be delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim, or credit shall be or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall be guilty of forgery.

SOURCES: *Codes*, *Hutchinson's* 1848, ch. 64, art. 12, Title 4(35); 1857, ch. 64, art. 119; 1871, § 2583; 1880, § 2829; 1892, § 1108; *Laws*, 1906, § 1189; *Hemingway's* 1917, § 919; *Laws*, 1930, § 946; *Laws*, 1942, § 2175.

Cross References — False entries and other offenses by state trust company participants, see § 81-27-6.206.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 *Am. Jur.* 2d, *Forgery* § 17.
2 *Am. Jur.* *Trials, Investigating Particular Crimes* §§ 23-31 (*forgery*).

CJS. 37 *C.J.S.*, *Forgery* § 28.

§ 97-21-5. Certain instruments deemed writings.

Every instrument, partly written and partly printed, or wholly printed, with a written signature thereto, and every signature of an individual, firm, or corporate body, or of any officer of such body, and every writing purporting to be such signature, shall be deemed a writing and a written instrument within the meaning of the provisions of this chapter.

SOURCES: *Codes*, *Hutchinson's* 1848, ch. 64, art. 12, Title 4(45); 1857, ch. 64, art. 127; 1871, § 2591; 1880, § 2836; 1892, § 1115; *Laws*, 1906, § 1196; *Hemingway's* 1917, § 926; *Laws*, 1930, § 953; *Laws*, 1942, § 2183.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment charging that defendant
forged affidavit for marriage license held

not to charge offense. *State v. Ellis*, 161
Miss. 361, 137 So. 102 (1931).

RESEARCH REFERENCES

Am Jur. 36 **Am. Jur. 2d**, Forgery § 43. **CJS.** 37 **C.J.S.**, Forgery § 18.

§ 97-21-7. Certificate of acknowledgment or proof of deeds and other recordable instruments.

If any officer authorized to take the proof or acknowledgment of any conveyance of real or personal estate, or of any other instrument which by law may be recorded, shall wilfully and falsely certify that any such conveyance or instrument was acknowledged by any party thereto, when in truth such acknowledgment was not made, or that any such instrument or conveyance was proved, when in truth such proof was not made, he shall, upon conviction, be guilty of forgery.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 12, Title 4(27); 1857, ch. 64, art. 111; 1871, § 2575; 1880, § 2821; 1892, § 1097; Laws, 1906, § 1178; *Hemingway's* 1917, § 908; Laws, 1930, § 935; Laws, 1942, § 2164.

Cross References — Acknowledgments, see §§ 89-3-1 et seq.

Penalty for forgery, see § 97-21-33.

Forgery of certificate of acknowledgment or proof of recordable instrument, see § 97-21-63.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

The indictment in a forgery prosecution was not defective for failing to identify the defrauded party where it was obvious that the persons defrauded were those who had signed the forged deed at issue, a copy of which was attached to and made a part of the indictment; the sentence of one year

in the county jail was not an abuse of discretion where it was within the limitations of the sentencing statute, even though the statute under which the defendant had been prosecuted did not require a criminal intent. *Sherman v. State*, 359 So. 2d 1366 (Miss. 1978).

RESEARCH REFERENCES

Am Jur. 36 **Am. Jur. 2d**, Forgery §§ 9 et seq. **CJS.** 37 **C.J.S.**, Forgery § 25.

§ 97-21-9. Certificate or public security, share in public stock or indorsement thereof.

Every person who shall be convicted of having forged, counterfeited, or

falsely altered any certificate or other public security issued or purporting to have been issued under the authority of this state by virtue of any law thereof, by which certificate or other public security the payment of any money, absolutely or upon contingency, shall be promised, or the receipt of any money, goods, or valuable thing shall be acknowledged; or any certificate of any share, right or interest in any public stock, created by virtue of any law of this state, issued or purporting to have been issued by any public officer, or any other evidence of any debt or liability of this state, either absolute or contingent, issued or purporting to be issued by any public officer; or any indorsement or other instrument transferring or purporting to transfer the right or interest of any holder of any such certificate, public security, certificate of stock, evidence of debt or liability, or of any person entitled to such right or interest, with intent to defraud this state, or any public officer thereof, or any other person, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(23); 1857, ch. 64, art. 108; 1871, § 2572; 1880, § 2818; 1892, § 1094; Laws, 1906, § 1175; Hemingway's 1917, § 905; Laws, 1930, § 932; Laws, 1942, § 2161.

Cross References — County bonds and notes, see §§ 19-9-1 et seq.

Municipal bonds, see §§ 21-33-301 et seq.

School bonds, see §§ 37-59-1 et seq.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indictment, sufficiently informing ac-

cused of charge, held sufficient. *State v. Dotch*, 126 Miss. 837, 89 So. 667 (1921).

RESEARCH REFERENCES

ALR. What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense. 69 A.L.R.2d 1095.

What constitutes a "falsely made, forged, altered, or counterfeited" security within the meaning of 18 USC § 2314,

making transportation of such securities a criminal offense. 4 A.L.R. Fed. 793.

Am Jur. 36 Am. Jur. 2d, Forgery §§ 25 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

CJS. 37 C.J.S., Forgery §§ 1 et seq.

§ 97-21-11. Coin operated machines; use or sale of slug or other device.

Any person who shall operate or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated, any automatic vending machine, slot machine, coin box telephone, or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use, or

enjoyment of property or service, by means of a slug or any false, counterfeit, mutilated, sweated, or foreign coin or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin box telephone or receptacle, or who shall take, obtain, or receive from or in connection with any automatic vending machine, slot machine, coin box telephone, or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use, or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph, or other property, without depositing in and surrendering to such machine, coin box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin box telephone or receptacle, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars (\$100.00) or imprisoned in the county jail not exceeding thirty days, or both.

Any person, who, with intent to cheat or defraud the owner, lessee, licensee, or other person entitled to the contents of any automatic vending machine, slot machine, coin box telephone or other receptacle, depository, or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use, or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars (\$500.00) or imprisoned in the county jail not exceeding six months, or both. Provided, however, that this section shall not apply when a privilege license for the operation of said automatic vending machines has not been procured for the operation of said automatic vending machines by the owners thereof.

SOURCES: Codes, 1842, § 2178; Laws, 1932, ch. 267.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Criminal prosecutions for use of "blue box" or similar device permitting user to make long-distance telephone calls without incurring charges. 78 A.L.R.3d 449.

§ 97-21-13. Coins; gold and silver coins and treasury notes of United States.

Every person who shall be convicted of having counterfeited any of the

gold or silver coins which shall be at the time current, by custom or usage, within this state, or the treasury notes of the United States, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(28); 1857, ch. 64, art. 112; 1871, § 2576; 1880, § 2822; 1892, § 1098; Laws, 1906, § 1179; Hemingway's 1917, § 909; Laws, 1930, § 936; Laws, 1942, § 2165; Laws, 1924, ch. 161.

Cross References — Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Making counterfeit coin and uttering it are two distinct offenses and where the charge is of making it, testimony showing

only possession of suitable tools is admissible, but it is inadmissible on the charge of uttering the coin. *Burgess v. State*, 81 Miss. 482, 33 So. 499 (1903).

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.

36 Am. Jur. 2d, Forgery §§ 9 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

CJS. 20 C.J.S., Counterfeiting §§ 1 et seq.

§ 97-21-15. Coins; gold and silver coins of foreign countries.

Every person who shall be convicted of having counterfeited any gold or silver coin of any foreign government or country, with the intent of exporting the same to injure or defraud any foreign government or the subjects or citizens thereof, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(29); 1857, ch. 64, art. 113; 1871, § 2577; 1880, § 2823; 1892, § 1099; Laws, 1906, § 1180; Hemingway's 1917, § 910; Laws, 1930, § 937; Laws, 1942, § 2166.

Cross References — Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.

CJS. 20 C.J.S., Counterfeiting §§ 1 et seq.

§ 97-21-17. Coins; possession of counterfeit gold or silver coin with intention to utter.

Every person who shall have in his possession any counterfeit of any gold

or silver coin, which shall be at the time current in this state, knowing the same to be counterfeited, with intention to defraud or injure, by uttering the same, as true or false, or by causing the same to be so uttered, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(38); 1857, ch. 64, art. 121; 1871, § 2585; 1880, § 2831; 1892, § 1110; Laws, 1906, § 1191; Hemingway's 1917, § 921; Laws, 1930, § 948; Laws, 1942, § 2177.

Cross References — Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq. **CJS.** 20 C.J.S., Counterfeiting §§ 4, 5.

§ 97-21-19. Corporate evidences of debt signed by pretended officer.

The false making, forging, or counterfeiting of any evidence of debt issued, or purporting to have been issued, by any corporation having authority for that purpose, to which shall be affixed the pretended signature of any person as an agent or officer of such corporation, shall be forgery, in the same manner as if such person was at the time an officer or agent of such corporation, notwithstanding there never was any such person in existence.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(47); 1857, ch. 64, art. 129; 1871, § 2593; 1880, § 2838; 1892, § 1117; Laws, 1906, § 1198; Hemingway's 1917, § 928; Laws, 1930, § 955; Laws, 1942, § 2185.

Cross References — Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 12. **CJS.** 37 C.J.S., Forgery § 28.
2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

§ 97-21-21. Destruction, erasure, or obliteration of writing deemed forgery.

The total erasure, obliteration, or destruction of any instrument of writing, with the intent to defraud, by which any pecuniary obligation or any right, interest, or claim to property, shall be or shall be intended to be created, increased, discharged, diminished, or in any manner affected, shall be forgery

in the same manner and in the same degree as the false alteration of any part of such instrument of writing.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(43); 1857, ch. 64, art. 125; 1871, § 2589; 1880, § 2834; 1892, § 1113; Laws, 1906, § 1194; Hemingway's 1917, § 924; Laws, 1930, § 951; Laws, 1942, § 2181.

Cross References — Nature and sufficiency of intent to defraud, see § 97-21-27. Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

The evidence was sufficient to support a finding that a deed was a forgery under this section where the signature on the deed appeared to have been altered, the person whose signature appeared on the deed denied that the signature was his, witnesses who were familiar with his sig-

nature testified that the signature was not his, and the person who acknowledged the deed testified that she would not have acknowledged it if it appeared to have been erased or changed and that the instrument did not appear to have been the one she acknowledged. *Jordon v. Warren*, 602 So. 2d 809 (Miss. 1992).

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 18. **CJS.** 37 C.J.S., Forgery § 20.

§ 97-21-23. Engraving or possessing plate for printing bank check, note or other evidence of debt; possessing impressions made from such plate.

Every person who shall be convicted of having made or engraved, or having caused or procured to be made or engraved, any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, issued by any incorporated bank in this state, or by any bank incorporated under the laws of the United States, or of any state or territory, or under the laws of any foreign country or government, without the authority of such bank, with the intent of using or having the same used for the purpose of taking therefrom any impression, to be passed, sold, or altered, or of having made or caused to be made, or having in his custody or possession any plate upon which shall be engraved any figures or words which may be used for the purpose of falsely altering any evidence of debt issued by any such incorporated bank, with the intent of having the same used for such purpose, or of having or keeping in his custody or possession, without the authority of such bank, any impression taken from any such plate, with intent to have the same filled up and completed for the purpose of being passed, sold, or uttered, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(30); 1857, ch. 64, art. 114; 1871, § 2578; 1880, § 2824; 1892, § 1103; Laws, 1906, § 1184; Hemingway's 1917, § 914; Laws, 1930, § 941; Laws, 1942, § 2170.

Cross References — When plate deemed imitation of genuine instrument, see § 97-21-25.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 30, **CJS.** 20 C.J.S., Counterfeiting §§ 1 et seq.

§ 97-21-25. Engraving or possessing plate for printing bank check, note or other evidence of debt; when plate deemed imitation of genuine instrument.

Every plate specified in Section 97-21-23, shall be deemed to be in the form and similitude of the genuine instrument imitated, in either of the following cases: When the engraving on such plate resembles and is intended to conform to such parts of the genuine instrument as are engraved; or when such plate shall be partly finished, and the part so finished resembles and is intended to conform to similar parts of the genuine instrument.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(31); 1857, ch. 64, art. 115; 1871, § 2579; 1880, § 2825; 1892, § 1104; Laws, 1906, § 1185; Hemingway's 1917, § 915; Laws, 1930, § 942; Laws, 1942, § 2171.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-21-27. Intent to defraud.

Whenever, by any of the provisions of this chapter, an intent to defraud is required to constitute a forgery, it shall be sufficient if such intent appear to defraud the United States, any state or territory, and body-corporate, county, city, town, or village, or any public officer in his official capacity, any copartnership, or any one of such partners, or any real person whatever.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(46); 1857, ch. 64, art. 128; 1871, § 2592; 1880, § 2837; 1892, § 1116; Laws, 1906, § 1197; Hemingway's 1917, § 927; Laws, 1930, § 954; Laws, 1942, § 2184.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

In a prosecution for uttering, evidence that the defendant had previously attempted to utter the forged instrument at another location was not evidence of other criminal activity but went directly to es-

tablishing the defendant's guilt for his later attempt to cash the forged instrument, which was the crime charged. *Hartfield v. State*, 532 So. 2d 1237 (Miss. 1988).

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852.

Falsifying of money order as forgery. 65 A.L.R.3d 1307.

Evidence of intent to defraud in state forgery prosecution. 108 A.L.R.5th 593.

Am Jur. 36 Am. Jur. 2d, Forgery § 30, 31.

36 Am. Jur. 2d, Forgery § 38.

CJS. 37 C.J.S., Forgery § 5.

§ 97-21-29. Making and uttering instrument in own name under pretense that it is act of another of same name.

If any person shall, with intent to injure or defraud, make any instrument in his own name, intended to create, increase, discharge, defeat, or diminish any pecuniary obligation, right or interest, or to transfer or affect any property whatever, and shall utter and pass it under the pretense that it is the act of another who bears the same name, he shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(41); 1857, ch. 64, art. 123; 1871, § 2587; 1880, § 2833; 1892, § 1112; Laws, 1906, § 1193; Hemingway's 1917, § 923; Laws, 1930, § 950; Laws, 1942, § 2180.

Cross References — Imposter as payee of commercial paper, see § 75-3-405.

Credit card forgery, see § 97-19-17.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Indorsement and receipt of proceeds of draft by person of same name as payee, wrongfully in possession, constitutes forgery. *Thomas v. First Nat'l Bank*, 101 Miss. 500, 58 So. 478 (1912).

One presenting forged order for goods

received from another believing it to be good held not guilty of forgery. *Scott v. State*, 91 Miss. 156, 44 So. 803 (1907).

Writing held sufficient to form basis of forgery, and unnecessary to allege in indictment any intrinsic facts. *McGuire v. State*, 91 Miss. 151, 44 So. 802 (1907).

ATTORNEY GENERAL OPINIONS

Prosecution under the forgery and counterfeiting statutes, should occur when a

person attempts to cash a check by forging another's name, not for knowingly writing

a check with insufficient funds to cover the amount. Stricklin, March 27, 1998, A.G. Op. #98-0158.

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852. 2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).
Am Jur. 36 Am. Jur. 2d, Forgery §§ 7, 8. **CJS.** 37 C.J.S., Forgery § 14.

§ 97-21-31. Parts of several genuine instruments connected to make one instrument.

When different parts of several genuine instruments shall be so placed or connected together as to produce one instrument, with intent to defraud, the same shall be forgery, in the same manner as if the parts so put together were falsely made or forged.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(44); 1857, ch. 64, art. 126; 1871, § 2590; 1880, § 2835; 1892, § 1114; Laws, 1906, § 1195; Hemingway's 1917, § 925; Laws, 1930, § 952; Laws, 1942, § 2182.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery §§ 18 et seq. **CJS.** 37 C.J.S., Forgery § 17.
 2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

§ 97-21-33. Penalty for forgery.

Persons convicted of forgery shall be punished by imprisonment in the Penitentiary for a term of not less than two (2) years nor more than ten (10) years, or by a fine of not more than Ten Thousand Dollars (\$10,000.00), or both; provided, however, that when the amount of value involved is less than Five Hundred Dollars (\$500.00) in lieu of the punishment above provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars (\$1,000.00), or both, within the discretion of the court.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(42); 1857, ch. 64, art. 124; 1871, § 2588; 1880, § 2840; 1892, § 1119; Laws, 1906, § 1200; Hemingway's 1917, § 930; Laws, 1930, § 957; Laws, 1942, § 2187; Laws, 1928, ch. 38; Laws, 1970, ch. 343, § 1; Laws, 2003, ch. 499, § 6, eff from and after July 1, 2003.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Limitations of prosecutions, generally, see § 99-1-5.

JUDICIAL DECISIONS

1. In general.

Defendant argued that his sentence was contrary to the dictates of Miss. Code Ann. § 47-7-34 because by failing to comply with the terms and conditions of postrelease supervision he could be required to serve a term exceeding the maximum allowed under the statute; defendant's sentence totaling 15 years, specifically 10 years to serve with 5 years of postrelease supervision, was unquestionably in accord with Miss. Code Ann. § 97-21-33 as it was at the time of his sentencing, and therefore, his sentence did not conflict with Miss. Code Ann. § 47-7-34. *Kemp v. State*, 904 So. 2d 1162 (Miss. Ct. App. 2004).

Sentencing defendant to 15 years without possibility of parole, the maximum penalty for forgery, upon conviction for uttering a \$35 forged check, was not unconstitutionally disproportionate in violation of Federal Constitution's Eighth Amendment's cruel and unusual punishment clause, where sentence was imposed under habitual offender statute and defendant's 2 prior burglary convictions were not "truly non-violent" offenses; court noted that defendant's sentence was for 15 years, not life. *Burt v. Puckett*, 933 F.2d 350 (5th Cir. 1991).

A defendant convicted of uttering a forgery, who was also indicted as, and proven to be, a recidivist, was properly sentenced to 15 years in prison pursuant to Mississippi Code § 99-19-81. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

The indictment in a forgery prosecution was not defective for failing to identify the defrauded party where it was obvious that the persons defrauded were those who had signed the forged deed at issue, a copy

of which was attached to and made a part of the indictment; the sentence of one year in the county jail was not an abuse of discretion where it was within the limitations of the sentencing statute, even though the statute under which the defendant had been prosecuted did not require a criminal intent. *Sherman v. State*, 359 So. 2d 1366 (Miss. 1978).

In a prosecution for uttering a forgery, the case would be remanded to determine whether the maximum sentence had been improperly imposed pursuant to the habitual criminal statute, which was not part of the indictment, as required, or whether it had been properly imposed pursuant to the general sentencing statute for this crime. *Bell v. State*, 355 So. 2d 1106 (Miss. 1978).

In a forgery prosecution, where the face of each check or warrant involved was copied in exact detail in the indictment and each warrant as copied showed not only the payee and his address but the check numbers and other numbers and symbols used by the departments involved, the indictment was not defective on the ground that it did not protect the defendant from prosecution by others because it did not name all the parties involved. *Langston v. State*, 245 So. 2d 579 (Miss. 1971).

Judgments of conviction of forgery were not void because the court was without authority to suspend sentence, since, even if the court did lack such authority, the judgment of conviction would not be affected but only the suspension of sentence. *Langston v. State*, 245 So. 2d 579 (Miss. 1971).

Failure of proof to show where the alleged crime was committed required a reversal and remand of case. *Brownlee v. State*, 15 So. 2d 209 (Miss. 1943).

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852.

Procuring signature by fraud as forgery. 11 A.L.R.3d 1074.

Embezzlement, larceny, false pretenses or allied criminal fraud by a partner. 82 A.L.R.3d 822.

Am Jur. 36 Am. Jur. 2d, Forgery § 68, 69.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

CJS. 37 C.J.S., Forgery § 98.

§ 97-21-35. Pleadings, process and other court papers, licenses, or written instruments generally.

Every person who, with the intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be any process issued by any competent court, magistrate, or officer, or being or purporting to be any pleading or proceeding filed or entered in any court of law or equity, or being or purporting to be any certificate, order, or allowance, by any competent court, board, or officer, or being or purporting to be any license or authority authorized by any statute, or any instrument or writing being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be created, increased, discharged, or diminished, or by which any right or property whatever shall be or purport to be transferred, conveyed, discharged, diminished, or in any manner affected, by which false making, forging, altering or counterfeiting any person may be affected, bound, or in any way injured in his person or property, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(33); 1857, ch. 64, art. 117; 1871, § 2581; 1880, § 2827; 1892, § 1106; Laws, 1906, § 1187; Hemingway's 1917, § 917; Laws, 1930, § 944; Laws, 1942, § 2173.

Cross References — Process, generally, see §§ 13-3-1 et seq.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Instruments which may be subject of forgery.
3. Indictment.
4. Evidence.
5. Instructions.
6. Venue and Jurisdiction.

1. In general.

While it would be possible to commit the crime of obtaining money by false pretenses without committing the crime of forgery, it is extremely unlikely that an accused could be guilty of forgery and at the same time not also be guilty of obtain-

ing money by false pretenses. Rowland v. State, 531 So. 2d 627 (Miss. 1988).

Forgery and uttering are two separate and distinct crimes. Criddle v. State, 250 Miss. 328, 165 So. 2d 339 (1964).

The three essential elements necessary to constitute the crime of forgery are (1) there must be a false making or other alteration of some instrument in writing, (2) there must be a fraudulent intent, and (3) the instrument must be apparently capable of effecting a fraud. Dunson v. State, 223 Miss. 551, 78 So. 2d 580 (1955).

Fraudulent intent is of the essence of forgery. Hays v. State, 207 Miss. 748, 43

So. 2d 206 (1949); *Criddle v. State*, 250 Miss. 328, 165 So. 2d 339 (1964).

An alteration in an immaterial part of an instrument and which could not injure anyone does not constitute forgery under this section [Code 1942, § 2173]. *Wilson v. State*, 85 Miss. 687, 38 So. 46 (1905).

2. Instruments which may be subject of forgery.

Check, termed a due bill by prosecuting witness, held subject to forgery. *Hodgkin v. State*, 172 Miss. 297, 160 So. 562 (1935).

Instrument purporting to be valid teacher's state license authorizing holder to teach in schools of Mississippi held susceptible of forgery. *Bradford v. State*, 171 Miss. 8, 156 So. 655 (1934).

Accused who executed alleged first-grade teacher's license, forged names of members of board of examiners, and transferred license to another in payment of consideration, and promised that transferee would thereby be enabled to obtain position as teacher, held guilty of uttering a forged instrument. *Bradford v. State*, 171 Miss. 8, 156 So. 655 (1934).

Warrant on treasurer of county based on regular allowance of the board of supervisors in accordance with a general statute, is the subject of forgery. *Saucier v. State*, 102 Miss. 647, 59 So. 858, Am. Ann. Cas. 1915A,1044 (1912).

False indorsement of the name of the payee on the back of a warrant on the treasurer of a county is a forgery. *Saucier v. State*, 102 Miss. 647, 59 So. 858, Am. Ann. Cas. 1915A,1044 (1912).

Instance of paper of which forgery may be predicated in reference to crops. *France v. State*, 83 Miss. 281, 35 So. 313 (1903).

3. Indictment.

While an indictment charging the forging of one instrument and the uttering of another would doubtless be bad since this would constitute two different transactions, and the accused would be prejudiced, where the crime of forgery and uttering are joined in one indictment, it is not demurrable if the two charges are based on the same transaction or series of connected transactions. *Criddle v. State*, 250 Miss. 328, 165 So. 2d 339 (1964).

Where an indictment was for forgery of a written order for four sacks of rye and

where the allegations of the indictment were that the writing involved was capable of effecting a fraud, and was altered with a fraudulent intent, the accused's demurrer to indictment based on the contention that the writing in question was not susceptible of forgery, was properly overruled. *Dunson v. State*, 223 Miss. 551, 78 So. 2d 580 (1955).

Name of party defrauded must be set out in indictment for forgery as means of identifying offense charged and as protection against another prosecution for same offense. *Hays v. State*, 207 Miss. 748, 43 So. 2d 206 (1949); *Criddle v. State*, 250 Miss. 328, 165 So. 2d 339 (1964).

Indictment for forgery is defective but amendable when it fails to allege names of individual persons composing the partnership defrauded by forged instrument. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

Amending indictment for uttering forgery by changing name of payee of check to conform to proof held not error. *Graves v. State*, 148 Miss. 62, 114 So. 123 (1927).

An indictment under this section [Code 1942, § 2173] is valid when the language sufficiently informs of the nature and cause of the accusation. *State v. Dotch*, 126 Miss. 837, 89 So. 667 (1921).

For indictment based upon alleged forged and counterfeited check, see *State v. Ellis*, 112 Miss. 503, 73 So. 565 (1917).

In prosecution for forging school trustee's certificate, indictment must allege and proof must show persons whose names were forged were trustees of the school. *Mississippi Cent. R.R. v. Crawford*, 96 Miss. 401, 51 So. 466 (1910).

Where extrinsic facts are necessary to be known and considered along with the writing to constitute forgery an indictment therefore must set out such facts as well as the instrument itself. *France v. State*, 83 Miss. 281, 35 So. 313 (1903).

4. Evidence.

Where defendant made a verbal confession to the charge of uttering forgery for changing a \$ 65 check to a \$ 650 check, the trial court did not err in denying his motion for a directed verdict. The complainant left a check for \$ 65 to pay defendant for cleaning her house; defendant presented a check signed by the

complainant to the bank teller for payment in the amount of \$ 650. *Berry v. State*, 907 So. 2d 1011 (Miss. Ct. App. 2005), cert. dismissed, 921 So. 2d 344 (Miss. 2005).

Unexplained or unsatisfactorily explained possession of a forged instrument by the defendant is prima facie evidence that he either committed the forgery himself or procured another to do so. *Rowland v. State*, 531 So. 2d 627 (Miss. 1988).

Evidence of uttering the forged check was properly admitted in defendant's prosecution for forgery where it tended to establish defendant's fraudulent intent and where the forgery and the uttering took place at the same time and thus were a part of the same transaction. *Harrington v. State*, 336 So. 2d 721 (Miss. 1976).

In forgery prosecution when property is alleged to be that of named corporation and proof shows that such company is in fact a partnership, variance between indictment and proof is fatal and conviction will not be allowed to stand. *Hays v. State*, 207 Miss. 748, 43 So. 2d 206 (1949).

To support conviction for forgery, it is necessary that fraudulent intent be proven as laid in indictment. *Hays v. State*, 207 Miss. 748, 43 So. 2d 206 (1949); *Criddle v. State*, 250 Miss. 328, 165 So. 2d 339 (1964).

In forgery prosecution when property is alleged in indictment to be that of named

corporation there must be proof that such company is in fact corporation. *Hays v. State*, 207 Miss. 748, 43 So. 2d 206 (1949); *Criddle v. State*, 250 Miss. 328, 165 So. 2d 339 (1964).

Evidence held to sustain conviction for forgery of check. *Hodgkin v. State*, 172 Miss. 297, 160 So. 562 (1935).

5. Instructions.

Instruction for state that if jury believes from evidence beyond every reasonable doubt that defendant is guilty as charged in indictment is prejudicially erroneous as it does not inform jury of elements of crime of forgery for which defendant was being tried. *Wilson v. State*, 204 Miss. 111, 37 So. 2d 19 (1948).

In prosecution on bad check instruction failing to state that check must have been uttered "with intent to defraud" was erroneous. *May v. State*, 115 Miss. 708, 76 So. 636 (1917).

6. Venue and Jurisdiction.

Venue of prosecution for uttering forged teacher's license held properly laid in county where license was mailed by accused, notwithstanding license was received in another county, where contract was consummated by correspondence originating in county from which license was mailed. *Bradford v. State*, 171 Miss. 8, 156 So. 655 (1934).

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 33.
2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

CJS. 37 C.J.S., Forgery § 27.

§ 97-21-37. Possession of counterfeit bank notes or other instrument with intention to utter.

Every person who shall have in his possession any forged, altered or counterfeited negotiable note, bill, draft, or other evidence of debt issued or purported to have been issued by any corporation or company duly authorized for that purpose by the laws of the United States or of this state, or of any other state, government, or country, or any other forged, altered, or counterfeit, instrument the forgery of which is declared by the provisions of this chapter to be punishable, knowing the same to be forged, altered, or counterfeited, with intention to utter the same as true or as false, or to cause the same to be uttered, with intent to injure or defraud, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(36); 1857, ch. 64, art. 120; 1871, § 2584; 1880, § 2830; 1892, § 1109; Laws, 1906, § 1190; Hemingway's 1917, § 920; Laws, 1930, § 947; Laws, 1942, § 2176.

Cross References — Unauthorized signature on commercial paper, see §§ 75-3-404 through 75-3-406.

Alteration of commercial paper, see §§ 75-3-406, 75-3-407.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Counterfeiting **CJS.** 20 C.J.S., Counterfeiting § 4.
§§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

§ 97-21-39. Railroad tickets; definition.

The words "railroad passenger ticket," as used in Sections 97-21-41 and 97-21-43, shall be construed to embrace any ticket, card, pass, certificate, or paper, providing or intending to provide for the carriage or transportation of any person or persons upon any railroad, and shall include not only such tickets fully prepared for use, but those not so fully prepared, and all others which have been once used.

SOURCES: Codes, 1892, § 1102; Laws, 1906, § 1183; Hemingway's 1917, § 913; Laws, 1930, § 940; Laws, 1942, § 2169.

§ 97-21-41. Railroad tickets; making or altering.

Every person who shall falsely make, forge, or counterfeit any railroad passenger ticket, purporting to be made or issued by any railroad company or companies, with intent to injure or defraud, or who shall, with like intent, alter any railroad passenger ticket made or issued by any railroad company or companies, shall be guilty of forgery.

SOURCES: Codes, 1892, § 1100; Laws, 1906, § 1181; Hemingway's 1917, § 911; Laws, 1930, § 938; Laws, 1942, § 2167.

Cross References — Robbery of railroad tickets, see § 97-3-83.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Meaning of "railroad passenger ticket", see § 97-21-39.

Embezzlement of railroad tickets, see § 97-25-9.

Theft of railroad tickets, see § 97-25-11.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 32.

CJS. 20 C.J.S., Counterfeiting §§ 1 et seq.

§ 97-21-43. Railroad tickets; possession of forged or altered tickets.

Every person who shall sell or offer to sell, or who shall have in his possession with intent to sell, any such false, forged, altered or counterfeit railroad passenger ticket, knowing the same to be false, forged, altered, or counterfeit, shall be guilty of forgery.

SOURCES: Codes, 1892, § 1101; Laws, 1906, § 1182; Hemingway's 1917, § 912; Laws, 1930, § 939; Laws, 1942, § 2168.

Cross References — Penalty for forgery, see § 97-21-33.

Meaning of "railroad passenger ticket", see § 97-21-39.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 30, 31. **CJS.** 20 C.J.S., Counterfeiting § 4.

§ 97-21-45. Record of will or other instrument constituting evidence, judgment or decree of court, or return on process.

Every person who, with intent to defraud, shall falsely alter, destroy, corrupt, or falsify the record of any will, conveyance or other instrument the record of which shall by law be evidence, or any record or any judgment or decree of a court of record, or the enrollment of any such judgment or decree, or the return of an officer, court, or tribunal, to any process of any court, or who shall falsely make, forge, or alter any entry in any book of record, or any instrument purporting to be any such record or return, with intent to defraud, shall, upon conviction, be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(25); 1857, ch. 64, art. 110; 1871, § 2574; 1880, § 2820; 1892, § 1096; Laws, 1906, § 1177; Hemingway's 1917, § 907; Laws, 1930, § 934; Laws, 1942, § 2163.

Cross References — Recording of instruments, see §§ 89-5-1 et seq.

Recording of wills, see §§ 91-7-31, 91-7-33.

Alteration, destruction, and secretion of wills, see § 97-9-77.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Forgery of will, deed, acknowledgment, etc., see § 97-21-63.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

To convict of falsifying a public record by entering a deed of trust record, it must

be averred and proved that the chancery clerk attested the entry. *Poythress v. State*, 99 Miss. 805, 56 So. 168 (1911).

RESEARCH REFERENCES

ALR. What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense. 69 A.L.R.2d 1095.

Am Jur. 36 Am. Jur. 2d, Forgery §§ 1-3.

66 Am. Jur. 2d, Records and Recording Laws § 12, 13.

CJS. 37 C.J.S., Forgery §§ 1 et seq.

§ 97-21-47. Seal of state and other government and corporate seals or their impressions.

Every person who shall forge or counterfeit the great seal of this state, the seal of any public office or officer authorized by law, the seal of any court of record, the seal of any county, city, town or village, or the seal of any body-corporate, duly incorporated, or who shall falsely make, forge, or counterfeit any impression purporting to be the impression of any such seal, with intent to defraud, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(24); 1857, ch. 64, art. 109; 1871, § 2573; 1880, § 2819; 1892, § 1095; Laws, 1906, § 1176; Hemingway's 1917, § 906; Laws, 1930, § 933; Laws, 1942, § 2162.

Cross References — Great seal of state of Mississippi, see Miss Const Art. 5, § 126. Governor's use of great seal, see § 7-1-9.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery §§ 25 et seq.

CJS. 37 C.J.S., Forgery §§ 1 et seq.

§ 97-21-49. Selling or offering to sell counterfeit notes or other evidence of debt, etc.

Every person who shall be convicted of having sold, exchanged, or delivered, for any consideration, any forged or counterfeited promissory note, check, bill, draft or other evidence of debt, or engagement for the payment of money, absolutely, or upon contingency, knowing the same to be forged or counterfeited, with the intent to have the same uttered or passed; or of having offered any such notes or other instruments for sale, exchange, or delivery, for any consideration, with the like knowledge and with the like intention, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(32); 1857, ch. 64, art. 116; 1871, § 2580; 1880, § 2826; 1892, § 1105; Laws, 1906, § 1186; Hemingway's 1917, § 916; Laws, 1930, § 943; Laws, 1942, § 2172.

Cross References — Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. —Variance between indictment and proof.
4. Sentencing Considerations.

1. In general.

A 14-year sentence for forging and publishing a \$40 check, a 2-year consecutive sentence for forging a \$50 check, and 2 14-year sentences for forging and publishing checks in the amounts of \$54 and \$62, though severe, were not so "grossly disproportionate" as to violate the Eighth Amendment to the United States Constitution. *Wallace v. State*, 607 So. 2d 1184 (Miss. 1992).

Trial court did not abuse its discretion in excluding for cause a potential juror who was a double first cousin to a defendant charged with uttering a forgery, and with whom defendant had discussed the case prior to trial, despite the juror's testimony that she could still be fair and impartial. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

In absence of anything in the record that suggests that a defendant charged with uttering a forgery was prejudiced to the point of warranting a new trial by the failure to furnish him with a handwriting expert, the trial court did not err in refusing defendant's request for the expert. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

At trial for uttering a forgery, the trial court did err in allowing into evidence a bank check containing disputed writing before the writing was authenticated, where the check was not shown to the jury until the writing was authenticated. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

Determining the voluntariness of a confession at trial of charge of uttering forged instrument is a function of the trial judge, and, where the evidence is conflicting, the Supreme Court must respect the trial judge's finding. *Kelly v. State*, 493 So. 2d 984 (Miss. 1986).

Store owner's in court identification of defendant as person who uttered bad check is not impermissibly tainted by unnecessarily suggestive pretrial lineup where in court identification is based upon owner's observation of defendant in store and not upon pretrial lineup. *Tobias v. State*, 472 So. 2d 398 (Miss. 1985).

Evidence that defendant charged with uttering forged check had uttered forged check on prior occasion is not admissible for purpose of impeaching defendant's denial of having previously written check to store at which forged check was cashed. *Tobias v. State*, 472 So. 2d 398 (Miss. 1985).

Testimony of witnesses who positively identify defendant as person who passed bad check on particular date is sufficient to allow jury to convict defendant notwithstanding testimony of defense witness that defendant was in another county entire day. *Donald v. State*, 472 So. 2d 370 (Miss. 1985).

Evidence of forged checks uttered by defendant other than check upon which check forgery prosecution is based is inadmissible as proof of identity where defendant is regular customer of bank to which check is issued and is remembered by tellers. *Donald v. State*, 472 So. 2d 370 (Miss. 1985).

A sentence of nine years in the penitentiary upon a conviction of forgery involving a \$43 check, was excessive where the evidence supporting the conviction was weak at best. *Crapps v. State*, 221 So. 2d 722 (Miss. 1969).

Testimony showing possession of suitable tools for making counterfeit coin is inadmissible on the charge of uttering the coin. *Burgess v. State*, 81 Miss. 482, 33 So. 499 (1903).

2. Indictment.

In a prosecution for forgery of a check wherein the defendant had moved to quash the indictment based upon former §§ 97-23-63 and 97-23-67 on the ground that the check bearing a notation "for painting" had been a written contract and therefore void because it had been made on a Sunday, the trial court did not err in denying the motion where the Sunday-dated check had been cashable and had therefore possessed sufficient legal efficacy to create a liability and where the intent of the "Blue Laws" had never been to make the crime of forgery lawful if perpetrated on Sunday. *Harper v. State*, 394 So. 2d 311 (Miss. 1981).

Under an indictment for forgery of a written order for four sacks of rye, where the allegations of the indictment were that the writing involved was capable of effecting a fraud, and was altered with a fraudulent intent, the accused's demurrer to indictment based on the contention that the writing in question was not susceptible of forgery, was properly overruled. *Dunson v. State*, 223 Miss. 551, 78 So. 2d 580 (1955).

Under this section [Code 1942, § 2172] the indictment should allege extrinsic fact showing how the writings could have been used as evidences of debt or engagements for the payment of money. *Cohran v. State*, 219 Miss. 767, 70 So. 2d 46 (1954).

3. —Variance between indictment and proof.

Amendment to an indictment, after state had closed its case in an uttering a

forgery trial, to show that a named person was a part owner, instead of agent, of store which had received check, was one of form, not of substance, and would not support defendant's motion for a directed verdict. *Burt v. State*, 493 So. 2d 1325 (Miss. 1986), habeas corpus dismissed, 933 F.2d 350 (5th Cir. Miss. 1991).

In a forgery prosecution, the fact that the indictment charged that the defendant had intended to defraud certain persons doing business at a store, by the cashing of a forged check, while a witness on cross-examination remarked that the business was a corporation, did not constitute a material variance, for there was not even a remote chance that such inconsistency could result in subjecting the defendant to another prosecution. *Smith v. State*, 222 So. 2d 688 (Miss. 1969).

Variance is fatal where evidence showed different check from that described in indictment. *Bradley v. State*, 128 Miss. 114, 90 So. 627 (1922).

4. Sentencing Considerations.

Court had the right to revoke petitioner's suspended sentence for uttering forgery because he tested positive for marijuana and was terminated from a work program. He was not entitled to postconviction relief, because he had signed a waiver of his right to a probation revocation hearing. *Gates v. State*, 919 So. 2d 170 (Miss. Ct. App. 2005).

Court did not improperly rely on evidence of a prior criminal conviction to justify the length of the sentence in defendant's forgery case where defendant had two prior felony convictions, a pending charge of possession of paraphernalia, and numerous arrests. *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

RESEARCH REFERENCES

ALR. What constitutes uttering and passing counterfeit obligation or other security of the United States, with intent to defraud, under 18 USC § 472. 3 A.L.R.3d 1051.

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.

36 Am. Jur. 2d, Forgery § 23, 24.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

§ 97-21-51. Unauthorized use or signing of another's name to telegram, petition or related communication.

If any person shall wilfully and falsely, or fraudulently forge, sign, or otherwise use the name of another person to a telegram, petition or related communication or instrument of writing with intent to deceive, defraud, or for personal gain or benefit, or for the benefit of another person, without the express written approval of such person, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than 90 days and by a fine of not more than \$500.00, or both in the discretion of the court.

SOURCES: Codes, 1942, § 2187.5; Laws, 1962, ch. 316, eff from and after passage (approved May 16, 1962).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852.

2 Am. Jur. Trials, Investigating Particular Crimes §§ 23-31 (forgery).

Am Jur. 36 Am. Jur. 2d, Forgery §§ 28, 32.

§ 97-21-53. Trade-marks; counterfeiting and forging of.

Every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy, or imitation of the private stamp, wrappers, or labels usually fixed by any mechanic or manufacturer to, and used by such mechanic or manufacturer on, in, or about the sale of any goods, wares, or merchandise whatsoever, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not less than three months nor more than one year.

SOURCES: Codes, 1857, ch. 64, art. 131; 1871, § 2595; 1880, § 2841; 1892, § 1306; Laws, 1906, § 1380; Hemingway's 1917, § 1123; Laws, 1930, § 1153; Laws, 1942, § 2390.

Cross References — Registration of trademarks and labels, see §§ 75-25-1 et seq. Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity and construction of state statutes penalizing "criminal simulation" of goods or merchandise. 72 A.L.R.4th 1071.

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.
36 Am. Jur. 2d, Forgery §§ 1-3.

§ 97-21-55. Trade-marks; possession of dies, plates, printed label or any imitation for purpose of vending imitation goods.

Every person who shall have in his possession any die, plate, engraving, or printed label, stamp, or wrapper, or any representation, likeness, similitude, copy, or imitation of the private stamp, wrapper, or label usually fixed by any mechanic or manufacturer to, and used by such mechanic or manufacturer on, in, or about the sale of any goods, wares, or merchandise, with intent to use or sell the said die, plate or engraving, or printed stamp, label, or wrapper, for the purpose of aiding or assisting, in any way whatever, in vending any goods, wares, or merchandise in imitation of, or intended to resemble and be sold for the goods, wares, or merchandise of such mechanic or manufacturer, shall be guilty of a misdemeanor, and, upon conviction, be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not less than three months nor more than one year.

SOURCES: Codes, 1857, ch. 64, art. 132; 1871, § 2596; 1880, § 2842; 1892, § 1307; Laws, 1906, § 1381; Hemingway's 1917, § 1124; Laws, 1930, § 1154; Laws, 1942, § 2391.

Cross References — Registration of trademarks and labels, see §§ 75-25-1 et seq.
Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity and construction of state statutes penalizing "criminal simulation" of goods or merchandise. 72 A.L.R.4th 1071.

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.
36 Am. Jur. 2d, Forgery §§ 1-3.

§ 97-21-57. Trade-marks; sale of goods bearing counterfeit stamp or label.

Every person who shall vend any goods, wares, or merchandise having thereon any forged or counterfeit stamp or label, imitating, resembling, or purporting to be the stamp or label of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer, without disclosing the fact to the purchaser thereof, shall be guilty of a misdemeanor,

and, upon conviction, shall be punished by imprisonment in the county jail not exceeding three months, or by a fine not less than fifty nor more than five hundred dollars, or both.

SOURCES: Codes, 1857, ch. 64, art. 133; 1871, § 2597; 1880, § 2843; 1892, § 1308; Laws, 1906, § 1382; Hemingway's 1917, § 1125; Laws, 1930, § 1155; Laws, 1942, § 2392.

Cross References — Registration of trademarks and labels, see §§ 75-25-1 et seq. Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity and construction of state statutes penalizing "criminal simulation" of goods or merchandise. 72 A.L.R.4th 1071.

Am Jur. 20 Am. Jur. 2d, Counterfeiting §§ 1 et seq.

36 Am. Jur. 2d, Forgery §§ 1-3.

§ 97-21-59. Uttering counterfeit instrument or coin.

Every person who shall be convicted of having uttered or published as true, and with intent to defraud, any forged, altered, or counterfeit instrument, or any counterfeit gold or silver coin, the forgery, altering, or counterfeiting of which is declared by the provisions of this chapter to be an offense, knowing such instrument or coin to be forged, altered, or counterfeited, shall suffer the punishment herein provided for forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(39); 1857, ch. 64, art. 122; 1871, § 2586; 1880, § 2832; 1892, § 1111; Laws, 1906, § 1192; Hemingway's 1917, § 922; Laws, 1930, § 949; Laws, 1942, § 2179.

Cross References — Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. Instructions.
5. Sentencing Considerations.

1. In general.

Denial of the prisoner's postconviction relief motion without an evidentiary hearing was proper where the appellate court found there was no defect in the factual basis for the prisoner's guilty plea to ut-

tering a forgery, as the prisoner understood the charge and also signed a petition to enter a guilty plea, agreeing that the attorney had explained the charges. *Moore v. State*, 830 So. 2d 1274 (Miss. Ct. App. 2002).

Sentencing defendant to 15 years without possibility of parole, the maximum penalty for forgery, upon conviction for uttering a \$35 forged check, was not unconstitutionally disproportionate in viola-

tion of Federal Constitution's Eighth Amendment's cruel and unusual punishment clause, where sentence was imposed under habitual offender statute and defendant's 2 prior burglary convictions were not "truly non-violent" offenses; court noted that defendant's sentence was for 15 years, not life. *Burt v. Puckett*, 933 F.2d 350 (5th Cir. 1991).

A 15-year sentence without hope of parole, imposed upon a defendant as a habitual offender, for uttering a forged check in the amount of \$500, did not constitute cruel and unusual punishment. *Barnwell v. State*, 567 So. 2d 215 (Miss. 1990).

An accused, who wrongfully obtained possession of a check and, after forging on the back of the check the name of the payee, exhibited the same to a corporation, representing it to be a genuine instrument, and obtained the face value thereof, was guilty of the crime of uttering and publishing a forged check knowing it to be forged. *Osby v. State*, 229 Miss. 660, 91 So. 2d 748 (1957).

To constitute offense of uttering forged instrument, bill, or coin, knowledge of forgery on part of accused is necessary. *Keyes v. State*, 166 Miss. 316, 148 So. 361 (1933).

2. Indictment.

An indictment charging forgery was sufficient where it contained all of the elements necessary to charge the offense. *Veal v. State*, 357 So. 2d 943 (Miss. 1978).

A defendant who was shown by testimony to have induced another to forge the name of the payee on a check, was not entitled to acquittal of the forgery charged in the indictment on the theory that the indictment did not inform the defendant that he was being tried as an accessory before the fact of forgery, since, as an accessory before the fact, the defendant was considered a principal under Code 1942, § 1995. *Ellis v. State*, 255 So. 2d 325 (Miss. 1971).

A conviction on an indictment charging the defendant with the crime of uttering and publishing as true a forged check, knowing the instrument to be forged, was not sustained by proof that he was found in possession of a check upon which an indorsement had been forged. *Cogsdell v. State*, 183 Miss. 826, 185 So. 206 (1938).

3. Evidence.

Evidence was sufficient to sustain defendant's conviction for forgery; a convenience store clerk testified that defendant presented a check at the convenience store for cashing. The check was not issued in the ordinary course of business; the evidence, taken in its entirety, showed that defendant knew that the check was forged. *Duhart v. State*, 927 So. 2d 768 (Miss. Ct. App. 2006).

Defendant's motion for a peremptory instruction and a judgment notwithstanding the verdict was properly denied by the trial court where considering the strength of all inferences and circumstances of possession by defendant of the victim's check, together with his attempt to negotiate the check at the bank, the jury was fully warranted in concluding that defendant was guilty of uttering a forged instrument and petit larceny. *Miles v. State*, 864 So. 2d 963 (Miss. Ct. App. 2003).

State succeeded in proving all of the elements of the crime of uttering a forgery where there was no dispute that the check presented at the bank for deposit was in defendant's possession prior to being presented and defendant did not offer evidence that there was another person who allegedly presented the check to defendant in exchange for an automobile; defendant presented nothing to explain satisfactorily his possession of the forgery. *Cannady v. State*, 855 So. 2d 1000 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Evidence was sufficient to support a conviction where (1) the defendant claimed that he was only helping a young man by picking up things the young man had dropped, but (2) all of the witnesses for the state testified it was in fact the defendant who stood at the customer service counter and offered a check to be cashed, (3) none of the witnesses for the state testified that there was any young man there at all, and (4) the state, in addition, put on evidence that the defendant asked for the check to be cashed, that he provided false identification when asked for it, and that he even endorsed the check in the plain sight of the store owner. *Wiseman v. State*, 771 So. 2d 977 (Miss. Ct. App. 2000).

In a forgery prosecution, a witness' reviewing of a photograph of the forgery suspect taken by a store security system at the time that the suspect cashed the forged check did not impermissibly taint the witness' in-court identification of the defendant so as to render it inadmissible. Such photographs may properly be used to refresh the recollection of an eyewitness since they show the person who actually committed the crime as opposed to some possible suspect in the police files. *George v. State*, 521 So. 2d 1287 (Miss. 1988).

Evidence that the signee is a fictitious person is admissible to show that the instrument is a forgery. *Sanders v. State*, 219 So. 2d 913 (Miss. 1969), cert. denied, 396 U.S. 913, 90 S. Ct. 228, 24 L. Ed. 2d 188 (1969).

Where an indictment, charging the accused with the crime of uttering and publishing a forged check, knowing it to be forged, alleged that the check was cashed by a corporation, it was not reversible error to permit the cashier of the company to testify orally that the company was a corporation. *Osby v. State*, 229 Miss. 660, 91 So. 2d 748 (1957).

In prosecution for crime of uttering and publishing as true, with intent to defraud, a forged and counterfeit check, knowing such instrument to be forged, evidence that a name signed to an instrument is that of a fictitious person is admissible to prove that the instrument is a forgery. *Coward v. State*, 223 Miss. 538, 78 So. 2d 605 (1955).

In a prosecution for the crime of uttering and publishing as true, with intent to defraud, a forged and counterfeit check,

knowing such an instrument to be forged, evidence by persons so situated that they would probably know the signer if she existed is admissible and they may testify that they did not know of any such person. *Coward v. State*, 223 Miss. 538, 78 So. 2d 605 (1955).

Knowledge on part of accused that bill uttered by him was forged may be supplied by circumstantial evidence. *Keyes v. State*, 166 Miss. 316, 148 So. 361 (1933).

Evidence held insufficient to support conviction under indictment charging uttering of United States government note which had been raised or altered. *Keyes v. State*, 166 Miss. 316, 148 So. 361 (1933).

4. Instructions.

An instruction for the prosecution, granted in a trial of an indictment under Code 1942, § 2179, which stated the elements of the offense in the alternative that the defendant either knew, or had reasonable reason to believe, that he was uttering a forged instrument would ordinarily be fatally defective, for the language of the section requires that the person uttering the instrument must know it to be forged; but such defect may be cured by properly phrased instructions granted on behalf of the defendant. *Pierce v. State*, 213 So. 2d 769 (Miss. 1968).

5. Sentencing Considerations.

Court did not improperly rely on evidence of a prior criminal conviction to justify the length of the sentence in defendant's forgery case where defendant had two prior felony convictions, a pending charge of possession of paraphernalia, and numerous arrests. *Swindle v. State*, 881 So. 2d 174 (Miss. 2004).

RESEARCH REFERENCES

ALR. Forgery: use of fictitious or assumed name. 49 A.L.R.2d 852.

Falsifying of money order as forgery. 65 A.L.R.3d 1307.

Am Jur. 20 Am. Jur. 2d, Counterfeiting § 4, 5.

36 Am. Jur. 2d, Forgery § 23, 24.

CJS. 20 C.J.S., Counterfeiting § 5.

§ 97-21-61. Warrants on state treasury, United States treasury, or county, city, town or village treasury.

If any person shall falsely or fraudulently make, forge, or alter any writing, being, or pretending to be, an auditor's warrant on the state treasury, or any order or warrant on the treasury of this state or the treasury of the

United States, or of any county, or of any city, town, or village, with intent to defraud the state, the United States, or any county, city, village, or town, or any person, he shall be guilty of forgery.

SOURCES: Codes, 1857, ch. 64, art. 130; 1871, § 2594; 1880, § 2839; 1892, § 1118; Laws, 1906, § 1199; Hemingway's 1917, § 929; Laws, 1930, § 956; Laws, 1942, § 2186.

Editor's Note — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — Warrants by state auditor, see § 7-7-15.

Requirement of warrant for receipts or payments by state treasurer, see § 7-9-13.

Issuance of county bonds and notes, see §§ 19-9-1 et seq.

Issuance of municipal warrants, see § 21-39-13.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 36 Am. Jur. 2d, Forgery § 33.

CJS. 20 C.J.S., Counterfeiting §§ 1 et seq.

§ 97-21-63. Will, deed, certificate of acknowledgment or proof of recordable instrument.

Every person who shall be convicted of having forged, counterfeited, or falsely altered any will of real or personal property, or any deed or other instrument, being or purporting to be the act of another by which any right or interest in real or personal property shall be or purport to be transferred, conveyed, or in any way changed or affected; or any certificate or indorsement of the acknowledgment of any person of any deed or other instrument which by law may be recorded, made or purporting to have been made by any officer duly authorized to make such certificate or indorsement; or any certificate of the proof of any deed or other instrument which by law may be recorded, made or purporting to have been made by any officer duly authorized to make such certificate, with intent to defraud, shall be guilty of forgery.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(22); 1857, ch. 64, art. 107; 1871, § 2571; 1880, § 2817; 1892, § 1093; Laws, 1906, § 1174; Hemingway's 1917, § 904; Laws, 1930, § 931; Laws, 1942, § 2160.

Cross References — Before whom oaths may be taken, see § 11-1-1.

Notaries public, see §§ 25-33-1 et seq.

Land and conveyances, see §§ 89-1-1 et seq.

Acknowledgments, see §§ 89-3-1 et seq.

Wills and testaments, see §§ 91-5-1 et seq.

Executors and administrators, see §§ 91-7-1 et seq.

Testing validity of will within two years, see § 91-7-23.

Credit card forgery, see § 97-19-17.

False certification of acknowledgment or proof of deed or other recordable instrument, see § 97-21-7.

Nature and sufficiency of intent to defraud, see § 97-21-27.

Penalty for forgery, see § 97-21-33.

Falsification of record of will, conveyance, etc., see § 97-21-45.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

The enactment of Code 1942, § 2148.5, dealing specifically with fraudulent use of credit cards does not pre-empt the field and does not preclude prosecution under the general forgery statute of a defendant charged with using a stolen credit card to obtain goods and signing the credit card owner's name to the credit card slip or invoice. *McCrory v. State*, 210 So. 2d 877 (Miss. 1968).

To constitute "forgery," there must be false making or alteration of written instrument and fraudulent intent, and instrument must be apparently capable of effecting fraud. *State v. Ellis*, 161 Miss. 361, 137 So. 102 (1931).

Deed not under seal purporting to have been executed prior to the abolishment of

private seals was a proper subject of forgery. *State v. Saucier*, 102 Miss. 887, 60 So. 3 (1912).

Alteration of existing instrument may constitute forgery. *Donaldson v. State*, 102 Miss. 346, 59 So. 99 (1912).

Instrument alleged to be forged, if available, must be produced in evidence. *Deal v. State*, 96 Miss. 82, 50 So. 495 (1909).

Forgery is not committed by the act of inducing one to sign a conveyance of land on false representations that the paper was a pension paper. The act under the common law was that of a cheat or swindle. *Johnson v. State*, 87 Miss. 502, 39 So. 692 (1906).

RESEARCH REFERENCES

ALR. Admissibility, in forgery prosecution, of other acts of forgery. 34 A.L.R.2d 777.

What are "forgeries" within coverage of forgery bond or insurance. 52 A.L.R.2d 207.

Alteration of figures indicating amount

of check, bill, or note, without change in written words, as forgery. 64 A.L.R.2d 1029.

Am Jur. 36 Am. Jur. 2d, Forgery §§ 25-33.

CJS. 37 C.J.S., Forgery §§ 25-33.

CHAPTER 23

Offenses Affecting Trade, Business and Professions

SEC.

- 97-23-1. False advertising and misrepresentation of nature of business.
- 97-23-3. Advertising; untrue, deceptive, or misleading.
- 97-23-5. Advertising; pulling down advertisements.
- 97-23-7. Cotton; fraudulent packing.
- 97-23-9. Cotton; seed-cotton not sold at night.
- 97-23-11. Cotton; scalage; deductions from true weight of bale prohibited.
- 97-23-13. Cotton; scalage; purchasers of cotton to account for actual weight.
- 97-23-15. Cottonseed meal; adulterated meal to be branded.
- 97-23-17. Customers, patrons or clients; right to choose or refuse to serve; penalty for violation.
- 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.
- 97-23-21. Embezzlement; evidence of debt negotiable by delivery but not delivered.
- 97-23-23. Embezzlement; buying or receiving embezzled goods.
- 97-23-25. Embezzlement; property held in trust or received on contract.
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- 97-23-29. Enticing away servant or lessee without written consent; provisions applicable to minors.
- 97-23-31. Insurance; acting as agent for company not complying with law.
- 97-23-33. Interference with exercise of lawful trade or calling by printing or distributing of matter, etc.
- 97-23-35. Newspapers and periodicals to print names of their editors.
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- 97-23-39. Preventing employment by force or violence; penalty.
- 97-23-41. Preventing employment by force or violence; conspiracy.
- 97-23-43. Profession; practicing without license.
- 97-23-45 through 97-23-53. Repealed.
- 97-23-55. Storage battery; unlawful to deface rental battery.
- 97-23-57. Storage battery; unlawful to sell or give away rental battery.
- 97-23-59. Storage battery; unlawful to retain or recharge rental battery.
- 97-23-61. Storage battery; penalty.
- 97-23-63 through 97-23-82. Repealed.
- 97-23-83. Threats or coercion to prevent lawful conduct of business.
- 97-23-85. Unlawful restraint of trade; boycott; civil liability.
- 97-23-87. Unauthorized copying or sale of recordings.
- 97-23-89. Sale, distribution of recordings without display of required information.
- 97-23-91. Construction of Sections 97-23-87 through 97-23-91; private causes of action; confiscation of illegal recordings.
- 97-23-92. Unauthorized use of audiovisual recording device in motion picture theater.
- 97-23-93. Shoplifting; elements of offense; presumptions; evidence; penalties; aggregation of multiple offenses occurring within same jurisdiction over 30-day period in determining gravity of offense.
- 97-23-93.1. Shoplifting; use of theft detection device remover prohibited; use of theft detection shielding device prohibited; activation of anti-shoplifting device constitutes probable cause for detention.
- 97-23-94. Aiding and abetting shoplifting by minor; penalty.
- 97-23-94.1. Punishment for violation of Section 97-23-94.

- 97-23-95. Shoplifting; detention of suspect for questioning without incurring civil liability.
- 97-23-96. Civil remedy for shoplifting violations; written demand prior to commencing civil proceedings; recovery from parents or legal guardians of minors; costs.
- 97-23-97. Scalping of admission tickets at college events held on state property.
- 97-23-99. Giving away of merchandise by employee without authorization of merchant.
- 97-23-101. Laundering of monetary instruments; offense; penalties; effect of federal conviction.
- 97-23-103. Home repair fraud; definitions; exceptions; penalties.
- 97-23-105. Falsely using or producing retail sales receipts and universal product codes.

§ 97-23-1. False advertising and misrepresentation of nature of business.

(1) It shall be unlawful for any person, firm, association or corporation to misrepresent the true nature of its business by use of the words "manufacturer," "wholesaler," "retailer," or words of similar import or for any person, firm, association or corporation to represent itself as selling at wholesale, or use the word "wholesale" in any form of sale or advertising unless such person, firm, association or corporation is actually selling at wholesale those items advertised for the purpose of resale. For the purpose of this section, the term "wholesale" shall be defined as a sale made for the purpose of resale by the purchaser on which a wholesale sales tax is charged, and not one made to a consuming purchaser on which a retail sales tax is charged.

However, this section shall in nowise affect or prohibit a corporation from using the word "wholesale" in its corporate name even though such corporation also does a retail business. However, if it does a retail business, it must indicate in its advertisements that such business is being conducted by its retail division, or that such advertised products are to be sold only at retail.

(2) The violation of this section shall constitute a misdemeanor, and any person or firm convicted of violating this section shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00).

SOURCES: Codes, 1942, § 2144.3; Laws, 1962, ch. 315, §§ 1, 2.

Cross References — White-collar crime investigation, see § 7-5-59.

False and misleading advertisements, see § 97-23-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices. 50 A.L.R.3d 1008.

Advertising agency as subject to FTC order under 15 USCS § 45 for false or deceptive representations in its advertisements for client's product. 47 A.L.R. Fed. 393.

Am Jur. 32 Am. Jur. 2d, False Pretenses § 97.

1A Am. Jur. Pl & Pr Forms (Rev), Advertising, Forms 31 et seq. (false and misleading advertising).

18 Am. Jur. Proof of Facts 2d 265, Un-

fair Competition — Appropriation of Competitor's Advertising Matter, Methods, or Slogan.

CJS. 35 C.J.S., False Pretenses §§ 29, 30.

§ 97-23-3. Advertising; untrue, deceptive, or misleading.

Any person who, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, directly or indirectly, to the public for sale or distribution, or who, with intent to increase the consumption of or demand for such merchandise, securities, service or other thing, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public within the state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or by a label affixed to the merchandise or its container, or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, including but not limited to representing himself as selling at wholesale unless he is actually selling at wholesale those items so represented, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished by a fine of not more than five hundred dollars (\$500.00), and the offending person, whether found guilty or not, may be held civilly responsible in tort for damages to persons or property proximately resulting from a violation of this section. This section shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, or to any agent of the advertiser who in good faith and without knowledge of the falsity or deceptive character thereof publishes, causes to be published, or participates in the publication of such advertisement. Firms with the word "wholesale" in their corporate title are not in violation of this section so long as they identify the sales as being made by their retail division.

SOURCES: Codes, 1942, § 2003.5; Laws, 1962, ch. 317, eff from and after July 1, 1962.

Cross References — White-collar crime investigation, see § 7-5-59.

False advertising and misrepresentation of nature of business, see § 97-23-1.

JUDICIAL DECISIONS

1. In general.

The plaintiffs were properly denied leave to amend the complaint in order to add a claim for misleading and deceptive advertising practices in relation to the home they rented where the advertisement for the home merely described the nature of the house in general terms, and no representations were made in the ad the defects alleged by the plaintiffs. *Sweatt v. Murphy*, 733 So. 2d 207 (Miss. 1998).

Allegation that advertisement for student loans was misleading because primary purpose was to sell life insurance states claim under this section; punitive damages are not available where evidence in case does not support claim for fraud and is sufficient under statute only because statute allows recovery for advertising which is merely "misleading" as opposed to fraudulent. *Watson v. First Commonwealth Life Ins. Co.*, 686 F. Supp. 153 (S.D. Miss. 1988).

Allegations that insurance company's advertisement for student loans was misleading because primary purpose of adver-

tisement was to sell life insurance states claim under Miss. Code Annotated § 97-23-3, only because statute allows recovery for advertising which is merely "misleading" as opposed to fraudulent. *Watson v. First Commonwealth Life Ins. Co.*, 686 F. Supp. 153 (S.D. Miss. 1988).

The statement in an advertisement issued by a supermarket in which it was stated that a notary had "purchased" products in a competitor's market as part of a comparison shopping endeavor when, in fact, the notary had merely accompanied an employee of the supermarket who made the purchases, did not constitute a violation of the statute where the portion of the advertisement concerning the notary's role had been an insignificant part of the ad, had been placed in a small area in an inconspicuous spot, and had only verified that the ad had been correct according to him and where there was no proof that any customers had in any way been misled or deceived by the misstatement which was subsequently corrected. *Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc.*, 391 So. 2d 633 (Miss. 1980).

RESEARCH REFERENCES

ALR. Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices. 50 A.L.R.3d 1008.

What constitutes "false advertising" of food products or cosmetics within §§ 5 and 12 of the Federal Trade Commission Act (15 USCS §§ 45, 52). 50 A.L.R. Fed. 16.

Am Jur. 3 Am. Jur. 2d, Advertising §§ 3, 14.

32 Am. Jur. 2d, False Pretenses § 97.

CJS. 35 C.J.S., False Pretenses § 30.

Law Reviews. Robinson III, Mississippi Statutory Claims for False Advertising, 20 Miss. C. L. Rev. 165 (Fall, 1999).

§ 97-23-5. Advertising; pulling down advertisements.

If any person shall pull down any advertisement authorized by law, he shall, on conviction thereof, be fined not more than five hundred dollars, or be imprisoned not more than six months.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 1(74); 1857, ch. 64, art. 337; 1871, § 2830; 1880, § 2702; 1892, § 958; Laws, 1906, § 1034; Hemingway's 1917, § 759; Laws, 1930, § 777; Laws, 1942, § 2003.

§ 97-23-7. Cotton; fraudulent packing.

If any person shall fraudulently pack or bale any cotton, he shall, on conviction thereof, be fined not more than five hundred dollars, or imprisoned in the county jail not more than six months, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 12; 1857, ch. 64, art. 65; 1871, § 2720; 1880, § 2762; 1892, § 1011; Laws, 1906, § 1088; Hemingway's 1917, § 814; Laws, 1930, § 837; Laws, 1942, § 2063.

Cross References — Regulation of cotton gins, see §§ 75-41-1 et seq.

§ 97-23-9. Cotton; seed-cotton not sold at night.

Any person who shall buy, sell, or exchange or receive or deliver, in pursuance of any contract of sale or exchange, any cotton in the seed or ginned and not baled, between sunset on one day and sunrise on the next, shall, upon conviction, be punished as for a misdemeanor.

SOURCES: Codes, 1880, § 2763; 1892, § 1012; Laws, 1906, § 1089; Hemingway's 1917, § 815; Laws, 1930, § 838; Laws, 1942, § 2064.

§ 97-23-11. Cotton; scalage; deductions from true weight of bale prohibited.

If any purchaser or weigher of cotton shall deduct from the true weight of any bale or package thereof any amount whatever, as scalage, with intent to diminish the sum to be paid or credited to the seller, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than ten dollars nor more than twenty dollars.

SOURCES: Codes, 1892, § 1296; Laws, 1906, § 1370; Hemingway's 1917, § 1106; Laws, 1930, § 1135; Laws, 1942, § 2372; Laws, 1888, p. 91.

Cross References — Cotton weigher's register of cotton weighed, see § 75-41-3.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-23-13. Cotton; scalage; purchasers of cotton to account for actual weight.

If any purchaser of cotton shall fail to account to the seller for the actual weight of the cotton bought, except where the amount of the deduction is agreed upon between them, or adjudged by a disinterested person for them, he shall be guilty of a misdemeanor, and, on conviction, shall be punished as prescribed in the last section.

SOURCES: Codes, 1892, § 1297; Laws, 1906, § 1371; Hemingway's 1917, § 1107; Laws, 1930, § 1136; Laws, 1942, § 2373; Laws, 1888, p. 91.

Cross References — Cotton weigher's register of cotton weighed, see § 75-41-3.

§ 97-23-15. Cottonseed meal; adulterated meal to be branded.

It shall be unlawful for any person or corporation to adulterate any cottonseed meal with hulls, sawdust or anything else, without noting such adulteration in plain and legible characters on each sack, and it shall be unlawful for any person to sell or barter in this state any cottonseed meal adulterated with sawdust or anything else without such adulteration being noted in plain and legible characters on each sack or receptacle thereof. Any person or corporation violating the foregoing provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined in a sum not less than one hundred nor more than one thousand dollars.

SOURCES: Codes, 1906, § 1317; Hemingway's 1917, § 1050; Laws, 1930, § 840; Laws, 1942, § 2066; Laws, 1912, ch. 138.

Cross References — Penalty for violation of commercial fertilizer regulations, see § 75-47-37.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS**1. In general.**

This provision has been held constitutional. *Alcorn Cotton Oil Co. v. State*, 100 Miss. 299, 56 So. 397 (1911).

Code 1906, § 1317, not repealed by Acts 1908, ch. 107 § 14. *Alcorn Cotton Oil Co. v. State*, 100 Miss. 299, 56 So. 397 (1911).

§ 97-23-17. Customers, patrons or clients; right to choose or refuse to serve; penalty for violation.

(1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve. The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

(2) Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this section.

(3) Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

SOURCES: Codes, 1942, § 2046.5; Laws, 1956, ch. 257, §§ 1-3.

Cross References — Disorderly conduct constituting a felony, see § 97-35-3.

JUDICIAL DECISIONS

1. In general.
2. Exclusion because of prior shoplifting incident.

1. In general.

Mississippi, by passage of this section [Code 1942, § 2046.5], merely restated the common law rule allowing restaurateurs to serve whomever they wished. *Adickes v. S.H. Kress & Co.*, 409 F.2d 121 (2d Cir. N.Y. 1968), rev'd on other grounds, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

Where the plaintiff in an action for damages against a variety store can show that the defendant discriminated against her pursuant to a custom, enforced by the state under this section [Code 1942, § 2046.5], of refusing luncheon service to whites in the company of Negroes, she will satisfy the state action requirement of 42 USC § 1983 which provides that any person who "under cover of" state law deprives another of "rights, privileges, or immunities" secured by the constitution and laws, shall be liable to the party injured in an action at law. *Adickes v. S.H. Kress & Co.*, 252 F. Supp. 140 (S.D.N.Y. 1966), aff'd, 409 F.2d 121 (2d Cir. N.Y. 1968), rev'd on other grounds, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

Persons arrested for violating ordinances by parading without a permit, in an antisegregation demonstration, held not entitled to habeas corpus in federal court on ground that mass arrests had so loaded state courts as to deprive them of an adequate remedy under state law. *Brown v. Rayfield*, 320 F.2d 96 (5th Cir.

1963), cert. denied, 375 U.S. 902, 84 S. Ct. 191, 11 L. Ed. 2d 143 (1963).

An action to enjoin enforcement of the statute, the court, in lieu of injunctive relief, declared the rights of complainants to the use of public facilities. *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), aff'd, 313 F.2d 637 (5th Cir. 1963), cert. denied, 375 U.S. 951, 84 S. Ct. 440, 11 L. Ed. 2d 312 (1963).

In an action for an injunction restraining defendants from enforcing or executing subsection (1) of this section [Code 1942, § 2046.5] subsection (7) of Code 1942, § 2056, and § 4065.3, against the plaintiffs by preventing them from using public recreational facilities on an integrated and equal basis solely on the ground of race and color, the federal three-judge statutory court would be dissolved and the case left for decision of a single federal district judge, where it appeared that what plaintiffs actually sought was to attack a pattern or practice rather than the constitutional validity of a statute or actions under it. *Clark v. Thompson*, 204 F. Supp. 30 (S.D. Miss. 1962).

2. Exclusion because of prior shoplifting incident.

Premises liability action was dismissed on summary judgment because newly discovered evidence clearly established a customer's status as a trespasser at the time of her alleged abduction from a store's parking lot where the store was authorized to ban her from the store under Miss. Code Ann. § 97-23-17 after a prior shoplifting incident, the customer failed to show that store breached its duty to a

trespasser, and store was immune from liability pursuant to Miss. Code Ann. § 97-17-103(2) where the customer had committed a criminal trespass under

Miss. Code Ann. § 97-17-97 at the time of the incident. *Bates v. Wal-Mart Stores*, 413 F. Supp. 2d 763 (S.D. Miss. 2006).

RESEARCH REFERENCES

ALR. Trailer park as place of public accommodation within meaning of state civil rights statutes. 70 A.L.R.3d 1142.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages. 89 A.L.R.3d 7.

Propriety of exclusion of persons from horseracing tracks for reasons other than color or race. 90 A.L.R.3d 1361.

Exclusion of one sex from admission to or enjoyment of equal privileges in places of accommodation or entertainment as actionable sex discrimination under state law. 38 A.L.R.4th 339.

Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises. 41 A.L.R.4th 773.

Am Jur. 15 Am. Jur. 2d, Civil Rights §§ 28 et seq.

Lawyers' Edition. Racial discrimination in establishments or public accommodations serving food or furnishing lodging. 26 L. Ed. 2d 835.

Racial discrimination involving recreational facilities. 29 L. Ed. 2d 1028.

§ 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.

If any director, agent, clerk, servant, or officer of any incorporated company, or if any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private person, shall embezzle or fraudulently secrete, conceal, or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods, rights in action, money, or other valuable security, effects, or property of any kind or description which shall have come or been intrusted to his care or possession by virtue of his office, place, or employment, either in mass or otherwise, with a value of Five Hundred Dollars (\$500.00) or more, he shall be guilty of felony embezzlement, and, upon conviction thereof, shall be imprisoned in the Penitentiary not more than ten (10) years, or fined not more than Ten Thousand Dollars (\$10,000.00), or both. If the value of such goods, rights in action, money or other valuable security, effects, or property of any kind is less than Five Hundred Dollars (\$500.00), he shall be guilty of misdemeanor embezzlement, and, upon conviction thereof, shall be imprisoned in the county jail not more than six (6) months, or fined not more than One Thousand Dollars (\$1,000.00), or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(59); 1857, ch. 64, art. 82; 1871, § 2547; 1880, § 2782; 1892, § 1058; Laws, 1906, § 1136; Hemingway's 1917, § 864; Laws, 1930, § 889; Laws, 1942, § 2115; Laws, 2003, ch. 499, § 7, eff from and after July 1, 2003.

Cross References — White-collar crime investigations, see § 7-5-59.

Disqualification of persons convicted of certain crimes to hold office in labor organizations, etc., see § 71-1-49.

Penal laws applicable to operation of credit unions, see § 81-13-71.

False entries and other offenses by state trust company participants, see § 81-27-6.206.

Prohibition against employees of merchants giving away merchandise without merchant's permission, see § 97-23-99.

Embezzlement of railroad tickets, see § 97-25-9.

Limitations of prosecutions generally, see § 99-1-5.

What constitutes a commencement of a prosecution, see § 99-1-7.

Description of property in indictment for embezzlement, see § 99-7-31.

Prosecution of embezzlement, see § 99-11-11.

Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds, see § 99-19-18.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Defenses.
4. Election between charges.
5. Proof.
6. Instructions.
7. Sentencing.
8. Motion for directed verdict.

1. In general.

In her embezzlement prosecution, defendant failed to satisfy the first and third prongs of the four-prong Brady test as she failed to show that the evidence was favorable or that the State even possessed the subject bank records (several banks were involved). Furthermore, there was no proof in the record that would have allowed the appellate court to decide whether the evidence allegedly suppressed was favorable or unfavorable and defendant also failed to satisfy the second prong under the Brady test, as she failed to prove that she did not possess the evidence nor could she obtain it herself with any reasonable diligence. *Montgomery v. State*, 891 So. 2d 179 (Miss. 2004).

Defendant's period of supervised release was not counted toward his time served; therefore, defendant's sentence of three years to serve, seven years suspended, and five years of post release supervision was within the ten years allowable pursuant to the embezzlement statute, Miss. Code Ann. § 97-23-19. *Brown v. State*, 872 So. 2d 96 (Miss. Ct. App. 2004).

As a trial judge clearly had authority via Miss. Code Ann. § 99-19-32 to impose

a fine in addition to the penitentiary sentence imposed under the felony portion of the embezzlement statute, former Miss. Code Ann. § 97-23-19 (which provided for a fine only when being sentenced as a misdemeanor), the trial judge properly rejected the inmate's argument that upon payment of the fine he had completed his misdemeanor sentence and was entitled to release from the prison sentence. *Gulley v. State*, 870 So. 2d 652 (Miss. 2004).

A transaction between a wholesale seller of automobiles and a buyer constituted a sale rather than an entrustment of the automobiles and a subsequent embezzlement thereof where the transaction involved 13 automobiles, 11 of which were paid for after the buyer had taken possession of them and 2 of which were not paid for. *Reed v. State*, 523 So. 2d 62 (Miss. 1988).

Under this section prohibiting embezzlement by an agent, an escrow agent constituted a special agent for both parties to the escrow agreement, and the escrow agent therefore was an agent for one of such parties as alleged in the indictment within the meaning of this section. *Cowart v. State*, 349 So. 2d 506 (Miss. 1977).

When a person, even an agent of the owner, takes possession of property with the unlawful intent to feloniously convert the property to his own use at the time he acquires possession, he is guilty of larceny and not embezzlement. *Mahfouz v. State*, 303 So. 2d 461 (Miss. 1974).

Embezzlement involves wrongful or fraudulent appropriation of another's property. *United States Fid. & Guar. Co. v. Constantin*, 247 Miss. 812, 157 So. 2d 642 (1963).

Conduct of service station operator required to report daily sales, in understating their amount, held embezzlement. *United States Fid. & Guar. Co. v. Constantin*, 247 Miss. 812, 157 So. 2d 642 (1963).

Failure of owner's son-in-law and employee to return automobile with which he had been entrusted, constitutes embezzlement but not larceny. *Peerless Ins. Co. v. St. Laurent*, 247 Miss. 134, 154 So. 2d 135 (1963).

To constitute embezzlement, something must have been done in execution of an intention to appropriate property in the possession of the accused to his own use. *Gradsky v. State*, 243 Miss. 379, 137 So. 2d 820 (1962).

In a prosecution for the theft of certain cattle, defendant's co-indictee, who was the cattle manager and employee of the partnership owning the cattle, but who could only make sales for partnership upon authorization of one of the partners, was a mere caretaker, with custody of the property, so that the offense charged was grand larceny as contrasted with embezzlement. *Mills v. State*, 231 Miss. 641, 97 So. 2d 386 (1957).

Embezzlement is the wrongful appropriation or conversion of property where the original taking was lawful, or with the consent of the owner, while in larceny the taking involves a trespass, and a felonious intent must exist at the time of such taking. *Jackson v. State*, 211 Miss. 828, 52 So. 2d 914 (1951).

This section [Code 1942, § 2115] includes not only trustees, factors, carriers, and bailees of private persons, but those of both artificial and natural persons as corporations. *State v. Journey*, 105 Miss. 516, 62 So. 354 (1913).

"Amount" and "value" synonymous when applied to money. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

2. Indictment.

Indictment charging defendant alleged that she had embezzled property "owned by an individual d/b/a a named engineer-

ing business." At the close of the State's case-in-chief, the trial court properly denied defendant's motion for a directed verdict alleging that the indictment was fatally defective because it failed to identify or prove the identity of the person or entity claiming ownership of the embezzled property; the trial court properly granted the State's motion to amend the indictment to name the "corporation" as the owner of the embezzled property as the matter was one of form, not of substance. *Montgomery v. State*, 891 So. 2d 179 (Miss. 2004).

Indictment, substantially in words of Code, alleging firm of which accused was partner was agent of other partner to handle his money to buy cotton, and that accused by reason of employment as such agent of other partner had in his control \$2,400 of other partner and, prior to a named date in a named county, without consent of owner, embezzled and converted money to accused's use, and fraudulently and feloniously concealed same, held not demurrable as vague and indefinite. *State v. Coltharp*, 176 Miss. 883, 170 So. 285 (1936).

Indictment charging bank clerk had bank's money in his possession and embezzled same, not demurrable. *Davis v. State*, 108 Miss. 710, 67 So. 178 (1915), error overruled, 67 So. 662 (Miss. 1915).

Indictment charging embezzlement and conversion of reel of films held sufficient. *State v. Journey*, 105 Miss. 516, 62 So. 354 (1913).

Indictment must set out extrinsic facts necessary with writing to constitute forgery. *Griffin v. State*, 96 Miss. 309, 51 So. 466 (1909); *State v. Chapman*, 103 Miss. 658, 60 So. 722 (1913).

No distinction between words "care" and "possession" and use of either sufficient in indictment for embezzlement. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

Indictment not objectionable for failure to charge from whom the money under defendant's care was received. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

Indictment charging embezzlement by a bank cashier of money belonging to the bank, in the language of the statute, was sufficient. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

Form of indictment. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

3. Defenses.

Restitution of money converted does not preclude conviction for embezzlement. *Sherman v. State*, 234 Miss. 775, 108 So. 2d 205 (1959).

Agent's right to a commission out of the money collected does not prevent the conversion thereof to his own use from being embezzlement. *Sherman v. State*, 234 Miss. 775, 108 So. 2d 205 (1959).

In prosecution of bank cashier for embezzlement of \$500.00 held to be no defense that he afterwards deposited \$504.00 in view of the fact that his account was overdrawn. *Richberger v. State*, 90 Miss. 806, 44 So. 772 (1907).

4. Election between charges.

In prosecution for embezzlement of \$1,311.00 committed systematically at various times, action of district attorney securing instruction that defendant was guilty if he feloniously embezzled said money "to the amount of \$25.00," was not an election to stand on one item. *Davis v. State*, 108 Miss. 710, 67 So. 178 (1915), error overruled, 67 So. 662 (Miss. 1915).

Motion to compel state to elect on which peculiar item it would ask a conviction was properly overruled. *Davis v. State*, 108 Miss. 710, 67 So. 178 (1915), error overruled, 67 So. 662 (Miss. 1915).

Where every act of embezzlement charged is proven, requiring state to elect on which act it would rely for conviction not reversible error. *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. Ann. Cas. 776 (1907).

State not required to elect on which act of embezzlement it will rely for conviction. *Starling v. State*, 90 Miss. 255, 43 So. 952, 13 Am. Ann. Cas. 776 (1907).

5. Proof.

Defendant was properly convicted of embezzlement for converting casino money entrusted to him as a casino employee to his own personal use. Casino employees testified that defendant began his shift with \$ 150,000 in his drawer, he left his station with six or seven bundles of one hundred dollar bills, he entered the restroom near his station with the money

in a plastic bag, and a shortage of \$ 80,000 was discovered when his cash drawer was subsequently opened. *Bright v. State*, 894 So. 2d 590 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Driver for a customer (and an accomplice), testified to placing two \$100 bills in defendant's pocket, and that defendant, a supervisor for the furniture company, then loaded the unauthorized furniture onto the driver's truck, and the evidence established that as the driver tried to leave, the security guard for the furniture company found the furniture was not properly tagged, and an officer then recovered \$100 bills from defendant, consistent with the driver's story; consequently, there was evidence in the record that was sufficient to support defendant's conviction for embezzlement. *Jones v. State*, 872 So. 2d 53 (Miss. Ct. App. 2003).

Evidence was sufficient to support a conviction where there was testimony that (1) the defendant took a lawnmower with permission from the victim for the purpose of repairing it, (2) approximately three to four days after he picked up the lawnmower, he pawned it for \$150, and (3) the defendant only told the manager of the pawn shop that the lawnmower was not his after the police placed a hold on the lawnmower. *Bishop v. State*, 755 So. 2d 1269 (Miss. Ct. App. 2000).

In a prosecution of a plant manager indicted for embezzling about 300 shirts belonging to a named corporation, of which defendant was an agent, clerk, servant, or officer, wherein defendant contended that a corporation other than the one named in the indictment was the owner of the shirts and his employer, best evidence rule did not preclude use of witness testimony to establish the status of the corporation set forth in the indictment. *Bunkley v. State*, 495 So. 2d 1 (Miss. 1986).

The prosecution failed to meet its burden of proof that an escrow agent embezzled funds from the escrow account where, even though the escrow agent drew two checks on the escrow account for the purchase of an automobile, the prosecution offered no proof for whom the automobile was purchased, no title certificate was introduced, and no testimony was pre-

sented that the automobile was purchased in defendant's name. *Cowart v. State*, 349 So. 2d 506 (Miss. 1977).

An agreement under which a service station business was the defendant's to be run as he saw fit, and the alleged victim of embezzlement would sell gasoline to the defendant at wholesale price, and the defendant would pay the alleged victim promptly each week when billed, created merely a debtor-creditor relationship rather than an agency, and the defendant who failed to make good on 3 checks made in payment of petroleum products sold to him by the alleged embezzlement victim, but returned because of insufficient funds, was not guilty of embezzlement, the element of agency or fiduciary relationship not having been established. *Fairchild v. State*, 258 So. 2d 254 (Miss. 1972).

In a prosecution for embezzlement from a partnership testimony of defendant's wife as to a statement made in her presence to the defendant by the wife of one of the partners to the effect that they were fixing to frame the defendant was properly excluded as hearsay and was incompetent without the partner's consenting thereto. *Barry v. State*, 187 Miss. 221, 192 So. 841 (1940).

Permitting the wife of a partner in a prosecution for embezzlement of funds of the partnership by the defendant employed as a salesman of such partnership to contradict defendant's proffered evidence that the wife made a statement that they were fixing to frame the defendant, which evidence itself was excluded as hearsay, was highly prejudicial, since it is not permissible to contradict a witness about an immaterial matter. *Barry v. State*, 187 Miss. 221, 192 So. 841 (1940).

It was reversible error in a prosecution of a salesman for embezzlement of the funds of his employer, a partnership, to exclude the testimony of its customers to the effect that after defendant's alleged embezzlement, a representative of the partnership presented statements to such witnesses, that they informed the representatives that they had paid their bills by check, and that upon rechecking the representatives admitted that their bills had been paid. *Barry v. State*, 187 Miss. 221, 192 So. 841 (1940).

Fiduciary relation must be proved. *Lawson v. State*, 125 Miss. 754, 88 So. 325 (1921).

Conviction cannot be sustained, where no conversion was shown. *Bell v. State*, 110 Miss. 430, 70 So. 456 (1916).

Cashier could not be convicted of embezzling funds in joint custody of himself and another in absence of evidence that he was the one who misappropriated them. *Clark v. State*, 109 Miss. 737, 69 So. 497 (1915).

Evidence of the de facto existence of bank and performance of its function as such constituted sufficient proof of its corporate existence. *Davis v. State*, 108 Miss. 710, 67 So. 178 (1915), error overruled, 67 So. 662 (Miss. 1915).

Indictment for embezzling funds belonging to corporation not sustained by proof that the funds belonged to a partnership. *Hampton v. State*, 99 Miss. 176, 54 So. 722 (1911).

Defendants not guilty of embezzlement, where it was not shown they collected premiums they were alleged to have embezzled. *State v. Russell*, 98 Miss. 64, 53 So. 954 (1911).

6. Instructions.

In her embezzlement trial, defendant's proffered instruction stated, in part, that good character could in itself be sufficient to generate in the jurors' minds reasonable doubt as to the guilt of defendant so as to require an acquittal, although without it the other evidence would be convincing of guilt. The instruction would have been an improper comment upon the weight of the testimony and the trial court did not err when it refused same. *Montgomery v. State*, 891 So. 2d 179 (Miss. 2004).

Instructions in a prosecution of a salesman for embezzlement of the funds collected on behalf of a partnership by whom he was employed to the effect that the jury might convict him if they found beyond a reasonable doubt that he had embezzled all or any part, exceeding \$25, of the funds alleged to have been embezzled, were erroneous and prejudicial, in that such instructions would permit the individual insurers to find him guilty of embezzlement of any one of numerous items without there being a unanimous agreement

as to any one particular item. *Barry v. State*, 187 Miss. 221, 192 So. 841 (1940).

A requested instruction that even if the jury should find that the books and accounts of the partnership, whose funds defendant was alleged to have embezzled, showed less credit to the account of its customers than were actually paid to the defendant, the jury could not convict the defendant unless it believed from the evidence beyond a reasonable doubt that the defendant himself embezzled money belonging to the partnership, should have been given. *Barry v. State*, 187 Miss. 221, 192 So. 841 (1940).

Instruction that jury should try case on evidence and not on statement of attorney, if error, was harmless. *Davis v. State*, 108 Miss. 710, 67 So. 178 (1915), error overruled, 67 So. 662 (Miss. 1915).

Instruction that a mere failure on defendant's part without explanation, to turn over to the express company the funds in his hands belonging to it, established guilt, was erroneous. *Hampton v. State*, 99 Miss. 176, 54 So. 722 (1911).

7. Sentencing.

Where defendant was convicted of embezzling \$ 80,000 from the casino where he worked, his sentence of 10 years was within the statutory range. The trial court properly exercised its discretion in sen-

tencing defendant. *Bright v. State*, 894 So. 2d 590 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

8. Motion for directed verdict.

Trial court erred by denying defendant's motion for a directed verdict as there was insufficient evidence to find that defendant had embezzled funds from the church deacon under Miss. Code Ann. § 97-23-19; the deacon had no ownership rights in any portion of the embezzled funds and defendant should have been charged with larceny under Miss. Code Ann. § 97-17-4. *Coleman v. State*, — So. 2d —, 2005 Miss. App. LEXIS 795 (Miss. Ct. App. Nov. 1, 2005).

Trial court did not commit reversible error in denying defendant's motion for directed verdict and motion for a new trial on the ground that the offense she allegedly committed constituted larceny and not embezzlement. Defendant, who the evidence showed took \$15,000 from her employer by writing duplicate checks and depositing some checks in her own account, was in charge of running the day-to-day operations, she was the office manager and record keeper and was entrusted to write checks on behalf of the employer, make deposits and reconcile the bank statements; it was a classic case of embezzlement, *Montgomery v. State*, 891 So. 2d 179 (Miss. 2004).

RESEARCH REFERENCES

ALR. Nature of property or rights other than tangible chattels which may be subject of conversion. 44 A.L.R.2d 927.

Embezzlement by independent collector or collection agency working on commission or percentage. 56 A.L.R.2d 1156.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest. 83 A.L.R.2d 791.

Drawing of check on bank account of principal or employer payable to accused's creditor as constituting embezzlement. 88 A.L.R.2d 688.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes. 77 A.L.R.3d 689.

Validity and construction of statute providing criminal penalties for failure of contractor who has received payment from owner to pay laborers or materialmen. 78 A.L.R.3d 563.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner. 82 A.L.R.3d 822.

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 29A C.J.S., Embezzlement §§ 17 et seq.

§ 97-23-21. Embezzlement; evidence of debt negotiable by delivery but not delivered.

Every officer, clerk, agent, or other person mentioned in Section 97-23-19 who shall embezzle or fraudulently secrete, conceal, or convert to his own use, by putting the same in circulation, any evidence of debt negotiable by delivery, but not delivered or issued as a valid instrument, shall be guilty of embezzlement, and punished, on conviction, as provided in the last section.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(60); 1857, ch. 64, art. 83; 1871, § 2548; 1880, § 2783; 1892, § 1059; Laws, 1906, § 1137; Hemingway's 1917, § 865; Laws, 1930, § 890; Laws, 1942, § 2116.

Cross References — White-collar crime investigations, see § 7-5-59.

Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.

An indictment charging embezzlement of gasoline credit cards is not void for failing to state the value of the cards, but where the value of the embezzled property

is neither stated nor proved the offense is punishable as petit larceny and not as a felony. *Bell v. State*, 251 Miss. 511, 170 So. 2d 428 (1965).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 1 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A C.J.S., Embezzlement §§ 17 et seq.

§ 97-23-23. Embezzlement; buying or receiving embezzled goods.

Every person who shall buy or in any way receive any money, goods, rights in action, or other valuable security, effects, or property, knowing the same to have been embezzled, taken or secreted contrary to law, on conviction thereof, shall suffer the penalty provided in Section 97-17-70, for receiving stolen property.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 4(61); 1857, ch. 64, art. 84; 1871, § 2549; 1880, § 2784; 1892, § 1060; Laws, 1906, § 1138; Hemingway's 1917, § 866; Laws, 1930, § 891; Laws, 1942, § 2117; Laws, 1993, ch. 359, § 3, eff from and after July 1, 1993.

Cross References — White-collar crime investigations, see § 7-5-59.

Search warrant for embezzled goods, see § 99-15-11.

JUDICIAL DECISIONS

1. In general.

Defendant securing from cashier of payee bank, where his draft was dishonored, another draft drawn by it on a third

bank payable to bank which cashed first draft held not guilty under this section [Code 1942, § 2117]. *Lamb v. State*, 118 Miss. 693, 79 So. 849 (1918).

RESEARCH REFERENCES

Am Jur. 66 Am. Jur. 2d, Receiving and Transporting Stolen Property §§ 1 et seq.
2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

CJS. 29A C.J.S., Embezzlement § 13.

§ 97-23-25. Embezzlement; property held in trust or received on contract.

If any person shall fraudulently appropriate personal property or money which has been delivered to him on deposit, or to be carried or repaired, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, on conviction, he shall be punished by imprisonment in the penitentiary not more than ten years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year, or either.

SOURCES: Codes, 1880, § 2785; 1892, § 1061; Laws, 1906, § 1139; Hemingway's 1917, § 867; Laws, 1930, § 892; Laws, 1942, § 2118.

Cross References — White-collar crime investigations, see § 7-5-59.
Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.
2. Indictment, generally.
3. —Incorrect date or failure to state date.
4. Admissibility of Evidence.

1. In general.

State proved beyond a reasonable doubt that: (1) a fiduciary relationship existed between defendant (a car salesman), and the dealership; (2) money was paid by a customer to defendant in the context of that fiduciary relationship; and (3) defendant converted said monies to his own use. Further, although it was not an action in contract, the jury could have reasonably determined that a contract existed under § 75-2-201 and that defendant was obligated to deliver the subject down payment to the dealership;

therefore, the trial court was correct in denying defendant's motions for directed verdict and judgment notwithstanding the verdict, and request for a peremptory instruction. *Bell v. State*, 910 So. 2d 640 (Miss. Ct. App. 2005).

Person who retains possession of rental automobile obtained through use of false name on rental agreement may be convicted of embezzlement. *Ruffin v. State*, 482 So. 2d 231 (Miss. 1986).

Where the defendant received money pursuant to a contract under which he was required to build a home for two individuals, the money received by the defendant belonged to him, and notwithstanding his failure to complete the construction of the home he could not be properly indicted and convicted for embez-

zlement under section 97-23-25. *Shelley v. State*, 447 So. 2d 124 (Miss. 1984).

In a prosecution charging an insurance agent with embezzling money given him in trust for the purpose of securing fire insurance on a dwelling, it was reversible error to admit evidence that defendant's co-employee had used a postage meter to backdate an envelope addressed to the company from which the fire insurance was sought where the indictment did not charge a conspiracy and there was no proof thereof; the backdating was not done in the presence of the agent and there was no testimony or evidence to show that the backdating was done at defendant's direction or that he had knowledge of the act. *McBride v. State*, 366 So. 2d 666 (Miss. 1979).

Even though the sentence under this section was suspended, once the court elected to sentence the defendant to imprisonment in the state penitentiary, it could not under the guise of a condition of the suspension impose the additional sentence of paying a \$1,000 fine. *Bass v. State*, 328 So. 2d 665 (Miss. 1976).

When the words "any person" at the beginning of this section [Code 1942 § 2118] are considered in relation to the remainder of the words of the section, it is apparent from the entirety that the type of possession referred to is none other than a trust, and it necessarily follows that a trust or fiduciary relationship must be embodied in the charge of the indictment. *Grantham v. State*, 284 So. 2d 523 (Miss. 1973).

That a cattle purchaser had taken cattle purchased from the premises of the seller without paying for them as allegedly required by the contract, the purchaser testifying that he was buying on an open account as he had done in the past, totally failed to prove a wrongful conversion or appropriation of another's property lawfully possessed by the defendant, but proved only that the defendant forced his credit upon the association, not commendable perhaps, but nevertheless not constituting the crime of embezzlement. *Grantham v. State*, 284 So. 2d 523 (Miss. 1973).

2. Indictment, generally.

Defendant was not properly indicted and convicted under this section, and his

conviction of embezzlement under that section would be reversed, where he and the alleged victims entered into a clearly written and executed contract for the construction of a house, where the victims, who were intelligent people as evidence by their employment, freely gave their money completely to defendant in four different installments even though no work on the house was in progress after the second installment, and where the money belonged to defendant once he received it even though he did not produce the proceeds, in that those proceeds were for the completion of the house under the civil contract. *Shelley v. State*, 447 So. 2d 124 (Miss. 1984).

An indictment for the crime of embezzlement must contain the words of the statute or use their equivalent. *Grantham v. State*, 284 So. 2d 523 (Miss. 1973).

In prosecution for embezzlement of quantity of beer, the indictment was good in that it sufficiently described the contract under which defendant obtained delivery of beer, and it sufficiently informed the accused of the nature of the accusation and the description of the property was sufficient and it sufficiently informed the accused of acts made unlawful by statute with which he was charged. *Davis v. State*, 228 Miss. 441, 87 So. 2d 900 (1956), cert. denied, 352 U.S. 981, 77 S. Ct. 381, 1 L. Ed. 2d 365 (1957).

Indictment for embezzlement does not have to set forth evidence, but only enough to inform defendant sufficiently of charge therein laid against him. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

3. —Incorrect date or failure to state date.

Indictment for embezzlement under this section [Code 1942, § 2118], is not invalid because it charges that the alleged crime was committed on certain date and indictment was returned on that same date in view of Code 1942, § 2451, specifically providing that where time is not of essence of offense stating of time imperfectly will not make indictment insufficient. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

Indictment for embezzlement of money received on sale of automobile by agent of seller is not demurrable for failure to state

date of alleged sale by agent or name of person to whom automobile was alleged to have been sold. *State v. May*, 208 Miss. 862, 45 So. 2d 728 (1950).

4. Admissibility of Evidence.

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's hand-

writing, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). *Bell v. State*, 910 So. 2d 640 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

ALR. Embezzlement by independent collector or collection agency working on commission or percentage. 56 A.L.R.2d 1156.

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 20 et seq.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

§ 97-23-27. Embezzlement; property borrowed or hired.

The fraudulent appropriation of certain specific property by one to whom it has been delivered on a contract or loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time by a disposition not authorized by the contract, shall be an offense within the meaning of Section 97-23-25 and shall be punished as therein prescribed.

SOURCES: Codes, 1880, § 2786; 1892, § 1062; Laws, 1906, § 1140; Hemingway's 1917, § 868; Laws, 1930, § 893; Laws, 1942, § 2119.

Cross References — White-collar crime investigations, see § 7-5-59.

Description of property in indictment for embezzlement, see § 99-7-31.

JUDICIAL DECISIONS

1. In general.

Indictment for embezzling automobile hired from rental agency, not averring

place and time of redelivery, held insufficient. *Touchstone v. State*, 159 Miss. 356, 132 So. 340 (1931).

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Embezzlement §§ 20 et seq.

CJS. 29A C.J.S., Embezzlement § 13.

2 Am. Jur. Trials, Investigating Particular Crimes § 22 (embezzlement).

§ 97-23-29. Enticing away servant or lessee without written consent; provisions applicable to minors.

If any person shall wilfully interfere with, entice away, or who shall knowingly employ, or who shall in any manner induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord in writing signed by said landlord or employer under or with whom said laborer had first contracted, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and in addition shall be liable to the employer or landlord for all advances made by him to said renter or laborer by virtue of his contract with said renter or laborer, and for all damages which he may have sustained by reason thereof. The provisions of this section shall apply to minors under contract made by a parent or guardian.

SOURCES: Codes, 1892, § 1068; Laws, 1906, § 1146; Hemingway's 1917, § 874; Laws, 1930, § 900; Laws, 1942, § 2129; Laws, 1924, ch. 160; Laws, 1928, ch. 292.

Cross References — Proceedings when tenants desert premises, see § 89-7-49. Enticing children for employment, see § 97-5-7.

JUDICIAL DECISIONS

1. In general.
2. Affidavit.
3. Venue of prosecution.
4. When statute violated.
5. —Contracting with one who has abandoned former relation.
6. Actions for damages.

1. In general.

This section [Code 1942, § 2129] must be construed consistently with Const. 1890, § 15, and 13th Amend. U.S. Const. *Hill v. Duckworth*, 155 Miss. 484, 124 So. 641 (1929).

Person under contract to make crop for another is "laborer" within the law forbidding interference with employment. *Armstrong v. Bishop*, 151 Miss. 353, 117 So. 512 (1928).

Law forbidding interference with employment must be strictly construed in favor of liberty of contract and person. *Thompson v. Box*, 147 Miss. 1, 112 So. 597 (1927).

This section [Code 1942, § 2129] is a legitimate exercise of the police power of the state. *State v. Hurdle*, 113 Miss. 736, 74 So. 681 (1917).

Statute [Code 1942, § 2129] is highly

penal, and the plaintiff, to recover, must be without fault. *Mahoney v. McNeil*, 77 Miss. 406, 27 So. 528 (1900).

At common law if any person hired or retained another's servant, that other had an action for damages against both the hirer or retainer and the servant. This statute enforces this common-law right. *Hoole v. Dorroh*, 75 Miss. 257, 22 So. 829 (1897).

This statute [Code 1942, § 2129] is not class legislation. *Hoole v. Dorroh*, 75 Miss. 257, 22 So. 829 (1897).

This statute [Code 1942, § 2129] is not a statute for the collection of debts, and does not embrace debts due to the employer or landlord. *Chrestman v. Russell*, 73 Miss. 452, 18 So. 656 (1895).

2. Affidavit.

An affidavit alleging the enticing away and employment of a person who had contracted with another, charges no offense, where it omits to state that the person enticed away was a laborer, or that the matter complained of was without the consent of the employer. *Jackson v. State*, 13 So. 935 (Miss. 1893).

3. Venue of prosecution.

In a prosecution under this section [Code 1942, § 2129] venue must be laid at the place of the second hiring. *King v. State*, 83 Miss. 375, 35 So. 691 (1904).

4. When statute violated.

Understanding that former employer had released employee held insufficient, within law requiring employer's consent in writing before another can employ. *Armstrong v. Bishop*, 151 Miss. 353, 117 So. 512 (1928).

In determining status of person under contract to make a crop, date of expiration of contract is implied as that necessary to make a crop. *Armstrong v. Bishop*, 151 Miss. 353, 117 So. 512 (1928).

In order to recover for a violation of this section [Code 1942, § 2129] the employment must have been made with actual knowledge of the existing contract. *Beale v. Yazoo Yarn Mill*, 125 Miss. 807, 88 So. 411 (1921); *Shilling v. State*, 143 Miss. 709, 109 So. 737 (1926).

Instruction on good faith as defense to charge of wrongful hiring held erroneously refused. *Beale v. Yazoo Yarn Mill*, 125 Miss. 807, 88 So. 411 (1921).

Defendant enticing laborer away from indefinite employment did not violate statute [Code 1942, § 2129]. *Goolsby v. State*, 98 Miss. 702, 54 So. 155 (1911).

Where one who was defendant's tenant in 1905 contracted with plaintiff to work land for him in 1906, but never went on the land and refused to perform his contract, and defendant did nothing to prevent him, defendant not become liable by permitting the tenant to occupy another piece of land in the spring of 1906. *Alford v. Pegues*, 92 Miss. 558, 46 So. 76 (1908).

Where defendant rented land to one without knowing that he was plaintiff's renter, and upon being so informed tried to get the renter to go back to plaintiff, defendant is not liable. *Sneed v. Gilman*, 44 So. 830 (Miss. 1907).

Where the servant was arrested and agreed to return to his employer if the case was dismissed and then was seized and carried off by defendant, a conviction was proper. *Gregory v. State*, 42 So. 168 (Miss. 1906).

Failure of landlord to furnish tenant meat and clothing insufficient to justify

tenant in abandoning his lease, unless landlord under legal obligation to do so, and defendant employing him knowing of lease, was liable. *Petty v. Leggett*, 38 So. 549 (Miss. 1905).

Prior to the addition of the last sentence of the above section [Code 1942, § 2129], it was held that enticing away of an infant servant whose mother had made a contract for her services to another for a year is not an offense. *State v. Richardson*, 86 Miss. 439, 38 So. 497 (1905).

This section [Code 1942, § 2129] is not violated by a tenant who merely obtains advances from his landlord on pretense of going to certain places on business, and who leaves the premises and does not return. *Ex parte Harris*, 85 Miss. 4, 37 So. 505 (1904).

Under this section [Code 1942, § 2129] one cannot be convicted who has never actually entered upon the service, or gone upon the farm of his alleged employer. *Hendricks v. State*, 79 Miss. 368, 30 So. 708 (1901).

A laborer who has contracted in writing to work on shares who has never actually entered upon the service cannot be convicted under § 1068, Code of 1892, even as amended by the laws of 1900 (p. 140) (Code 1906, § 1146). *Hendricks v. State*, 79 Miss. 368, 30 So. 708 (1901).

In an action under this section [Code 1942, § 2129] the defendant is liable where he employs a laborer before the expiration of his term of service without the consent of his employer or landlord, whether the contract with the landlord has been breached or not. *Armistead v. Chatters*, 71 Miss. 509, 15 So. 39 (1894).

5. —Contracting with one who has abandoned former relation.

Laws 1928, ch. 292 has no application to employment of tenant theretofore abandoning contract. *Hill v. Duckworth*, 155 Miss. 484, 124 So. 641 (1929).

Third person may lawfully employ laborer or renter theretofore breaching contract without incurring liability to original landlord. *Hill v. Duckworth*, 155 Miss. 484, 124 So. 641 (1929).

Conviction cannot be had for enticing away, or employing laborer or renter already having abandoned his contract; evidence held insufficient to sustain conviction.

tion. *Waldrup v. State*, 154 Miss. 646, 122 So. 771 (1929).

Negro woman negotiating with another before harvesting crops had not left employment within law forbidding interference therewith. *Armstrong v. Bishop*, 151 Miss. 353, 117 So. 512 (1928).

Abandonment by a laborer of former contract authorizes re-employment by another. *Thompson v. Box*, 147 Miss. 1, 112 So. 597 (1927).

Person contracting with laborers, believing they had abandoned original contract, held not liable for statutory penalty. *Thompson v. Box*, 147 Miss. 1, 112 So. 597 (1927).

Mere hiring of tenant who has broken his contract not a violation of this section [Code 1942, § 2129]. *Evans v. State*, 121 Miss. 252, 83 So. 167 (1919).

Laws of 1900, ch. 102, does not compel a renter to fulfill the contract, except by penalties for abandonment, nor prevent him from leasing land from another. *Sneed v. Gilman*, 44 So. 830 (Miss. 1907).

Whether the cause for which the tenant abandoned the premises was sufficient was a question of law, and not a question of fact for the jury. *Petty v. Leggett*, 38 So. 549 (Miss. 1905).

The mere employment of a servant after he had left his former master is not sufficient to sustain a conviction under the statute. *Jackson v. State*, 16 So. 299 (Miss. 1894).

6. Actions for damages.

An action to recover damages for inducing an automobile dealership to violate the terms of its premises lease, although

erroneously brought under this section, which was enacted to protect the farmer-sharecropper relationship, was nevertheless proper since the declaration set out sufficient allegations to charge a common law cause of action based on willful interference with contract; however, an award of punitive damages was improper, since only compensatory damages are authorized by this section and since the parties had confined recovery to that permitted hereunder. *Cranford v. Shelton*, 378 So. 2d 652 (Miss. 1980).

Right of the landlord to sue for damages not dependent on conviction of the crime of enticing away. *Wheeler v. Pannell*, 96 Miss. 382, 51 So. 598 (1910).

Landlord suing one for enticing away his tenant for advances made tenant on faith of the contract, may not recover from advances made to the tenant for completion of the crop under a prior contract of letting. *Wheeler v. Pannell*, 96 Miss. 382, 51 So. 598 (1910).

The laws of 1900 (p. 140) repealed the double damages allowed by this section [Code 1942, § 2129] under the operation of § 61 of the Constitution of 1890. *Nations v. Lovejoy*, 80 Miss. 401, 31 So. 811 (1902).

A plaintiff in a suit under § 1068, Code 1892, could not recover double damages when, pending his suit, another statute (Laws 1900, p. 140) had limited his recovery to a less amount. *Nations v. Lovejoy*, 80 Miss. 401, 31 So. 811 (1902).

Plaintiff suing under this statute must show damages. *Hoole v. Dorroh*, 75 Miss. 257, 22 So. 829 (1897).

RESEARCH REFERENCES

ALR. Punitive damages for interference with contract or business relationship. 44 A.L.R.4th 1078.

Am Jur. 45 Am. Jur. 2d, Interference §§ 44 et seq.

17 Am. Jur. Proof of Facts 2d 517, Tortious Interference with at-will Business Relationship.

25 Am. Jur. Proof of Facts 2d 725, Tortious Deprivation of Former Employer's Customers and Employees.

41 Am. Jur. Proof of Facts 2d 393, Tor-

tious Interference with Real Estate Broker's Business Relationship with Seller.

50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

CJS. 30 C.J.S., Employer-Employee Relationship §§ 259 et seq.

Law Reviews. Walker, Common Law Protection of Economic Expectancies: "Business Torts" in Mississippi. 50 Miss. L. J. 335, March 1979.

§ 97-23-31. Insurance; acting as agent for company not complying with law.

Any person who shall do or perform any of the acts or things mentioned in the laws governing insurance companies, the doing or performing of which is there provided, shall constitute such person the agent of the company, for any insurance company not organized under or incorporated by the laws of this state, without such company having first complied with the requirements of the laws of this state or having received the certificate of authority from the commissioner of insurance, as required by law, shall be guilty of a misdemeanor, and, on conviction, be fined five hundred dollars and be imprisoned in the county jail not exceeding twelve months, or by either; but the penalties of this section shall not apply to an adjuster of a loss, if the insurance could not have been obtained from a company which had complied with the laws of this state, or if the insurance was given at a rate fully one-half of one per centum less than that charged by such companies.

SOURCES: Codes, 1857, ch. 35, art. 63; 1871, § 2453; 1880, § 1086; 1892, § 1170; Laws, 1906, § 1248; Hemingway's 1917, § 978; Laws, 1930, § 1006; Laws, 1942, § 2236.

Cross References — Agents of nonadmitted insurance companies, see §§ 83-21-17 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS**1. In general.**

Mississippi statutory scheme pertaining to insurance carriers and agents, embodies in §§ 83-5-7, 83-17-103[Repealed], 83-17-105[Repealed], and 97-23-31, allegedly violated by defendants, met 3 criteria for laws to regulate "business of insurance," being (1) whether practice has effect of transferring or spreading a policy holder's risk, (2) whether practice is an integral part of policy relationship between insurer and insured, and (3) whether practice is limited to entities within insurance industry; therefore there was possibility of a valid state law claim based on Mississippi insurance regulatory statutes and/or fraud in the inducement against one of defendants who was insurance agent; accordingly, defendant was not nominal or fraudulently joined party for purposes of removal jurisdiction. *Smith v. Arkansas Blue Cross & Blue Shield*, 781 F. Supp. 1159 (N.D. Miss. 1991).

One transmitting application, receiving and delivering policy, and collecting and transmitting premium to a broker was an agent within statute, though not authorized to solicit business. *Cain v. State*, 103 Miss. 701, 60 So. 731 (1913).

Indictment charging defendant "did unlawfully assume to act as an insurance agent" was fatally defective for failure to specify particular unlawful act charged. *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906).

Testimony of state insurance commissioner and certified copy of records of his office was competent and conclusive on question of whether company for which defendant was soliciting insurance had been permitted to do business in state. *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906).

The statute is valid and not in conflict with either the state or federal Constitution. *Moses v. State*, 65 Miss. 56, 3 So. 140 (1887).

§ 97-23-33. Interference with exercise of lawful trade or calling by printing or distributing of matter, etc.

If any person shall wilfully and maliciously print, circulate or distribute, cause to be printed, circulated or distributed, or assist in printing, circulating or distributing, in any form whatever, any matter, the purpose and design of the contents thereof being to wilfully and maliciously interfere with, or prevent another from exercising a lawful trade or calling, or engaging in a lawful business, or engaging in lawful use and enjoyment of his property, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than six (6) months in the county jail or be fined not more than five hundred dollars (\$500.00) or both.

SOURCES: Codes, 1942, § 2236.5; Laws, 1964, ch. 344, eff from and after passage (approved March 3, 1964).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Liability of one who induces or causes third person not to enter into or continue a business relation with another. 9 A.L.R.2d 228.

Liability for interference with at will business relationship. 5 A.L.R.4th 9.

Am Jur. 45 Am. Jur. 2d, Interference §§ 47 et seq.

18 Am. Jur. Proof of Facts 2d 265, Unfair Competition — Appropriation of Com-

petitor's Advertising Matter, Methods, or Slogan.

41 Am. Jur. Proof of Facts 2d 393, Tortious Interference with Real Estate Broker's Business Relationship with Seller.

50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

§ 97-23-35. Newspapers and periodicals to print names of their editors.

Newspapers and periodicals published in this state, for regular distribution through the mails or otherwise, shall print at the top of the editorial page of said publication the full name of its chief editor, the assistant editor, if any, or the person or persons directly responsible for the editorial utterances of said publication. The owner or owners of any newspaper or periodical published in this state in violation of this section, shall be guilty of a misdemeanor and upon conviction, shall be fined not more than twenty-five dollars for each offense.

SOURCES: Codes, Hemingway's 1917, §§ 1023, 1024; Laws, 1930, § 1055; Laws, 1942, § 2287; Laws, 1912, ch. 156.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-23-37. Oleomargarine and other imitation food to be branded.

A person who sells or manufactures, exposes or offers for sale as an article of food, any oleomargarine or other substance in imitation of any article of food, without disclosing the imitation by a suitable and plainly visible mark or brand, indicating and naming what the substance really is, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding one month, or both.

SOURCES: Codes, 1892, § 1242; Laws, 1906, § 1316; Hemingway's 1917, § 1049; Laws, 1930, § 1081; Laws, 1942, § 2314; Laws, 1892, p. 85.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Federal pre-emption of state food labeling legislation or regulation. 79 A.L.R. Fed. 181.

Validity, under Commerce Clause (Art I, § 8, Cl 3), of state statutes regulating labeling of food. 79 A.L.R. Fed. 246.

Am Jur. 35 Am. Jur. 2d, Food §§ 41 et seq.

CJS. 36A C.J.S., Food §§ 25 et seq.

§ 97-23-39. Preventing employment by force or violence; penalty.

It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or to attempt to prevent any person from engaging in any lawful vocation within this state. Any person guilty of violating this section shall be deemed guilty of a felony and, upon conviction thereof, shall be fined in the sum of not more than five hundred dollars (\$500.00) or imprisoned in the county jail not more than six months, or both, or in the state penitentiary not more than two (2) years.

SOURCES: Codes, 1942, § 2126; Laws, 1942, ch. 323.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Punitive damages for interference with contract or business relationship. 44 A.L.R.4th 1078.

Am Jur. 45 Am. Jur. 2d, Interference §§ 16, 47 et seq.

50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

§ 97-23-41. Preventing employment by force or violence; conspiracy.

It shall be unlawful for any two or more persons to conspire together to use force or violence, or threats thereof, to prevent any person or persons from engaging in any lawful vocation or work in this state, and it shall be unlawful for any two or more persons in furtherance of such conspiracy to assemble or gather together at any place where a labor dispute exists or anywhere in this state for the purpose of carrying such unlawful conspiracy into effect. Any person violating this section, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or imprisonment in the county jail not more than six months, or both, or in the state penitentiary not more than two years.

The term "labor dispute" as used in this section shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

SOURCES: Codes, 1942, §§ 2127, 2128; Laws, 1942, ch. 323.

Cross References — Conspiracy, generally, see § 97-1-1.

Conspiracy for unlawful restraint or boycott of trade or business, see § 97-23-85.

RESEARCH REFERENCES

ALR. Combination of separate plants or units of same employer as single bargaining unit. 12 A.L.R.3d 787.

Multiemployer group as appropriate bargaining unit under Labor Relations Act. 12 A.L.R.3d 805.

State criminal prosecutions of union officer or member for specific physical threats to employer's property or person, in connection with labor dispute — modern cases. 43 A.L.R.4th 1141.

Punitive damages for interference with contract or business relationship. 44 A.L.R.4th 1078.

Am Jur. 50 Am. Jur. Proof of Facts 2d 455, Tortious Interference with Employment Relationship.

CJS. 51 C.J.S., Labor Relations §§ 364 et seq.

§ 97-23-43. Profession; practicing without license.

If any person shall practice as an attorney and counsellor-at-law, or shall practice as a physician or surgeon, or shall practice as a dentist, or shall practice as a pharmacist, without having first been examined and obtained a license as required by law, he shall, on conviction, of the first offense, be punished by a fine of not less than one hundred (\$100.00) dollars or more than two hundred (\$200.00) dollars or by imprisonment in the county jail not less than three months or more than twelve months or both; and such person, upon conviction of the second offense against this section, shall be punished by a fine of not less than two hundred (\$200.00) dollars or more than five hundred (\$500.00) dollars or by imprisonment in the penitentiary not less than one year

or more than two years; and such person, upon conviction of any succeeding offense, shall be punished in the discretion of the court; provided, however, that such punishment shall in no case exceed the payment of a fine of five thousand dollars (\$5,000.00) or imprisonment for five years.

SOURCES: Codes, Hutchinson's § 1848, ch. 26, art. 3(4); 1857, ch. 9, art. 3; 1871, § 2246; 1880, § 2398; 1892, § 1258; Laws, 1906, § 1334; Hemingway's 1917, § 1068; Laws, 1930, § 1099; Laws, 1942, § 2332; Laws, 1932, ch. 270.

Cross References — Failure to procure license required for persons liable for privilege taxes, see § 27-15-215.

Penalty for practicing architecture without certificate, see § 73-1-25.

Unlawful practice of law without license, see § 73-3-55.

Unauthorized practice of law, see § 73-3-55.

Penalties for practicing dentistry illegally, see § 73-9-57.

Unlawful practice of engineering, see § 73-13-39.

Physicians' duty to obtain license, see § 73-25-1.

Penalties for practicing as certified public accountant without license, see § 73-33-13.

Unlicensed practice of profession, generally, see §§ 73-51-1 et seq.

Penalty for failure to obtain boxing or wrestling license, see § 75-75-117.

Insurance agent obtaining license, see § 83-17-5.

JUDICIAL DECISIONS

1. In general.
2. Professions within statute.
3. Indictment.

1. In general.

A statute of this sort does not contravene U. S. Const., amend. 14, but is within the police power of the state. *State v. Tucker*, 102 Miss. 517, 59 So. 826 (1912).

2. Professions within statute.

A chancery clerk who, through the exercise of discretion and the use of her own knowledge and judgment, drew deeds, deeds of trust, bills of sale, and title certificates to real property was not a mere scrivener but was engaged in the unlawful practice of law, and an injunction was properly granted to restrain her from continuing these activities. *Darby v. Mississippi State Bd. of Bar Admissions*, 185 So. 2d 684 (Miss. 1966).

The element of compensation for legal services performed by one not licensed to practice law may be a factor in determining whether specified conduct is unlawful, but it is not controlling, and the character of the service and its relation to the public interest determines its classification, not whether compensation is charged. *Darby*

v. Mississippi State Bd. of Bar Admissions, 185 So. 2d 684 (Miss. 1966).

The prohibition against others than members of the bar of the State of Mississippi from engaging in the practice of law is not for the protection of the lawyer against lay competition, but is for the protection of the public. *Darby v. Mississippi State Bd. of Bar Admissions*, 185 So. 2d 684 (Miss. 1966).

A chiropractor, who, for compensation injected into the body of patients by the use of hypodermic needles vitamins or penicillin for the cure, relief or palliations of the ailments of which the patients were complaining, came within the statutory definition of practicing medicine. *Harris v. State*, 229 Miss. 755, 92 So. 2d 217 (1957).

Sustaining a conviction of a chiropractor, who, for compensation, injected into the body of patients by the use of hypodermic needles vitamins or penicillin for the cure, relief, or palliation of the patient's ailments, of practicing medicine without a license, would not so construe this section [Code 1942, § 2332] and Code 1942, § 8888, as to render them in violation of the constitutional right of a citizen to liberty and pursuit of happiness, or to constitute a restriction upon the right of

private contract. *Harris v. State*, 229 Miss. 755, 92 So. 2d 217 (1957).

Under statute defining practice of medicine, "medicine" need not be drug used in pharmacopoeia or by druggist and physicians, so long as it is a healing agency, sold for profit. *Joyner v. State*, 181 Miss. 245, 179 So. 573, 115 A.L.R. 954 (1938).

Whether liquid used by chiropractor on patient's throat preparatory to inserting needle for application of electricity to diseased tonsils, was medicine or anaesthetic instead of mineral water, held for jury. *Joyner v. State*, 181 Miss. 245, 179 So. 573, 115 A.L.R. 954 (1938).

Offense of practicing medicine without license is not committed by failure to file license in time to prevent it becoming void under a statute [Code 1942, § 8884]

avoiding it unless recorded in 60 days from the date of issuance. *Grady v. State*, 144 Miss. 100, 109 So. 728 (1926).

An osteopath is not within this section [Code 1942, § 2332] nor the Act 1896 (Laws 1896, p. 79; Code 1906, § 3691). *Hayden v. State*, 81 Miss. 291, 33 So. 653, 95 Am. St. R. 471 (1903).

Professional services by a physician who has no license come under this section [Code 1942, § 2332]. *Bohn v. Lowry*, 77 Miss. 424, 27 So. 604 (1900).

3. Indictment.

Indictment charging defendant "did unlawfully practice as a physician...and did not then and there have a license to do so," is sufficient. *State v. Tucker*, 102 Miss. 517, 59 So. 826 (1912).

RESEARCH REFERENCES

ALR. Constitutionality and construction of statutes or regulations prohibiting one who has no license to practice dentistry or medicine from owning, maintaining, or operating an office therefor. 20 A.L.R.2d 808.

Trust company's acts as fiduciary as practice of law. 69 A.L.R.2d 404.

Title examination activities by lending institution, insurance company, or title and abstract company, as illegal practice of law. 85 A.L.R.2d 184.

Practicing medicine, surgery, dentistry, optometry, podiatry, or other healing arts without license as a separate or continuing offense. 99 A.L.R.2d 654.

Sale of books or forms designed to enable layman to achieve legal results without assistance of attorney as unauthorized practice of law. 71 A.L.R.3d 1000.

Recovery back of money paid to unlicensed person required by law to have

occupation or business license or permit to make contract. 74 A.L.R.3d 637.

Layman's assistance to party in divorce proceeding as unauthorized practice of law. 12 A.L.R.4th 656.

Contracts by organizations in business of providing evidence, witness, or research assistance to legal counsel in specific litigation. 15 A.L.R.4th 1255.

Validity and construction of contracts by organizations in business of providing expert witnesses, research assistance, and consultation services to attorneys in specific litigation. 70 A.L.R.5th 513.

What constitutes "unauthorized practice of law" by out-of-state counsel?, 83 A.L.R.5th 497.

Am Jur. 51 Am. Jur. 2d, Licenses and Permits § 72.

CJS. 53 C.J.S., Licenses §§ 125 et seq.

§§ 97-23-45 through 97-23-53. Repealed.

Repealed by Laws, 1988, ch. 556, § 3, eff from and after July 1, 1988.

§ 97-23-45. [Codes, 1942, § 2374-01; Laws, 1958, ch. 268, § 1]

§ 97-23-47. [Codes, 1942, § 2374-02; Laws, 1958, ch. 268, § 2; 1975, ch. 460]

§ 97-23-49. [Codes, 1942, § 2374-03; Laws, 1958, ch. 268, § 3]

§ 97-23-51. [Codes, 1942, § 2374-04; Laws, 1958, ch. 268, § 4]

§ 97-23-53. [Codes, 1942, § 2374-05; Laws, 1958, ch. 268, § 5]

Editor's Note — Former § 97-23-45 was entitled: Shoplifting; elements of the offense. For similar provisions, see § 97-23-93.

Former § 97-23-47 was entitled: Shoplifting; penalties; subsequent offenses. For similar provisions, see § 97-23-93.

Former § 97-23-49 was entitled: Shoplifting; concealment of goods as prima facie evidence of crime. For similar provisions, see § 97-23-93.

Former § 97-23-51 was entitled: Shoplifting; detention of suspect for questioning without incurring civil liability. For similar provisions, see § 97-23-95.

Former § 97-23-53 was entitled: Shoplifting; construction.

§ 97-23-55. Storage battery; unlawful to deface rental battery.

It shall be unlawful for any person to remove or deface or alter or destroy, or cause to be removed or defaced or altered or destroyed the word "rental" or any letter, word, mark or character, printed or painted or stamped or branded upon or attached to, any electric storage battery which has been so placed upon or attached to such electric storage battery to identify the same as belonging to or being the property of another.

SOURCES: Codes, 1930, § 1140; Laws, 1942, § 2377; Laws, 1926, ch. 166.

Cross References — Penalty for violation of this section, see § 97-23-61.

§ 97-23-57. Storage battery; unlawful to sell or give away rental battery.

It shall be unlawful for any person to sell, dispose of, deliver or give, or to attempt to sell, dispose of, deliver or give, to any person other than the owner thereof or his agent any electric storage battery upon which the word "rental" or letter, word, mark or character is printed, painted, stamped or branded, for the purpose of identifying said electric storage battery as being a rental battery belonging to or being the property of another.

SOURCES: Codes, 1930, § 1141; Laws, 1942, § 2378; Laws, 1926, ch. 166.

Cross References — Penalty for violation of this section, see § 97-23-61.

§ 97-23-59. Storage battery; unlawful to retain or recharge rental battery.

It shall be unlawful for any person to retain in his possession for a longer period than fourteen days, or to recharge, except in cases of emergency, without the consent of the owner thereof, any electric storage battery upon which the word "rental" or any letter, word, mark or character is printed, painted, stamped or branded for the purpose of identifying the said electric storage battery as belonging to or being the property of another.

SOURCES: Codes, 1930, § 1142; Laws, 1942, § 2379; Laws, 1926, ch. 166.

Cross References — Penalty for violation of this section, see § 97-23-61.

JUDICIAL DECISIONS

1. In general.

Prosecution for failure to return storage battery eleven days after expiration of rental agreement held prematurely instituted. *Ball v. State*, 150 Miss. 780, 116 So. 878 (1928).

Affidavit alleging failure to return storage batteries, filed eleven days after expiration of rental agreement, held insufficient under law requiring return within fourteen days. *Ball v. State*, 150 Miss. 780, 116 So. 878 (1928).

§ 97-23-61. Storage battery; penalty.

Any person violating any of the provisions of any one of Sections 97-23-55 through 97-23-59 shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding twenty-five dollars or be imprisoned for a term not exceeding thirty days, or both such fine and imprisonment.

SOURCES: Codes, 1930, § 1143; Laws, 1942, § 2380; Laws, 1926, ch. 166.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§§ 97-23-63 through 97-23-82. Repealed.

Repealed by Laws, 1986, ch. 302, § 4, eff from and after July 1, 1986 (became law on February 4, 1986, without the Governor's signature).

§ 97-23-63. [Codes, Hutchinson's 1848, ch. 64, art. 4(4); 1857, ch. 64, art. 225; 1871, § 2679; 1880, § 2949; 1892, § 1291; 1906, § 1366; Hemingway's 1917, § 1102; 1930, § 1131; 1942, § 2368; Laws, 1926, ch. 277; 1932, ch. 248; 1954, ch. 252; 1956, ch. 247; 1982, ch. 401, § 1]

§ 97-23-65. [Codes, 1942, § 2369-02; Laws, 1964, ch. 353, § 2]

§ 97-23-67. [Codes, 1942, § 2369-03; Laws, 1964, ch. 353, § 3]

§ 97-23-69. [Codes, 1942, § 2369-04; Laws, 1964, ch. 353, § 4]

§ 97-23-71. [Codes, 1942, § 2369-05; Laws, 1964, ch. 353, § 5]

§ 97-23-73. [Codes, 1942, § 2369-06; Laws, 1964, ch. 353, § 6]

§ 97-23-75. [Codes, 1942, § 2369-07; Laws, 1964, ch. 353, § 7]

§ 97-23-77. [Codes, 1942, § 2369-01; Laws, 1964, ch. 353, § 1]

§ 97-23-79. [Codes, Hutchinson's 1848, ch. 64, art. 4(7); 1857, ch. 64, art. 227; 1871, § 2681; 1880, § 2951; 1892, § 1293; 1906, § 1368; Hemingway's 1917, § 1104; 1930, § 1133; 1942, § 2370; Laws, 1948, ch. 401, § 1; 1954, ch. 239; 1966, ch. 361, § 1]

§ 97-23-81. [Codes, 1942, § 2370.5; Laws, 1948, ch. 401, § 2; 1966, ch. 361, § 2]

§ 97-23-82. [En Laws, 1973, ch. 393, § 1]

Editor's Note — Former § 97-23-63 was entitled: Sunday; violations of Sabbath generally.

Former § 97-23-65 was entitled: Sunday sales; definition of "person."

Former § 97-23-67 was entitled: Sunday sales; prohibition of sales; exceptions.

Former § 97-23-69 was entitled: Sunday sales; certain sales and carrying of advertisement by communications media not prohibited.

Former § 97-23-71 was entitled: Sunday sales; penalties for violations.

Former § 97-23-73 was entitled: Sunday sales; injunction to restrain violations; costs.

Former § 97-23-75 was entitled: Sunday sales; powers of municipal governing authorities or boards of supervisors.

Former § 97-23-77 was entitled: Sunday sales; construction of law.

Former § 97-23-79 was entitled: Sunday shows or exhibits; certain shows, games, etc., prohibited; exceptions.

Former § 97-23-81 was entitled: Sunday shows or exhibits; local option election.

Former § 97-23-82 made playing of baseball, football, basketball, tennis and golf games on Sunday legal.

§ 97-23-83. Threats or coercion to prevent lawful conduct of business.

If any person shall in any manner threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business, including buying or selling, he shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year in the county jail or be fined not more than one thousand dollars (\$1,000.00) or both.

SOURCES: Codes, 1942, § 2384.5; Laws, 1966, ch. 384, § 1, eff from and after passage (approved February 9, 1966).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

No precise words are needed to convey a threat directed against customers of a store and intended to induce them to leave the store's premises, and it was a question

for the jury whether the language directed to the customers constituted threats or coercion under the provisions of this section [Code 1942, § 2384.5]. *Shields v. State*, 203 So. 2d 78 (Miss. 1967).

RESEARCH REFERENCES

CJS. 86 C.J.S., Threats and Unlawful Communications §§ 1 et seq.

§ 97-23-85. Unlawful restraint of trade; boycott; civil liability.

If two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchant or other person, and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or against which a boycott is attempted has no direct

control or no legal authority to correct, or when the conspiracy results from such alleged grievance against the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed, then each of such persons shall be guilty of the crime of unlawful restraint of trade and shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned for not more than two (2) years and in addition each such person shall be liable in civil action for any damages suffered by said merchant or place of business so wrongfully boycotted and also for attorney fees incurred by said merchant or person boycotted in a civil action to recover damages.

SOURCES: Codes, 1942, § 2059.3; Laws, 1968, ch. 344, § 3, eff from and after passage (approved July 30, 1968).

Cross References — Trusts and combines in restraint or hindrance of trade, see §§ 75-21-1 et seq.

Conspiracy, generally, see § 97-1-1.

Conspiracy to prevent persons from engaging in lawful work, see § 97-23-41.

JUDICIAL DECISIONS

1. In general.

The statute is prospective in nature and does not reflect any retrospective force; therefore, it did not apply to an economic boycott instituted on April 1, 1966. *NAACP v. Claiborne Hdwe. Co.*, 393 So. 2d

1290 (Miss. 1980), amended, 405 So. 2d 115 (Miss. 1981), rev'd on other grounds, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), reh'g denied, 459 U.S. 898, 103 S. Ct. 199, 74 L. Ed. 2d 160 (1982).

RESEARCH REFERENCES

ALR. Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Liability, under statute, of labor union or its membership for torts committed in

connection with primary labor activities—state cases. 85 A.L.R.4th 979.

Am Jur. 16 Am. Jur. 2d, Conspiracy §§ 1 et seq.

CJS. 15A C.J.S., Conspiracy § 248.

§ 97-23-87. Unauthorized copying or sale of recordings.

(1) For purposes of this section, the following words shall have the meaning ascribed herein, unless the context requires otherwise:

(a) "Person" means any individual, partnership, corporation, association or any communications media, including radio or television, broadcasters or licensees, newspapers, magazines, or other publications or media which offer facilities for the purposes stated herein.

(b) "Owner" means the person who owns, or who has the license in the United States to produce or to distribute to the public copies of the original fixation of sounds or pictures embodied in, the master phonograph record, master disc, master tape, master videocassette, master film or other device

used for reproducing recorded sounds or images on phonograph records, discs, tapes, films or other articles on which sound or images are recorded, and from which the transferred recorded sounds or images are directly or indirectly derived.

(2)(a) Any person who shall knowingly and willfully transfer or cause to be transferred, without the consent of the owner, any sounds or images recorded on phonograph record, disc, wire, tape, videocassette, film, or other article or device on which sounds or images are recorded with intent to sell, rent for a fee, or cause to be sold, or rented for a fee or for any financial gain the article on which such sounds or images are transferred, shall be guilty of a felony and, upon conviction of a first violation of this subsection, shall be fined not more than Twenty-five Thousand Dollars (\$ 25,000.00) or be imprisoned in the State Penitentiary for not more than five (5) years, or both. Any person who shall be convicted of a second or subsequent violation of this subsection shall be fined not more than One Hundred Thousand Dollars (\$100,000.00) or be imprisoned not more than ten (10) years, or both. The provisions of this paragraph (2)(a) apply only to sound and image recordings that were fixed initially before February 15, 1972.

(b) Any person who records, masters or causes to be recorded or mastered on any recorded article or device with the intent to sell, market or lease for commercial advantage or private financial gain, the sounds or images of a live performance, with the knowledge that the sounds or images so recorded have been recorded or mastered without the consent of the owner of the sounds of the live performance, is guilty of a felony, and upon conviction thereof, shall be subject to fine and imprisonment as provided for the first and subsequent convictions of violations of subsection (2)(a). In the absence of a written agreement or operation of law to the contrary, the performer or performers of the sounds of a live performance shall be presumed to own the right to record or master those sounds. Such performers shall also be deemed, in absence of such agreement or operation of law, to own the right to display and distribute their own personal images.

(c) Each and every individual and separate manufacture of a recorded device as described in this subsection shall constitute a separate offense of this subsection.

(3)(a) It is unlawful for any person to:

(i) Advertise, offer for sale or sell any such article or device described in subsection (2)(a) of this section with the knowledge that the sounds or images thereon have been transferred without the consent of the owner;

(ii) Offer or make available for a fee, rental or any other form of compensation, directly or indirectly, any equipment or machinery with the knowledge that it will be used by another to reproduce, without the consent of the owner, any phonograph record, disc, wire, tape, videocassette, film or other article on which sounds or images have been transferred; or

(iii) Possess with intent to sell, to make available for a fee, rental or other form of compensation, or for the purpose of obtaining any form of

compensation through the use of any article or device described in subsection (2)(a), with the knowledge that the sounds or images thereon have been transferred without the consent of the owner.

Any person convicted of a first violation of this subsection shall be guilty of a felony and fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned in the State Penitentiary for not more than three (3) years, or both. Any person convicted of a second or subsequent violation of this subsection shall be guilty of a felony and fined not more than Fifty Thousand Dollars (\$50,000.00) or imprisoned in the State Penitentiary for not more than seven (7) years, or both.

(b) Each and every individual advertisement, offer for sale, sale, rental or possession of such recorded devices or offer or making available of equipment or machinery in violation of the provisions of this subsection shall constitute a separate offense.

(4) The provisions of this subsection shall not apply to reproduction of sounds or images made in the home for private use with no purpose of otherwise capitalizing commercially on such reproduction.

SOURCES: Laws, 1974, ch. 527, § 1; Laws, 1992, ch. 556, § 1, eff from and after July 1, 1992.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Unfair competition by direct reproduction of literary, artistic, or musical property. 40 A.L.R.3d 566.

State civil actions by subscription television business for use, or providing tech-

nical means of use, of transmissions by nonsubscribers. 46 A.L.R.4th 811.

§ 97-23-89. Sale, distribution of recordings without display of required information.

(1) For purposes of this section, the following words shall have the meaning ascribed herein, unless the context requires otherwise:

(a) "Person" means any individual, partnership, corporation or association.

(b) "Manufacturer" means any individual, partnership, corporation or association which, after first having acquired the right to transfer sounds or images from the lawful owner thereof, actually transfers or causes the transfer thereon of such sounds or images recorded on a phonograph record, disc, wire, tape, videocassette, film or other article on which sounds or images are recorded, or assembles and transfers any product containing such transferred sounds or images as a component thereof.

(2) It shall be unlawful for any person to manufacture or knowingly (a) sell, rent, distribute or circulate, (b) cause to be sold, distributed or circulated, or (c) possess with intent to sell, rent, distribute or circulate, for any

compensation, a recorded article or device containing sounds or images, including any phonograph record, tape, disc, videocassette, film or other article or device upon which sounds or images may be fixed or reproduced, without the actual name and street address of the manufacturer thereof and, when the recorded article or device contains sounds only, without the name of the actual performer or group of performers prominently disclosed on the cover, jacket, box or label containing such recorded article or device. Any person who is convicted of a first violation of this subsection shall be guilty of a felony and fined not more than Ten Thousand Dollars (\$10,000.00) or be imprisoned in the State Penitentiary for not more than three (3) years, or both. Any person who is convicted of a second or subsequent violation of this subsection shall be guilty of a felony and fined not more than Fifty Thousand Dollars (\$50,000.00) or be imprisoned in the State Penitentiary for not more than seven (7) years, or both.

(3) Each and every individual manufacture, distribution or sale or transfer for a consideration of such recorded article or device in violation of the provisions of this section shall constitute a separate offense.

SOURCES: Laws, 1974, ch. 527, § 2; Laws, 1992, ch. 556, § 2, eff from and after July 1, 1992.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-23-91. Construction of Sections 97-23-87 through 97-23-91; private causes of action; confiscation of illegal recordings.

(1) Except as otherwise provided in this section, the provisions of Sections 97-23-87 through 97-23-91 shall not be construed or interpreted to enlarge or diminish the rights of parties in civil litigation. Such sections shall not be construed or interpreted to apply to the transfer by a television operator, radio or television broadcaster, librarian or archivist of any such sounds (other than from the sound track of a motion picture) intended for, or in connection with, broadcast transmission, retransmission or related uses, or for archival purposes only.

(2) Any owner of a recorded article or device whose work is allegedly the subject of a violation of the provisions of Section 97-23-87 or 97-23-89 shall have a cause of action in the circuit courts of this state for all damages resulting therefrom, including actual, compensatory, incidental and punitive damages.

(3) Any lawful producer of a recorded article or device whose product is allegedly the subject of a violation of the provisions of Section 97-23-87 or 97-23-89 shall have a cause of action in the circuit courts of this state for all damages resulting therefrom, including actual, compensatory, incidental and punitive damages.

(4) It shall be the duty of any state, county or local law enforcement officer to confiscate all recorded articles and devices prohibited by the provisions of

Sections 97-23-87 and 97-23-89 and all equipment and components used or intended to be used in the manufacture of the recordings prohibited by said sections. The law enforcement officer confiscating such materials and equipment shall deliver the prohibited recorded material, equipment and components to the State Attorney General or the appropriate local district attorney of the judicial district in which the confiscation was made, or cause the same to be stored in a safe place until such time as the court having jurisdiction over the confiscated recorded material and equipment shall determine the rights, if any, of any person in and to said confiscated materials and the appropriate disposition of such material and equipment. The provisions of this section shall apply to any prohibited recording, regardless of lack of knowledge or intent on the part of the person in possession of same to violate Section 97-23-87 or 97-23-89.

SOURCES: Laws, 1974, ch. 527, § 3; Laws, 1992, ch. 556, § 3, eff from and after July 1, 1992.

Cross References — Punitive damages, generally, see § 11-1-65.

§ 97-23-92. Unauthorized use of audiovisual recording device in motion picture theater.

(1) Any person who knowingly operates the audiovisual recording function of any device in a motion picture theater while a motion picture is being exhibited without the consent of the motion picture theater owner commits a crime punishable as provided in subsection (7) of this section.

(2) The term “audiovisual recording function” means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology whether developed before or after July 1, 2005.

(3) The term “motion picture theater” means a movie theater, screening room or other venue that is being utilized primarily for the exhibition of a motion picture at the time of the alleged offense.

(4) The owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, who alerts law enforcement authorities of an alleged violation of this section shall not be liable in any civil action arising out of measures taken while awaiting the arrival of law enforcement authorities by the owner, lessee, agent or employee in the course of subsequently detaining a person whom the owner, lessee, agent or employee in good faith believed to have violated this section unless the plaintiff can show by clear and convincing evidence that the measures were manifestly unreasonable or the period of detention was unreasonably long.

(5) This section does not prevent any lawfully authorized investigative, law enforcement, protective, or intelligence gathering employee or agent of the local, state or federal government from operating any audiovisual recording device in a motion picture theater as part of lawfully authorized investigative, protective, law enforcement, or intelligence gathering activities.

(6) Nothing in this section shall prevent prosecution under any provision of law providing for greater penalty.

(7) A person convicted of violating this section shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment in the county jail not to exceed six (6) months, or either.

SOURCES: Laws, 2005, ch. 336, § 1, eff from and after July 1, 2005.

§ 97-23-93. Shoplifting; elements of offense; presumptions; evidence; penalties; aggregation of multiple offenses occurring within same jurisdiction over 30-day period in determining gravity of offense.

(1) Any person who shall wilfully and unlawfully take possession of any merchandise owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, shall be punished as is provided in this section.

(2) The requisite intention to convert merchandise without paying the merchant's stated price for the merchandise is presumed, and shall be prima facie evidence thereof, when such person, alone or in concert with another person, willfully:

- (a) Conceals the unpurchased merchandise;
- (b) Removes or causes the removal of unpurchased merchandise from a store or other mercantile establishment;
- (c) Alters, transfers or removes any price-marking, any other marking which aids in determining value affixed to the unpurchased merchandise, or any tag or device used in electronic surveillance of unpurchased merchandise;
- (d) Transfers the unpurchased merchandise from one container to another; or
- (e) Causes the cash register or other sales recording device to reflect less than the merchant's stated price for the unpurchased merchandise.

(3) Evidence of stated price or ownership of merchandise may include, but is not limited to:

- (a) The actual merchandise or the container which held the merchandise alleged to have been shoplifted; or
- (b) The content of the price tag or marking from such merchandise; or
- (c) Properly identified photographs of such merchandise.

(4) Any merchant or his agent or employee may testify at a trial as to the stated price or ownership of merchandise.

(5) A person convicted of shoplifting merchandise for which the merchant's stated price is less than or equal to Five Hundred Dollars (\$500.00) shall be punished as follows:

- (a) Upon a first shoplifting conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00), or punished by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

(b) Upon a second shoplifting conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00) or punished by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

(6) Upon a third or subsequent shoplifting conviction the defendant shall be guilty of a felony and fined not more than Five Thousand Dollars (\$5,000.00), or imprisoned for a term not exceeding five (5) years, or by both such fine and imprisonment.

(7) A person convicted of shoplifting merchandise for which the merchant's stated price exceeds Five Hundred Dollars (\$500.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97-17-41 for the offense of grand larceny.

(8) In determining the number of prior shoplifting convictions for purposes of imposing punishment under this section, the court shall disregard all such convictions occurring more than seven (7) years prior to the shoplifting offense in question.

(9) For the purpose of determining the gravity of the offense under subsection (7) of this section, the prosecutor may aggregate the value of merchandise shoplifted from three (3) or more separate mercantile establishments within the same legal jurisdiction over a period of thirty (30) or fewer days.

SOURCES: Laws, 1988, ch. 556, § 1; Laws, 2003, ch. 499, § 8; Laws, 2005, ch. 511, § 2, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment added (9).

Cross References — Civil remedy for shoplifting violations, see § 97-23-96.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Subsequent offenses.
3. Computations.
4. Evidence.
5. Indictments.
- 6.-10. [Reserved for future use.]

II. UNDER FORMER § 97-23-45.

11. In general.

I. UNDER CURRENT LAW.

1. In general.

As defendant was properly convicted of felony shoplifting in violation of Miss. Code Ann. § 97-23-93, defendant's five year sentence pursuant to Miss. Code Ann. § 97-17-41 was proper as it did not

exceed the statutory maximum. *Watson v. State*, — So. 2d —, 2006 Miss. App. LEXIS 121 (Miss. Ct. App. Feb. 21, 2006).

Sufficient evidence supported defendant's conviction for felony shoplifting under Miss. Code Ann. § 97-23-93 based on two prior misdemeanor shoplifting offenses because the prior misdemeanors were elements of felony charge and had to be proven beyond a reasonable doubt, and defendant failed to rebut the presumption of validity that attached to abstracts of convictions by presenting evidence to show there was an irregularity in the abstracts. *Biggs v. State*, — So. 2d —, 2006 Miss. App. LEXIS 1 (Miss. Ct. App. Jan. 3, 2006).

To convict for felony shoplifting under Miss. Code Ann. § 97-23-93 (6), (8), the

State was required to prove as part of its case-in-chief and as an element of the charge, that defendant had twice previously been convicted of shoplifting within seven years. No such proof was offered, and while defendant testified on cross-examination that she had been convicted of shoplifting in 1999, there was no testimony or evidence that she had been convicted twice of shoplifting within seven years prior to the offense charged, nor was the jury instructed as to this; although defendant never moved for a directed verdict on the latter ground, nor did she raise it on appeal; reviewing the matter as plain error, the appellate court held that reversal on the felony shoplifting charge was warranted, but that entry of conviction for the second shoplifting offense was in order. *Evans v. State*, 919 So. 2d 231 (Miss. Ct. App. 2005).

Sufficient evidence existed to convict defendant of felony shoplifting as a store employee gave the opinion that defendant was the individual depicted in a videotape seen stealing cartons of cigarettes, the jury was also able to watch the videotape, and defendant had previously twice been convicted of shoplifting. *Ratliff v. State*, 879 So. 2d 1062 (Miss. Ct. App. 2004).

Evidence was sufficient to find defendant guilty of conspiracy to commit and committing felony shoplifting; the evidence presented by the State included testimony from several officers regarding the events after the shoplifting at one of the stores, including an in-court identification of defendant as the driver of the maroon car used, and any conflicts in the testimony of witness was resolved by the jury. *Richardson v. State*, 868 So. 2d 389 (Miss. Ct. App. 2004).

Defendant's conviction for felony shoplifting was proper where credible evidence was presented supporting an inference that defendant did take possession of the merchandise in question, steaks, with the intention of converting them to his own use without paying for them. *Sykes v. State*, 846 So. 2d 307 (Miss. Ct. App. 2003).

The evidence was insufficient to support a shoplifting conviction where the defendant was in the same store with the co-defendant during the shoplifting episode

involving the co-defendant and the defendant rode away from the store in a car driven by the co-defendant at a high rate of speed, but there was no evidence that the defendant knew that the shoplifting episode was taking place or that it was planned. *Lewis v. State*, 573 So. 2d 719 (Miss. 1990).

2. Subsequent offenses.

Defendant's conviction of felony shoplifting and five-year sentence without parole as a habitual offender was affirmed where the appellate court found no merit in his arguments that the indictment was defective and that the jurors' handwritten verdict was ambiguous; nothing in the language of the shoplifting statute, Miss. Code Ann. § 97-23-93, nor in this habitual offender statute, Miss. Code Ann. § 99-19-81, prevented conviction of a third felony shoplifting from having the normal maximum sentencing rules apply. *Taylor v. State*, 838 So. 2d 339 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. Ct. App. 2003).

Where a defendant was found to have violated the terms and conditions of his probation, the court had the power to impose any sentence that would have been originally imposed. *Brunson v. State*, 796 So. 2d 284 (Miss. Ct. App. 2001).

An indictment for felony shoplifting was not fatally flawed for failing to enumerate the defendant's prior shoplifting convictions; the clear language of the statute designates a third or subsequent shoplifting conviction as a felony, and the statute does not require successive convictions to receive a numerical designation before a felony may be charged. *Moore v. State*, 781 So. 2d 159 (Miss. Ct. App. 2000).

Trial court did not err in sentencing the defendant under the more severe penalties for shoplifting, third offense, despite the fact that the jury was not permitted to pass on the question of fact as to whether defendant actually had two prior shoplifting convictions; prior to commencement of his trial, the defendant successfully moved to prohibit the state from making any reference to his prior convictions because of the harmful prejudicial nature of such information and had successfully moved for the determination of this aspect of the case by a post-verdict inquiry. *Sell-*

ers v. State, 773 So. 2d 350 (Miss. Ct. App. 2000).

3. Computations.

Appellate court holds that for purposes of the computations required under Miss. Code Ann. § 97-23-93(8), relating to prior shoplifting convictions, the date of the "offense" is the date of the occurrence giving rise to the current charge rather than the date that it is finally adjudicated that the criminal activity actually occurred. *Bufkin v. State*, 867 So. 2d 285 (Miss. Ct. App. 2004).

4. Evidence.

Felony shoplifting is somewhat akin to felony driving under the influence (DUI) in that both rely on multiple prior convictions for the same offending conduct to raise the level of offense from a misdemeanor to a felony, and the Mississippi Supreme Court plainly states that, in the matter of DUI offenses, the prior convictions are elements of the crime that must be determined by the finder of fact beyond reasonable doubt as a part of the prosecution's case in chief. Thus, the trial court properly dealt with the problems arising under Miss. R. Evid. 404(b) by instructing the jury that it could not consider evidence of defendant's prior shoplifting convictions as evidence of defendant's guilt in the instant case. *Bufkin v. State*, 867 So. 2d 285 (Miss. Ct. App. 2004).

5. Indictments.

Defendant maintained that the indictment was insufficient because it omitted the allegation that she had concealed the merchandise and it failed to fully notify her of the nature and the cause of the offense charged. However, the indictment sufficiently informed her that she was

charged with taking the steaks with the intent of converting them to her own use without paying for them; moreover, her defense was that she had not concealed the steaks but only had them under her arm and, it was apparently clear to her that the State was relying upon the provisions of Miss. Code Ann. § 97-23-93(2)(a) (presumptive intent). *Evans v. State*, 919 So. 2d 231 (Miss. Ct. App. 2005).

6.-10. [Reserved for future use.]

II. UNDER FORMER § 97-23-45.

11. In general.

Manager clearly believed that while the customer's partner pilfered sausages by placing them in her purse, the customer acted as a decoy to distract watchful employees, and when the manager then requested that the customer and his partner accompany him to resolve the issue, the customer became belligerent, escorted his partner to his car, and drove away. Viewing the evidence in a light most favorable to the customer, it was clear that a fair-minded jury could not have concluded that the grocery store and its manager pursued criminal proceedings without probable cause or that the grocery store and its manager acted with malice; thus, summary judgment for the grocery store and its manager upon the customer's suit for malicious prosecution was proper. *Williams v. Jitney Jungle, Inc.*, 910 So. 2d 39 (Miss. Ct. App. 2005).

State trial court's refusal of defendant's lesser-included-offense instruction did not violate any of his federal constitutional rights where instructions on lesser included offense could properly be denied under standard that satisfies due process. *Reddix v. Thigpen*, 805 F.2d 506 (5th Cir. 1986).

RESEARCH REFERENCES

ALR. Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 A.L.R.3d 998.

Changing of price tags by patrons in self-service store as criminal offense. 60 A.L.R.3d 1293.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure. 10 A.L.R.4th 376.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense. 64 A.L.R.4th 1088.

Am Jur. 5 Am. Jur. 2d, Arrest § 59.
29 Am. Jur. 2d, Evidence § 417.
50 Am. Jur. 2d, Larceny § 71

13 Am. Jur. Trials, Defending Minor
Felony Cases §§ 1 et seq.

§ 97-23-93.1. Shoplifting; use of theft detection device remover prohibited; use of theft detection shielding device prohibited; activation of anti-shoplifting device constitutes probable cause for detention.

(1) As used in this section:

(a) "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant.

(b) "Theft detection device remover" means any tool or device specifically designed or manufactured to be used to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.

(c) "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor.

(2)(a) A person commits unlawful distribution of a theft detection shielding device when he or she knowingly manufactures, sells, offers to sell or distributes any theft detection shielding device.

(b) A person commits unlawful possession of a theft detection shielding device when he or she knowingly possesses any theft detection shielding device with the intent to commit larceny or shoplifting.

(c) A person commits unlawful possession of a theft detection device remover when he or she knowingly possesses any theft detection device remover with the intent to use such tool to remove any theft detection device from any merchandise without the permission of the merchant or person owning or holding said merchandise.

(d) A person commits unlawful use of a theft detection shielding device or a theft detection device remover when he or she uses or attempts to use either device while committing a violation of Section 97-23-93, Mississippi Code of 1972.

(e) Any person convicted of violating this subsection (2) is guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned for not less than thirty (30) days nor more than one (1) year, and fined not less than Two Hundred Fifty Dollars (\$250.00), nor more than One Thousand Dollars (\$1,000.00).

(3)(a) A person commits unlawful removal of a theft detection device when he or she intentionally removes any theft detection device from merchandise prior to purchase without the permission of the merchant or person owning or holding said merchandise.

(b) Any person convicted of violating this subsection (3) is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00),

and such fine shall not be suspended, or the person shall be imprisoned not more than sixty (60) days, or both.

(4)(a) The activation of an anti-shoplifting or inventory control device as a result of a person exiting the establishment or a protected area within the establishment shall constitute reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator, provided notice has been posted to advise patrons that such a device is being utilized. Each such detention shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the device or for the recovery of goods.

(b) The taking into custody and detention by a law enforcement officer, merchant or merchant's employee, if in compliance with the requirements of this section, does not render such law enforcement officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment, unlawful detention, malicious prosecution, intentional infliction of emotional distress or defamation.

SOURCES: Laws, 2001, ch. 558, § 1, eff from and after July 1, 2001.

§ 97-23-94. Aiding and abetting shoplifting by minor; penalty.

(1) In addition to any other offense and penalty provided by law, it shall be unlawful for any person eighteen (18) years of age or older to encourage, aid or abet any person under the age of eighteen (18) years to commit the crime of shoplifting as defined in Section 97-23-93. In addition to any other penalty provided by law, any person who violates this section shall be punished as follows:

(a) Upon a first conviction the defendant shall be guilty of a misdemeanor and fined not more than Seven Hundred Fifty Dollars (\$750.00), or punished by imprisonment not to exceed thirty (30) days, or by both such fine and imprisonment.

(b) Upon a second conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars (\$1,000.00) or punished by imprisonment not to exceed ninety (90) days, or by both such fine and imprisonment.

(c) Upon a third or subsequent conviction the defendant shall be guilty of a felony and fined One Thousand Dollars (\$1,000.00), or imprisoned for a term not exceeding five (5) years, or by both such fine and imprisonment.

(2) In addition to the penalties prescribed in subsection (1) of this section, the court is authorized to require the defendant to make restitution to the owner of the property where shoplifting occurred in an amount equal to twice the value of such property.

SOURCES: Laws, 1994, ch. 595, § 6, eff from and after July 1, 1994.

§ 97-23-94.1. Punishment for violation of Section 97-23-94.

Any person aged eighteen (18) years or older who encourages, aids or abets any person under the age of eighteen (18) years to violate Section 97-23-93 shall be punished as provided in Section 97-23-94 and as otherwise provided by law.

SOURCES: Laws, 1994, ch. 595, § 8, eff from and after July 1, 1994.

§ 97-23-95. Shoplifting; detention of suspect for questioning without incurring civil liability.

If any person shall commit or attempt to commit the offense of shoplifting, or if any person shall wilfully conceal upon his person or otherwise any unpurchased goods, wares or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may question such person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting as defined herein. Such questioning of a person by a merchant, merchant's employee or peace or police officer shall not render such merchant, merchant's employee or peace or police officer civilly liable for slander, false arrest, false imprisonment, malicious prosecution, unlawful detention or otherwise in any case where such merchant, merchant's employee or peace or police officer acts in good faith and upon reasonable grounds to believe that the person questioned is committing or attempting to commit the crime of shoplifting.

SOURCES: Laws, 1988, ch. 556, § 2, eff from and after July 1, 1988.

JUDICIAL DECISIONS

1. In general.
2. Burden of proof.
3. Application.
4. Instructions to jury.
- 5.-10. [Reserved for future use.]
11. Under former § 97-23-51.

1. In general.

Two elements must be shown in order for a store owner to claim the qualified immunity afforded under the statute: first, there must be proof of a good faith basis and probable cause based upon reasonable grounds to detain and question the customer; and second, there must be proof that the detention and questioning of the customer was done in a reasonable manner. *Turner v. Hudson Salvage, Inc.*, 709 So. 2d 425 (Miss. 1998).

Mississippi statute governing qualified immunity of merchants from liability for malicious prosecution of suspected shoplifters protected only questioning for purpose of ascertaining whether plaintiff shoplifted; any other actions by store owner, including insistence of plaintiff's arrest and filing of affidavit, would not fall within scope of qualified immunity. *Lyon v. Fred's, Inc.*, 971 F. Supp. 239 (N.D. Miss. 1997), *aff'd*, 176 F.3d 478 (5th Cir. 1999).

2. Burden of proof.

The burden of proof rests upon the party asserting the privilege to show that probable cause existed to detain and question the suspected shoplifter; mere suspicion or conjecture does not meet the prob-

able cause requirement. *Turner v. Hudson Salvage, Inc.*, 709 So. 2d 425 (Miss. 1998).

3. Application.

Where a store employee watched as a store security guard detained and questioned the plaintiff on suspicion of shoplifting and yet failed to find out what the security guard discovered before he detained the plaintiff a second time, the defendant store exceeded the immunity provided under the statute. *Turner v. Hudson Salvage, Inc.*, 709 So. 2d 425 (Miss. 1998).

4. Instructions to jury.

In a defamation action arising from an incident in which the plaintiff was asked by employees of the defendant to show his receipt for cigarettes after he left the defendant's store, the court properly instructed the jury with regard to the defendant's right to question customers upon suspicion of shoplifting. *Davis v. Wal-Mart Stores, Inc.*, 724 So. 2d 907 (Miss. 1998).

5-10. [Reserved for future use.]

11. Under former § 97-23-51.

In an action against a store for defamation and slander following an accusation of shoplifting, refusal of the trial court to define in its charge to the jury "probable cause," "reasonable grounds," "reasonable manner," or "good faith," constituted reversible error, since former § 97-23-51 protected the defendant store from liability, if all those elements were present, and the defendant store raised each of them as an affirmative defense. *McWilliams v. Watkins*, 430 So. 2d 854 (Miss. 1983).

Former § 97-23-51, authorizing a merchant to detain a suspect for questioning, protects the merchant from civil liability for stopping, detaining momentarily, and questioning a suspect in a reasonable manner to determine if he is guilty of shoplifting, but not from subsequent institution of criminal proceedings. *Owens v. Kroger Co.*, 430 So. 2d 843 (Miss. 1983).

In a damage action against a store by a customer who had been falsely accused of shoplifting, the trial court committed reversible error in directing a verdict in favor of the store, where there was conflicting evidence as to whether the store manager had acted in good faith and upon

probable cause based upon reasonable grounds in ascertaining whether the customer, who did not speak English, was guilty of shoplifting. *Jarjoura v. Fred's One & Two Dollar Store, Inc.*, 370 So. 2d 696 (Miss. 1979).

Where the facts are in dispute, the question of probable cause to stop and question a suspected shoplifter is for the court's determination, but under disputed facts, such question is one for the jury. *Butler v. W.E. Walker Stores, Inc.*, 222 So. 2d 128 (Miss. 1969).

In an action brought by a shopper who alleged that the manager of a store had unlawfully stopped her and searched her purse without cause, an instruction in which mere suspicion was made the basis of probable cause to believe that the plaintiff was attempting to commit the act of shoplifting, was in error. *Butler v. W.E. Walker Stores, Inc.*, 222 So. 2d 128 (Miss. 1969).

In order for a communication to be privileged the person making it must be careful to go no further than his interest or duties require, and a store manager who, instead of making inquiry in a reasonable manner of his cashier, accused the plaintiff of stealing a bar of soap exceeded the qualified privilege provided by this section [Code 1942, § 2374-04], and he and his employer thereby became liable to the party so unjustly accused. *Southwest Drug Stores of Miss., Inc. v. Garner*, 195 So. 2d 837, 29 A.L.R.3d 953 (Miss. 1967).

Mere suspicion, not grounded on definite information, does not justify detention of a customer. *J.C. Penney Co. v. Cox*, 246 Miss. 1, 148 So. 2d 679 (1963).

The qualified privilege under the statute [Code 1942, § 2374-04] does not give the merchant the right to embarrass or harass a suspect in public view of everyone in a rude manner, as by halting the customer on the store steps, demanding pay, and to be shown the contents of her purse and a paper bag. *J.C. Penney Co. v. Cox*, 246 Miss. 1, 148 So. 2d 679 (1963).

The burden of proof is on one asserting the right to question a customer believed to be a shoplifter, to show probable cause based upon reasonable ground. *J.C. Penney Co. v. Cox*, 246 Miss. 1, 148 So. 2d 679 (1963).

RESEARCH REFERENCES

ALR. Defamation: Actionability of accusation or imputation of shoplifting. 29 A.L.R.3d 961.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 A.L.R.3d 998.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter. 14 A.L.R.4th 950.

Am Jur. 32 Am. Jur. 2d, False Imprisonment §§ 20, 56.

50 Am. Jur. 2d, Libel and Slander § 186.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 21 (complaint, petition, or declaration — unreasonable detention and search of customer on accusation of shoplifting — against store and store manager).

10 Am. Jur. Pl & Pr Forms, Rev, False Imprisonment, Forms 21.1, 22.1, 22.

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 22.2 (Complaint, petition, or declaration — Unreasonable detention and search of customer on accusation of shoplifting).

10 Am. Jur. Pl & Pr Forms (Rev), False Imprisonment, Form 22.3 (Complaint, petition, or declaration — Unreasonable detention and search of customer on accusation of shoplifting).

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 67.1 (Allegation — Innuendo — False charge theft — By Store against customer).

16A Am. Jur. Pl & Pr Forms (Rev), Libel and Slander, Form 70.1 (Allegation — Innuendo — False charge — Plaintiff's character).

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 21.1 (complaint by customer of self-service retail store; customer knocked down by shoplifter fleeing from store security guard).

§ 97-23-96. Civil remedy for shoplifting violations; written demand prior to commencing civil proceedings; recovery from parents or legal guardians of minors; costs.

(1) Any person who proves by clear and convincing evidence that he has been injured in any fashion by reason of any violation of the provisions of Section 97-23-93, Mississippi Code of 1972, has a cause of action for threefold the actual damages sustained or damages in the amount of Two Hundred Dollars (\$200.00), whichever is greater, reasonable attorney's fees and court costs in the trial and in any proceedings in appellate courts. The recovery of stolen goods regardless of condition shall not affect the right to the minimum recovery provided herein.

(2) Before filing an action for damages under this section, the person claiming injury must make a written demand for Two Hundred Dollars (\$200.00) or threefold the actual damages sustained, whichever is greater, of the person or accused liable for damages under this section. If the accused to whom a written demand is made complies with such demand within thirty (30) days after receipt of the demand, he shall be given a written release from further civil liability for the specific act of shoplifting by the victim making the written demand.

(3) Any victim who has a cause of action under this section may recover the damages allowed under this section from the parents or legal guardian of any unemancipated minor who lives with his parents or legal guardian and who is liable for damages under this section if it is proven that the parents or legal guardian had knowledge of the minor's intent to violate the provisions of

Section 97-23-93 or aided and abetted the minor in such violations. Foster parents shall not be liable for the acts of children placed with them. Nothing in this section shall in any way be construed as to abrogate, compromise or violate any minor's right to confidentiality under any other provision of the Mississippi Code of 1972 or otherwise.

(4) In no event shall punitive damages be awarded under this section.

(5) In awarding damages, attorney's fees, expenses or costs under this section, the court shall not consider the ability of the opposing party to pay such fees and costs. Nothing under this section shall be interpreted as limiting any right to recover damages, attorney's fees, expenses or costs provided under other provisions of law.

SOURCES: Laws, 1991, ch. 498, § 1, eff from and after July 1, 1991.

§ 97-23-97. Scalping of admission tickets at college events held on state property.

It shall be unlawful for any admission ticket to any athletic contest of any college or university of the State of Mississippi or for any admission ticket to any entertainment event held on state property to be sold for a price in excess of the price printed on the face of the ticket.

It shall be unlawful to sell any such admission tickets at any place or in any manner except at such places and in such manner as designated by the proper authorities issuing such tickets.

Nothing in this section shall prohibit a private individual from selling tickets bought for personal use at a price not to exceed the price on the face of the ticket.

Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor.

SOURCES: Laws, 1990, ch. 342, § 1, eff from and after July 1, 1990.

§ 97-23-99. Giving away of merchandise by employee without authorization of merchant.

It shall be unlawful for any employee of a merchant engaged in the sale of goods to the public to willfully give away any merchandise of a value of less than Two Hundred Fifty Dollars (\$250.00) intended for sale without receiving full payment for such merchandise or to give away any merchandise without the specific authorization of the merchant. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars (\$1,000.00) or imprisoned for not more than one (1) year or both.

SOURCES: Laws, 1996, ch. 330, § 1, eff from and after July 1, 1996.

Cross References — Embezzlement, generally, see § 97-23-19.

§ 97-23-101. Laundering of monetary instruments; offense; penalties; effect of federal conviction.

(1)(a) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity:

(i) 1. With the intent to promote the carrying on of specified unlawful activity; or

2. With intent to engage in conduct constituting a violation of Section 7201 or 7206 of the Internal Revenue Code of 1986; or

(ii) Knowing that the transaction is designed in whole or in part:

1. To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

2. To avoid a transaction reporting requirement under state or federal law,

shall be sentenced to a fine of not more than Five Hundred Thousand Dollars (\$500,000.00) or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty (20) years, or both.

(b) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the state to or through a place outside the state or to a place in the state from or through a place outside the state;

(i) With the intent to promote the carrying on of specified unlawful activity; or

(ii) Knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part:

1. To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

2. To avoid a transaction reporting requirement under state or federal law,

shall be sentenced to a fine of Five Hundred Thousand Dollars (\$500,000.00) or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more than twenty (20) years, or both.

(c) Whoever, with the intent:

(i) To promote the carrying on of specified unlawful activity;

(ii) To conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(iii) To avoid a transaction reporting requirement under state or federal law,

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than twenty (20) years, or both. For purposes of this paragraph, the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a government official authorized to investigate or prosecute violations of this section.

(2) Whoever conducts or attempts to conduct a transaction described in subsection (1)(a), or a transportation described in subsection (1)(b), is liable to the state for a civil penalty of not more than the greater of:

(a) The value of the property, funds, or monetary instruments involved in the transaction; or

(b) Ten Thousand Dollars (\$10,000.00).

(3) As used in this section:

(a) The term “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity” means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state or federal law;

(b) The term “conducts” includes initiating, concluding, or participating in initiating, or concluding a transaction;

(c) The term “transaction” includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(d) The term “financial transaction” means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(e) The term “monetary instruments” means coin or currency of the United States or of any other country, travelers’ checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery;

(f) The term “financial institution” has the definition given that term in Section 5312(a)(2) of Title 31, United States Code, and the regulations promulgated thereunder.

(4) Nothing in this section shall supersede any provision of federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(5) Violations of this section may be investigated by the Attorney General.

(6) If a person is convicted of a federal violation of laundering of monetary instruments, such person shall not be prosecuted under this section for the same set of facts which resulted in the federal conviction.

SOURCES: Laws, 1998, ch. 475, § 1, eff from and after July 1, 1998.

§ 97-23-103. Home repair fraud; definitions; exceptions; penalties.

(1) As used in this section, unless the context clearly requires otherwise:

(a) "Home repair" means the fixing, replacing, altering, converting, modernizing, improving of or the making of an addition to any real property primarily designed or used as a residence.

(i) Home repair shall include the construction, installation, replacement or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing fixtures, storm doors, storm windows, awnings, carpets and other improvements to structures within the residence or upon the land adjacent thereto.

(ii) Home repair shall not include the sale of goods or materials by a merchant who does not directly or through a subsidiary perform any work or labor in connection with the installation or application of the goods or materials; the repair, installation, replacement or connection of any home appliance, including, but not limited to, disposals, refrigerators, ranges, garage door openers, television antennas, washing machines, telephones or other home appliances when the person replacing, installing, repairing or connecting such home appliance is an employee or agent of the merchant that sold the home appliance; or landscaping.

(b) "Person" means any individual, partnership, corporation, business, trust or other legal entity.

(c) "Residence" means a single or multiple family dwelling, including, but not limited to, a single family home, apartment building, condominium, duplex, townhouse or mobile home which is used or intended to be used by its occupants as their dwelling place.

(2) A person commits the offense of home repair fraud when he knowingly:

(a) Enters into an agreement or contract, written or oral, with a person for home repair, and he knowingly:

(i) Misrepresents a material fact relating to the terms of the contract or agreement or the preexisting or existing condition of any portion of the property involved, or creates or confirms another's impression which is false and which he does not believe to be true, or promises performance which he does not intend to perform or knows will not be performed;

(ii) Uses or employs any deception, false pretense or false promises in order to induce, encourage or solicit such person to enter into any contract or agreement;

(iii) Misrepresents or conceals either his real name, the name of his business or his business address; or

(iv) Uses deception, coercion or force to obtain the victim's consent to modification of the terms of the original contract or agreement;

(b) Damages the property of a person with the intent to enter into an agreement or contract for home repair; or

(c) Misrepresents himself or another to be an employee or agent of any unit of the federal, state or municipal government or any other governmental unit, or an employee or agent of any public utility, with the intent to cause a person to enter into, with himself or another, any contract or agreement for home repair.

(3) Intent and knowledge shall be determined by an evaluation of all circumstances surrounding a transaction and the determination shall not be limited to the time of contract or agreement.

(4) Substantial performance shall not include work performed in a manner of little or no value or work that fails to comply with the appropriate municipal, county, state or federal regulations or codes.

(5) Violation of this section shall be punished as follows:

(a) A first conviction under this section shall be a misdemeanor when the amount of the fraud is less than Five Thousand Dollars (\$5,000.00) and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment in the county jail not to exceed six (6) months, or both.

(b) A second or subsequent conviction under this section shall be punished as follows:

(i) As a felony punishable by imprisonment in the custody of the Department of Corrections not to exceed two (2) years when the amount of the fraud is more than One Thousand Dollars (\$1,000.00) but less than Five Thousand Dollars (\$5,000.00).

(ii) As a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months when the amount of the fraud is One Thousand Dollars (\$1,000.00) or less.

(c) A first or subsequent conviction under this section shall be a felony when the amount of the fraud is over Five Thousand Dollars (\$5,000.00) and shall be punished as follows:

(i) By imprisonment in the custody of the Department of Corrections not to exceed five (5) years or a fine not to exceed Ten Thousand Dollars (\$10,000.00) or both when the amount of the fraud is Five Thousand Dollars (\$5,000.00) or more, but less than Ten Thousand Dollars (\$10,000.00).

(ii) By imprisonment in the custody of the Department of Corrections not to exceed ten (10) years or a fine not to exceed Ten Thousand Dollars (\$10,000.00) when the amount of the fraud is Ten Thousand Dollars (\$10,000.00) or more.

(6) In addition to any other sentence it may impose, the court shall order that the defendant shall make restitution to the victim, either within a specified period of time or in specified installments. The order shall not be enforceable during the period of imprisonment unless the court expressly finds that the defendant has assets to pay the amounts ordered at the time of sentencing. Intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant's probation and may be cause for revocation of his probation or suspension of sentence.

SOURCES: Laws, 2003, ch. 499, § 10; Laws, 2006, ch. 348, § 1, eff from and after passage (approved Mar. 13, 2006.)

Amendment Notes — The 2006 amendment inserted “carpets” following “awnings” near the end of (1)(a)(i); deleted “the sale, installation, cleaning or repair of carpets” following “Home repair shall not include” near the beginning of (1)(a)(ii); inserted “when the amount of the fraud is less than Five Thousand Dollars (\$5,000.00)” following “misdemeanor” in (5)(a); added “As a felony punishable” at the beginning of (5)(b)(i); deleted former (5)(b)(ii) and (iii), and redesignated former (5)(b)(iv) as present (5)(b)(ii); and added (5)(c).

§ 97-23-105. Falsely using or producing retail sales receipts and universal product codes.

(1) A person who, with intent to cheat or defraud a retailer, possesses, uses, utters transfers, makes, alters, counterfeits or reproduces a retail sales receipt or a universal product code label commits a misdemeanor which shall be punished, upon conviction thereof, by imprisonment not to exceed one (1) year, a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

(2) A person who, with intent to cheat or defraud a retailer, possesses fifteen (15) or more retail sales receipts or universal product code labels or possesses a device the purpose of which is to manufacture fraudulent retail sale receipts or universal product code labels commits a felony punishable, upon conviction thereof, by imprisonment not to exceed five (5) years, a fine not to exceed Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Laws, 2005, ch. 511, § 3, eff from and after July 1, 2005.

CHAPTER 25

Offenses Affecting Railroads, Public Utilities and Carriers

SEC.

- 97-25-1. Electric power lines and facilities; tampering, injury or unauthorized use; stealing or destroying fixtures and equipment.
- 97-25-3. Meters; tampering with electric, gas or water meters.
- 97-25-4. Railroads; offenses committed on railroad right-of-way.
- 97-25-5. Railroads; destroying crossing-sign, gate or warning-strings.
- 97-25-7. Railroads; driving vehicle or livestock on track.
- 97-25-9. Railroads; embezzlement of tickets.
- 97-25-11. Railroads; stealing tickets.
- 97-25-13. Railroads; intoxication of engineer or conductor.
- 97-25-15. Railroads; jumping on or off cars in motion.
- 97-25-17. Railroads; leaving switch open or improperly placed.
- 97-25-19. Railroads; locomotive to be stopped before entering or crossing track of another company.
- 97-25-21. Railroads; obstructing or injuring.
- 97-25-23. Railroads; obstructing or injuring; derailling cars.
- 97-25-25. Railroads; seizing and running locomotive.
- 97-25-27. Railroads; signaling or unlawfully interfering with train.
- 97-25-29. Railroads; stealing a ride.
- 97-25-31. Railroads; stealing animal killed or wounded by railroad.
- 97-25-33. Railroads; not to destroy or bury animal killed by train until report made.
- 97-25-35. Railroads; stealing or interfering with communications or signaling equipment.
- 97-25-37. Railroads; stopping or standing at crossing.
- 97-25-39. Railroads; uncoupling locomotives and cars by persons not employed by railroad.
- 97-25-41. Railroads; wilfully shooting from or on moving train.
- 97-25-43. Railroads, public utilities, and carriers; conspiracy to impede.
- 97-25-45. Railroads, public utilities, and carriers; obstructing or impeding by intimidation, force or violence.
- 97-25-47. Railroad trains, buses, trucks, motor vehicles, depots, stations, and other transportation facilities; wilfully shooting or throwing at.
- 97-25-49. Wrongful access to telecommunications messages by cellular telephone; inadmissibility of information obtained in violation of this section.
- 97-25-51. Telegraphs and telephones; governmental messages.
- 97-25-53. Telegraphs and telephones; injuring or destroying lines; interrupting communications; stealing or destroying fixtures.
- 97-25-54. Theft of telephone and other communication services prohibited; definitions; manufacture and possession of devices to facilitate theft prohibited; penalties.
- 97-25-55. Aircraft piracy; boarding aircraft with dangerous or deadly weapon or instrument.
- 97-25-57. Nuclear sabotage.

§ 97-25-1. Electric power lines and facilities; tampering, injury or unauthorized use; stealing or destroying fixtures and equipment.

(1) Any person who shall intentionally in anywise obstruct, injure, break, tamper with or destroy or in any manner interrupt any electric power line or

the transmission of electric current in connection with such line, or who shall make or use electric power from any unauthorized connection with such line, or who shall intentionally injure or destroy any of the posts, wires, insulators, fixtures, equipment, installations or other things belonging to any electric power system, or used in connection with the furnishing of electric power service, shall be guilty of a misdemeanor and such person shall, on conviction, be fined not less than two hundred fifty dollars (\$250.00) nor more than seven hundred fifty dollars (\$750.00), or imprisoned in the county jail for not exceeding six (6) months, or both.

(2) Every person who shall be convicted of taking and carrying away, feloniously, such property as listed in subsection (1) of this section, of the value of one hundred dollars (\$100.00) or more, shall be guilty of grand larceny and shall be imprisoned in the penitentiary for a term not exceeding five (5) years, or shall be fined not more than one thousand dollars (\$1,000.00), or both.

(3) If any person shall feloniously take, steal and carry away any such property as listed in subsection (1) of this section, under the value of one hundred dollars (\$100.00), he shall be guilty of petit larceny and shall be punished by imprisonment in the county jail not exceeding three (3) months, or by fine not exceeding one hundred dollars (\$100.00), or both.

SOURCES: Codes, 1942, § 2114.5; Laws, 1960, ch. 252; Laws, 1981, ch. 541, § 1, eff from and after July 1, 1981.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny § 69. 52B C.J.S., Larceny § 7.
CJS. 29 C.J.S., Electricity § 124.

§ 97-25-3. Meters; tampering with electric, gas or water meters.

Whoever, intentionally, by any means or device, prevents electric current, water or gas from passing through any meter or meters belonging to any person, firm or corporation engaged in the manufacture, sale or distribution of electricity, water or gas for lighting, power or other purposes, furnished such persons to register current or electricity, water or gas, passing through meters, or intentionally prevents the meter from duly registering the quantity of electricity, water or gas supplied, or in any manner interferes with its proper action or just registration, or, without the consent of such person, firm or corporation, intentionally diverts any electrical current from any wire or cable, or water or gas from any pipe or main of such person, firm or corporation, or otherwise intentionally uses, or causes to be used, without the consent of such person, firm or corporation, any electricity or gas manufactured, or water produced or distributed, by such person, firm or corporation, or any person, firm or corporation who retains possession of, or refuses to deliver any meter

or meters, lamp or lamps, or other appliances which may be, or may have been, loaned them by any person, firm or corporation for the purpose of furnishing electricity, water or gas, through the same, with the intent to defraud such person, firm or corporation, shall be guilty of a misdemeanor and upon conviction, shall be punished by a fine of not less than One Hundred Dollars (\$100.00) and not more than Two Hundred Dollars (\$200.00), or by imprisonment in the county jail not more than three (3) months, or by both fine and imprisonment in the discretion of the court.

The presence at any time on or about such meter or meters, wire, cable, pipe or main of any device or unauthorized meter or pipe or wire resulting in the diversion of electric current, water or gas, as above defined, or resulting in the prevention of the proper action or just registration of the meter or meters as above set forth, the same being knowingly or intentionally installed, shall constitute prima facie evidence of knowledge on the part of the person, firm or corporation having custody or control of the room or place where such device or pipe or wire is located, or the existence thereof and the effect thereof, and shall constitute prima facie evidence of the intention on the part of such person, firm or corporation to defraud and shall bring such person, firm or corporation prima facie within the scope, meaning and penalties of this section.

Provided further, that if any person, firm or corporation engaged in the selling or delivering any electric current, water or gas, to a consumer shall knowingly cause to be installed any meter or meters intentionally adjusted or regulated so as to cause such meter or meters to register a greater amount of such electric current, water or gas, than actually passes through the same, shall be prima facie evidence of the knowledge of such person, firm or corporation engaged in selling or delivering such electric current, water or gas, of the existence thereof and shall bring such person, firm or corporation within the scope and meaning of this section, and subject to the operation of this section. Provided further, any employee, stockholder, or member of the board of directors who, with intent to defraud a customer, falsifies, or acquiesces in the falsifying, of any record which results in billing in excess of the amount lawfully due and owing, shall be guilty of a misdemeanor and shall be fined not more than Five Hundred Dollars (\$500.00) or sentenced to serve not more than six (6) months in jail, or both.

Provided further, this section shall not relieve any person, firm or corporation from any other liabilities now imposed by law.

The governing authorities of any municipality are authorized to prosecute any violation of this section which is committed upon meters owned or operated by a utility which is owned or operated by a municipality.

SOURCES: Codes, 1930, § 1025; Laws, 1942, § 2257; Laws, 1922, ch. 271; Laws, 1932, ch. 268; Laws, 1981, ch. 541, § 3; Laws, 1984, ch. 338; Laws, 1992, ch. 385, § 1, eff from and after July 1, 1992.

Cross References — Authorization for governing authorities of municipality to prosecute persons tampering with electricity, gas, or water meters, see § 21-27-9.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny §§ 68, 69, 77. **CJS.** 52B C.J.S., Larceny § 7.

§ 97-25-4. Railroads; offenses committed on railroad right-of-way.

(1) Except as otherwise provided in subsection (2) of this section, it shall be unlawful for any person to do any of the following acts without first having obtained written permission from the owner or operator of the railroad line:

- (a) To attempt to board or disembark from a moving freight train;
- (b) To damage or deface, or attempt to damage or deface, railroad track, signals, switches, buildings, structures, bridges, right-of-way, wire lines, motive power, rolling stock or other property; or
- (c) To dump, or cause to be dumped, upon railroad right-of-way any paper, ashes, sweepings, household wastes, glass, metal, tires, mattresses, furniture, dangerous substances or any other refuse or substance of any kind.

(2) Subsection (1) of this section shall not apply to:

- (a) Railroad employees engaged in the performance of their duties; or
- (b) Representatives of utilities or other agencies with easements across or along the railroad in the performance of their duties.

(3) Any person who violates the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, be punished by imprisonment for not more than thirty (30) days or by a fine of not less than Fifty Dollars (\$50.00) but not more than Two Hundred Fifty Dollars (\$250.00), or both, and may be required to pay any clean-up costs. In addition, any person who is convicted for a violation of subsection (1)(b) or subsection (1)(c) of this section shall be ordered by the court to make restitution to the owners or operators of the railroad line or property in an amount determined by the court to compensate for all damages caused by such person and all costs related to cleanup necessitated as a result of such person's unlawful conduct.

(4) The penalties provided for in this section shall be in addition to any other penalties provided by law for the same or similar acts.

(5) As used in this section the term "right-of-way" means track, roadbed and adjacent property which would be readily recognizable to a reasonable person as railroad property.

SOURCES: Laws, 2001, ch. 446, § 1, eff from and after July 1, 2001.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in (3). The words "of Section 1" were deleted and replaced, so that the reference now reads as "subsection (1)(b) or subsection (1)(c) of this section." The Joint Committee ratified the correction at its May 16, 2002 meeting.

§ 97-25-5. Railroads; destroying crossing-sign, gate or warning-strings.

If any person shall wilfully obliterate, injure or destroy any railroad-gate, warning-strings, cattle-gap or any board or sign erected or maintained by a railroad company in pursuance of law, he shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or be imprisoned in the county jail not exceeding three (3) months, or both.

SOURCES: Codes, 1857, ch. 35, art. 39; 1871, § 2425; 1880, § 1051; 1892, § 1268; Laws, 1906, § 1343; Hemingway's 1917, § 1077; Laws, 1930, § 1107; Laws, 1942, § 2343; Laws, 1981, ch. 541, § 4, eff from and after July 1, 1981.

Cross References — Requirement of railroad crossing-signs, see § 77-9-247.

§ 97-25-7. Railroads; driving vehicle or livestock on track.

Any person who shall ride, drive any vehicle, drive any cattle, horses, mules or other livestock along or on any railroad track open and operated for traffic, unless by permission of the owners of said track, or their agent, shall be guilty of a misdemeanor and be fined not less than twenty-five dollars (\$25.00) nor more than two hundred fifty dollars (\$250.00). The penalty hereof shall not be incurred by operating a street railroad or by crossing a track.

SOURCES: Codes, 1892, § 1267; Laws, 1906, § 1342; Hemingway's 1917, § 1076; Laws, 1930, § 1106; Laws, 1942, § 2342; Laws, 1981, ch. 541, § 5, eff from and after July 1, 1981.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-25-9. Railroads; embezzlement of tickets.

If any officer, agent, clerk, or employee of any railroad company, shall fraudulently embezzle, dispose of, or convert to his own use any passenger railroad ticket or tickets, whether such tickets be fully prepared for use or not, or who shall use such tickets which have been once used, and which have come to his hands or charge by virtue of his office or employment, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars.

SOURCES: Codes, 1892, § 1067; Laws, 1906, § 1145; Hemingway's 1917, § 873; Laws, 1930, § 898; Laws, 1942, § 2124.

Cross References — Forgery and counterfeiting of railroad tickets, see §§ 97-21-39 through 97-21-43.

Embezzlement by agents, employees, etc., generally, see § 97-23-19.

Description of property in indictment for embezzlement, see § 99-7-31.

RESEARCH REFERENCES

Am Jur. 26 Am. Jur. 2d, Embezzlement
§§ 1 et seq.

§ 97-25-11. Railroads; stealing tickets.

If any person shall steal any passenger railroad-ticket or tickets belonging to or issued by any railroad company, the amount of money which in the usual course of business it would have required to have purchased it or them from such railroad company, shall be deemed the value of the stolen ticket or tickets.

SOURCES: Codes, 1892, § 1177; Laws, 1906, § 1255; Hemingway's 1917, § 985; Laws, 1930, § 1013; Laws, 1942, § 2245.

Cross References — Robbery of railroad tickets, see § 97-3-83.

Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

Forgery and counterfeiting of railroad tickets, see §§ 97-21-39 through 97-21-43.

Embezzlement of railroad tickets, see § 97-25-9.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny §§ 59 **CJS.** 52B C.J.S., Larceny §§ 57 et seq.
et seq.

§ 97-25-13. Railroads; intoxication of engineer or conductor.

If any person, while on duty in charge of a locomotive-engine running or standing upon any railroad, or if any conductor in charge of a car or train on any railroad, shall be intoxicated, he shall, on conviction, be imprisoned in the penitentiary not less than one year nor more than fifteen years.

SOURCES: Codes, 1880, § 1063; 1892, § 1275; Laws, 1906, § 1350; Hemingway's 1917, § 1084; Laws, 1930, § 1114; Laws, 1942, § 2350.

§ 97-25-15. Railroads; jumping on or off cars in motion.

If any person, other than passengers or employees engaged in operating the railroad, shall wilfully climb, jump or step upon, or in any way attach himself to, or shall jump off a locomotive, tender or car while in motion on a railroad track or siding, he shall, upon conviction, be fined not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00), or be imprisoned in the county jail not less than five (5) days nor more than twenty-five (25) days, or both.

SOURCES: Codes, 1892, § 1272; Laws, 1906, § 1347; Hemingway's 1917, § 1081; Laws, 1930, § 1111; Laws, 1942, § 2347; Laws, 1981, ch. 541, § 6, eff from and after July 1, 1981.

JUDICIAL DECISIONS

1. In general.

Railroad special agent's permission to man to board freight train imposed no greater duty upon railroad than not to wantonly or wilfully injure man, since special agent had no authority to give such permission. *Gulf & S.I.R.R. v. Still*, 169 Miss. 69, 152 So. 824 (1934).

Trespasser injured in boarding freight train, when train suddenly jerked after he indicated to fireman that he intended to board train, held not entitled to recover

for wilful or gross negligence, where it did not appear that engineer was informed of trespasser's peril. *Gulf & S.I.R.R. v. Still*, 169 Miss. 69, 152 So. 824 (1934).

Affidavit under this section [Code 1942, § 2347] averring merely that a person jumped off a moving railroad train charges no offense and arrest and imprisonment of a passenger under such an affidavit subjects the party to an action for false imprisonment. *Alabama & V. Ry. Co. v. Kuhn*, 78 Miss. 114, 28 So. 797 (1900).

§ 97-25-17. Railroads; leaving switch open or improperly placed.

If any brakeman, switchman, or other person in charge of any switch, shall wilfully or carelessly leave the same open or improperly placed, whereby any person shall be killed or injured, he shall, on conviction, be imprisoned in the penitentiary not more than fifteen years.

SOURCES: Codes, 1880, § 1061; 1892, § 1279; Laws, 1906, § 1354; Hemingway's 1917, § 1088; Laws, 1930, § 1118; Laws, 1942, § 2354.

§ 97-25-19. Railroads; locomotive to be stopped before entering or crossing track of another company.

If any person shall run, or cause to be run, a locomotive propelled by steam upon or across the track of any other railroad company without first coming to a full stop just before it comes upon or across such track, he shall, on conviction, be fined not less than twenty-five dollars nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or both; and if, by reason of his coming upon or across such track, some person shall be killed or injured, he shall, upon conviction, be imprisoned in the penitentiary not more than fifteen years.

SOURCES: Codes, 1880, § 1060; 1892, § 1278; Laws, 1906, § 1353; Hemingway's 1917, § 1087; Laws, 1930, § 1117; Laws, 1942, § 2353.

Cross References — Highway crossings and bridges, see § 77-9-251.

JUDICIAL DECISIONS

1. In general.

An instruction that it was unlawful for a railroad train to be operated within a city at more than six miles an hour, etc.,

also embracing the hypothesis contemplated by this provision, was harmless error. *Mobile & O.R. Co. v. Campbell*, 114 Miss. 803, 75 So. 554 (1917).

§ 97-25-21. Railroads; obstructing or injuring.

If any person shall wantonly or negligently obstruct or injure any railroad, on conviction, he shall be fined not less than five hundred dollars (\$500.00) nor more than two thousand dollars (\$2,000.00), or imprisoned not longer than twelve (12) months in the county jail, or both.

SOURCES: Codes, 1857, ch. 64, art. 163; 1871, § 2626; 1880, § 2873; 1892, § 1265; Laws, 1906, § 1340; Hemingway's 1917, § 1074; Laws, 1930, § 1104; Laws, 1942, § 2340; Laws, 1981, ch. 541, § 7, eff from and after July 1, 1981.

Cross References — Rights, powers, and privileges of railroad corporations, see §§ 77-9-141 et seq.

Conspiracy to impede or obstruct railroad, public utility or carrier, see § 97-25-43.

Obstruction or impeding of railroad, public utility or carrier by intimidation, force or violence, see § 97-25-45.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2340] is not unconstitutional for not sufficiently defining the elements constituting the crime. *State v. Lucas*, 221 Miss. 538, 73 So. 2d 158 (1954).

Where an indictment charged that the defendant unlawfully, wantonly and negligently obstructed a railroad by negli-

gently and wantonly leaving his unattended automobile parked at a railroad crossing at a private road for automobiles, the indictment was sufficient in detail to inform the accused of the nature of the crime and the acts he is charged with having committed. *State v. Lucas*, 221 Miss. 538, 73 So. 2d 158 (1954).

§ 97-25-23. Railroads; obstructing or injuring; derailing cars.

If any person shall wantonly or maliciously injure, or place any impediment or obstruction on any railroad, or do any other act by means of which any car or vehicle might be caused to diverge, or be derailed, or thrown from the track, such person, on conviction, shall be committed to the custody of the department of corrections for a term of not less than one (1) year nor more than ten (10) years, and the penalty provided in this section shall apply to any engineer, conductor, switchman, brakeman, train dispatcher or telegraph operator who shall wilfully or negligently cause the derailment or collision of a passenger train.

SOURCES: Codes, 1857, ch. 64, art. 164; 1871, § 2627; 1880, § 2874; 1892, § 1266; Laws, 1906, § 1341; Hemingway's 1917, § 1075; Laws, 1930, § 1105; Laws, 1942, § 2341; Laws, 1981, ch. 541, § 8, eff from and after July 1, 1981.

Cross References — Conspiracy to impede or obstruct railroad, public utility or carrier, see § 97-25-43.

Obstruction or impeding of railroad, public utility or carrier by intimidation, force or violation, see § 97-25-45.

JUDICIAL DECISIONS

1. In general.

Where two years and forty-two days elapsed from the date the offense of placing an obstruction on a railroad track whereby a train or part thereof might be derailed was committed to the date the prosecution was begun, and the state did

not prove nor attempt to prove, nor was there any evidence on which it could be said that defendant was absent from the state any single day except at the time of his arrest, conviction must be reversed and remanded. *McCullar v. State*, 183 So. 487 (Miss. 1938).

§ 97-25-25. Railroads; seizing and running locomotive.

If any person shall unlawfully seize upon any locomotive and run it away, or shall aid, abet or procure the doing of the same, he shall, upon conviction, be fined not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00), or imprisoned in the county jail not exceeding six (6) months, or both.

SOURCES: Codes, 1892, § 1273; Laws, 1906, § 1348; Hemingway's 1917, § 1082; Laws, 1930, § 1112; Laws, 1942, § 2348; Laws, 1981, ch. 541, § 9, eff from and after July 1, 1981.

§ 97-25-27. Railroads; signaling or unlawfully interfering with train.

If any person, without authority and in the absence of apparent danger warranting such act, shall, out of a spirit of mischief, or with any purpose other than to prevent or give information of an accident, make, or cause to be made, any sign or signal to persons in charge of any locomotive, or railroad train or cars, or to any of such persons, or in sight of any of them, with intent to cause the stopping or starting of such locomotive, train, or cars; or if any person unlawfully interfere with the management or running of such locomotive, train, or cars on any railroad, the person so offending shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or shall be imprisoned in the county jail not exceeding three (3) months.

SOURCES: Codes, 1892, § 1280; Laws, 1906, § 1355; Hemingway's 1917, § 1089; Laws, 1930, § 1119; Laws, 1942, § 2355; Laws, 1981, ch. 541, § 10, eff from and after July 1, 1981.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-25-29. Railroads; stealing a ride.

Any person who shall ride on any engine, tender, car or train of any railroad company, without authority or permission of the proper officers or employees of the company, or of the persons in charge of such engine, tender, car or train, shall, on conviction, be fined not less than fifty dollars (\$50.00) nor

more than one hundred dollars (\$100.00) or be imprisoned not more than thirty (30) days, or both.

SOURCES: Codes, 1892, § 1269; Laws, 1906, § 1344; Hemingway's 1917, § 1078; Laws, 1930, § 1108; Laws, 1942, § 2344; Laws, 1981, ch. 541, § 11, eff from and after July 1, 1981.

§ 97-25-31. Railroads; stealing animal killed or wounded by railroad.

Any person other than the owner thereof or the agents or employees of the railroad company who shall take and carry away, with intent to appropriate to his own use, any animal killed or wounded by the engine or cars of a railroad company, without obtaining the consent of such owner or the agent of such company, shall be guilty of larceny, and, upon conviction, be punished as provided by law for the larceny of such animal.

SOURCES: Codes, 1880, § 2910; 1892, § 1185; Laws, 1906, § 1263; Hemingway's 1917, § 993; Laws, 1930, § 1021; Laws, 1942, § 2253.

Cross References — Notice to mortgagee of loss of mortgaged cattle, see § 69-29-13. Railroad's duty to construct and maintain stockgaps and cattle-guards, see § 77-9-253.

Grand larceny, see § 97-17-41.

Petit larceny, see § 97-17-43.

Report of animals killed by railroad, see § 97-25-33.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny §§ 26, **CJS.** 52B C.J.S., Larceny §§ 57 et seq. 64, 136.

§ 97-25-33. Railroads; not to destroy or bury animal killed by train until report made.

If any person or corporation operating a railroad shall bury or otherwise destroy, or cause to be buried or destroyed, the carcass of any domestic animal killed or injured by the running of a locomotive or cars, before a report in writing has been made to the nearest station agent, giving as near as can be the time of the killing or injury and a description of the animal, with marks and brands, and a fair estimate of its value if killed, and of the extent of damage if injured, said person or corporation shall, upon conviction, be fined not more than one hundred dollars. This section shall not apply in any case where the owner or possessor of the animal has been notified and had opportunity to examine the carcass of injured animal.

SOURCES: Codes, 1892, § 1277; Laws, 1906, § 1352; Hemingway's 1917, § 1086; Laws, 1930, § 1116; Laws, 1942, § 2352.

Cross References — Stealing animal killed or injured by railroad, see § 97-25-31.

§ 97-25-35. Railroads; stealing or interfering with communications or signaling equipment.

If any person shall maliciously remove, take, steal, change or in any manner interfere with any railroad transmission line, signaling device, microwave tower or any of the parts or attachments belonging to any communication or signaling device owned, leased or used by any railroad or transportation company, he shall, on conviction, be fined not more than three thousand dollars (\$3,000.00), or shall be imprisoned not more than five (5) years, or both.

SOURCES: Codes, 1942, § 2355.5; Laws, 1968, ch. 342, § 1; Laws, 1981, ch. 541, § 12, eff from and after July 1, 1981.

§ 97-25-37. Railroads; stopping or standing at crossing.

It shall be unlawful for any locomotive or train of cars to be stopped or left standing on any railroad crossing, unless done under regulations adopted by those having the right to control such matter. Any person violating this section shall, on conviction be fined not less than one hundred dollars, nor more than one thousand dollars, or be imprisoned in the county jail for one year, or both; and if, in consequence of such violation, any person shall be killed or injured, the guilty party shall be imprisoned in the penitentiary not exceeding fifteen years.

SOURCES: Codes, 1871, § 2423; 1880, § 1062; 1892, § 1274; Laws, 1906, § 1349; Hemingway's 1917, § 1083; Laws, 1930, § 1113; Laws, 1942, § 2349.

Cross References — Prohibition against railroad obstructing highways, see § 77-9-235.

Criminal responsibility of crew complying with orders of employer for obstruction of highways and streets, see § 77-9-236.

§ 97-25-39. Railroads; uncoupling locomotives and cars by persons not employed by railroad.

If any person, not being employed on any railroad, shall wilfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any way aid, abet or procure the doing of the same, such person shall be punished by a fine of not less than two hundred fifty dollars (\$250.00) nor more than one thousand dollars (\$1,000.00), or imprisonment in the county jail not exceeding six (6) months, or both.

SOURCES: Codes 1892, § 1271; Laws, 1906, § 1346; Hemingway's 1917, § 1080; Laws, 1930, § 1110; Laws, 1942, § 2346; Laws, 1981, ch. 541, § 13, eff from and after July 1, 1981.

§ 97-25-41. Railroads; wilfully shooting from or on moving train.

If any person shall wilfully shoot any firearms on or from any moving

train, such person shall, on conviction, be fined not less than two hundred fifty dollars (\$250.00) nor more than one thousand dollars (\$1,000.00), or be imprisoned in the county jail not more than six (6) months, or both.

SOURCES: Codes, 1906, § 1357; Hemingway's 1917, § 1091; Laws, 1930, § 1121; Laws, 1942, § 2357; Laws, 1981, ch. 541, § 14, eff from and after July 1, 1981.

Cross References — Shooting or throwing at train, bus, depot, etc., see § 97-25-47.

§ 97-25-43. Railroads, public utilities, and carriers; conspiracy to impede.

If two (2) or more persons shall wilfully or maliciously combine or conspire together to obstruct or impede or hinder by any unlawful act or threat of violence, terror or intimidation the regular operation and conduct of the business of any railroad company, or any public service corporation, or any public utility, or any person or corporation carrying passengers or property for hire, such persons, and each of them, shall, on conviction, be punished by a fine of not less than one thousand dollars (\$1,000.00) and not exceeding three thousand dollars (\$3,000.00), or imprisonment in the county jail for not less than ninety (90) days nor more than one (1) year, or by both such fine and imprisonment.

This section shall not apply to persons who merely quit the employment of a railroad company, whether by concert of action or otherwise.

SOURCES: Codes, 1892, § 1270; Laws, 1906, § 1345; Hemingway's 1917, § 1079; Laws, 1930, § 1109; Laws, 1942, §§ 2345, 2345-01; Laws, 1947, 2nd Ex. ch. 5, § 1; Laws, 1981, ch. 541, § 15, eff from and after July 1, 1981.

Cross References — Obstructing or injuring railroad, see §§ 97-25-21, 97-25-23. Conspiracy, generally, see § 97-1-1.

Obstruction or impeding of railroad, public utility or carrier by intimidation, force or violence, see § 97-25-45.

§ 97-25-45. Railroads, public utilities, and carriers; obstructing or impeding by intimidation, force or violence.

If any person shall unlawfully obstruct or impede by any act of force or violence, or by any means of intimidation, the regular operation and conduct of the business of any railroad company or any public service corporation, or person carrying passengers or property, or any public utility, or shall impede, hinder, or obstruct, by force or violence, the regular running of any locomotive-engine, freight or passenger train of any railroad, or any vehicle used in the transportation of persons or property on the public highways, or the operation of any public utility, such person shall be guilty of a felony and, upon conviction, shall be committed to the custody of the department of corrections for a term of not less than one (1) year nor exceeding five (5) years.

SOURCES: Codes, 1942, § 2345-02; Laws, 1947, 2nd Ex. ch. 5, § 2; Laws, 1981, ch. 541, § 16, eff from and after July 1, 1981.

Cross References — Obstructing or injuring railroad, see §§ 97-25-21, 97-25-23. Conspiracy to impede or obstruct railroad, public utility or carrier, see § 97-25-43.

§ 97-25-47. Railroad trains, buses, trucks, motor vehicles, depots, stations, and other transportation facilities; wilfully shooting or throwing at.

If any person or persons shall wilfully shoot any firearms or hurl any missile at, or into, any train, bus, truck, motor vehicle, depot, station, or any other transportation facility, such person shall, upon conviction, be punished by a fine of not less than one hundred dollars (\$100.00) nor more than two hundred fifty dollars (\$250.00), or be committed to the custody of the department of corrections not less than one (1) year nor more than five (5) years, or by both such fine and imprisonment.

SOURCES: Codes, 1906, § 1356; Hemingway's 1917, § 1090; Laws, 1930, § 1120; Laws, 1942, § 2356; Laws, 1947, 2nd Ex. ch. 4; Laws, 1981, ch. 541, § 17, eff from and after July 1, 1981.

Cross References — Shooting on or from moving train, see § 97-25-41.

JUDICIAL DECISIONS

1. In general.

Throwing missile into coach of moving train, while standing on platform of coach,

violates this section [Code 1942, § 2356].
State v. Ray, 87 Miss. 183, 39 So. 521 (1905).

§ 97-25-49. Wrongful access to telecommunications messages by cellular telephone; inadmissibility of information obtained in violation of this section.

(1) A person who commits either of the following offenses shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail not exceeding six (6) months, or both:

(a) Wrongfully obtains, or attempts to obtain, any knowledge of a private telecommunications message by gaining access to the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by cellular telephone, when such person is not the lawfully intended recipient of the message or is not authorized to have access to such message, or by connivance with a clerk, operator, messenger or other employee of a telecommunications company; or

(b) Being such clerk, operator, messenger or other employee, uses, or suffers to be used, or willfully divulges to anyone but the person for whom it was intended, the contents of a cellular phone message.

(c) The provisions of this subsection shall not apply to the use of a telephone monitoring device by either a law enforcement agency acting

pursuant to a valid court order or to a corporation or other business entity engaged in marketing research or telephone solicitation conversations by an employee of the corporation or other business entity when the monitoring is used for the purpose of service quality control and the monitoring is used with the consent of at least one (1) person who is a party to the conversation.

(d) The provisions of this subsection shall not apply to an employee of a cellular telephone company who discloses or uses an intercepted communication in the normal course of business as a necessary incident to providing service or to the protection of the rights or property of the employer or who provides assistance to an investigative or law enforcement officer acting under a valid court order.

(2) Any information obtained in violation of this section shall not be admissible in any civil proceeding unless the information was obtained by the lawful owner of the device that obtained the information.

SOURCES: Codes, 1892, § 1301; Laws, 1906, § 1375; Hemingway's 1917, § 1115; Laws, 1930, § 1145; Laws, 1942, § 2382; Laws, 1999, ch. 514, § 1, eff from and after July 1, 1999.

Cross References — Penalty for neglect in transmittal and delivery of messages, see §§ 77-9-703 et seq.

JUDICIAL DECISIONS

1. In general.

An action for damages against a telegraph company for the act of its agent in divulging the contents of a message is not

within the statute [Code 1942, § 2382].
Cock v. Western Union Tel. Co., 84 Miss. 380, 36 So. 392 (1904).

RESEARCH REFERENCES

Am Jur. 74 Am. Jur. 2d, Telecommunications § 59.

CJS. 86 C.J.S., Telecommunications § 131.

§ 97-25-51. Telegraphs and telephones; governmental messages.

If any telegraph company, or an officer, agent, operator, or employee of any such company or association, shall refuse or wilfully omit to transmit a dispatch tendered by an officer of this state, or of the United States, which by law is required to be given immediate dispatch, for the price of ordinary communications of the same length, or shall designedly alter or falsify the same for any purpose whatever, such company or such officer, agent, operator, or employee, shall, on conviction, be fined not exceeding two thousand dollars, or imprisoned in the county jail not exceeding one year, or both.

SOURCES: Codes 1892, § 1302; Laws, 1906, § 1376; Hemingway's 1917, § 1116; Laws, 1930, § 1146; Laws, 1942, § 2383.

Cross References — Penalty for neglect in transmittal and delivery of messages, see §§ 77-9-703 et seq.

RESEARCH REFERENCES

Am Jur. 74 Am. Jur. 2d, Telecommunications §§ 72 et seq.

CJS. 86 C.J.S., Telecommunications §§ 129 et seq.

§ 97-25-53. Telegraphs and telephones; injuring or destroying lines; interrupting communications; stealing or destroying fixtures.

(1) Any person who shall intentionally obstruct, injure, break or destroy, or in any manner interrupt any telegraph or telephone line, or communication thereon between any two (2) points, by or through which the said lines may pass, or who shall injure or destroy any of the posts, wires, insulators, or fixtures, or things belonging to such telegraph or telephone lines, such person shall, on conviction, be fined not less than two hundred fifty dollars (\$250.00), nor more than five hundred dollars (\$500.00), or imprisoned in the county jail not exceeding six (6) months, or both such fine and imprisonment.

(2) Every person who shall be convicted of taking and carrying away, feloniously, such property as listed in subsection (1) of this section, of the value of one hundred dollars (\$100.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the penitentiary for a term not exceeding five (5) years, or shall be fined not more than one thousand dollars (\$1,000.00), or both.

(3) If any person shall feloniously take, steal and carry away any such property as listed in subsection (1) of this section, under the value of one hundred dollars (\$100.00), he shall be guilty of petit larceny and shall be punished by imprisonment in the county jail not exceeding three (3) months, or by fine not exceeding one hundred dollars (\$100.00), or both.

SOURCES: Codes, 1857, ch. 64, art. 235; 1871, § 2702; 1880, § 2954; 1892, § 1300; Laws, 1906, § 1374; Hemingway's 1917, § 1114; Laws, 1930, § 1144; Laws, 1942, § 2381; Laws, 1902, ch. 100; Laws, 1981, ch. 541, § 18, eff from and after July 1, 1981.

Cross References — Telegraph and telephone lines, see §§ 77-9-711 et seq.

RESEARCH REFERENCES

ALR. Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass. 95 A.L.R.3d 44.

§ 97-25-54. Theft of telephone and other communication services prohibited; definitions; manufacture and possession of devices to facilitate theft prohibited; penalties.

(1) The following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Telecommunication device" means any type of instrument, device, machine, or equipment that is designed for or capable of transmitting or receiving telephonic, electronic or radio communications, or any part of such instrument, device, machine or equipment, or any computer circuit, computer chip, electronic mechanism or other component which is capable of facilitating the transmission or reception of telephonic, electronic or radio communications;

(b) "Telecommunication service" means any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, radio, electromagnetic, photoelectronic or photo-optical system.

(c) "Telecommunication service provider" means an entity engaged in the creation, display, management, storage, processing, transmission or distribution for compensation of images, text, voice, video or data by wire or by wireless means, or entities engaged in the construction, design, development, manufacture, maintenance or distribution for compensation of devices, products, software or structures used in the above activities. The term does not include companies organized to do business as commercial broadcast radio stations, television stations or news organizations primarily serving in-state markets.

(d) "Unlawful telecommunication device" means any electronic serial number, mobile identification number, personal identification number or any telecommunication device that is capable or has been altered, modified, programmed or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable of acquiring or facilitating the acquisition of a telecommunication service without the consent of the telecommunication service provider. The term includes without limitation phones altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone phones, tumbler microchips, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider and other instruments capable of disguising their identity or location or of gaining access to a communications system operated by a telecommunication service provider.

(2)(a) It shall be unlawful for any person to use a telecommunication device intending to avoid the payment of any lawful charge for service to the device.

(b) It shall be unlawful for any person to knowingly, willfully and with intent to defraud a person providing telephone or telegraph service to avoid or attempt to avoid or to aid, abet or cause another to avoid the lawful charge in whole or in part for telephone or telegraph service by any of the following means:

(i) By charging the service to an existing telephone number or credit card number without the authority of the subscriber thereto or the lawful holder thereof;

(ii) By charging the service to a nonexistent telephone number or credit card number, or to a number associated with telephone service which is suspended or terminated, or to a revoked, cancelled or expired credit card number, notice of the suspension, termination, revocation or cancellation of the telephone service or credit card having been given to the subscriber thereto or the holder thereof;

(iii) By use of a code, prearranged scheme, or other similar stratagem or device whereby the person, in effect, sends or receives information;

(iv) By rearranging, tampering with, or making connection with telephone or telegraph facilities or equipment, whether physically, electrically, acoustically, inductively, or otherwise, or by using telephone or telegraph service with knowledge or reason to believe that the rearrangement, tampering or connection existed at the time of the use;

(v) By using any other deception, false pretense, trick, scheme, device, conspiracy, or means, including the fraudulent use of false, altered, or stolen identification.

(c) The first offense under this subsection shall be a misdemeanor and shall be punishable by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both. A second or subsequent offense under this subsection shall be a felony and shall be punishable by a fine not to exceed Fifty Thousand Dollars (\$50,000.00) or commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(3)(a) It shall be unlawful for any person to make, possess, sell, give or otherwise transfer to another, or offer or advertise any instrument, apparatus, or device with intent to use it or with knowledge or reason to believe it is intended to be used to avoid any lawful telephone or telegraph toll charge or to conceal the existence or place of origin or destination of any telephone or telegraph message or to sell, give, or otherwise transfer to another or offer or advertise plans, instructions or any kit for making or assembling such an instrument, apparatus, or device with knowledge or reason to believe that the plans, instructions or kit may be used to make or assemble such an instrument, apparatus, or device.

(b) Any person who possesses a telecommunications device with intent to sell or offer to sell to another, intending to avoid the payment of any lawful charge for service to the device or who makes, distributes, possesses, uses or assembles an unlawful telecommunication device or modifies, alters, programs or reprograms a telecommunications device designed, adapted or which can be used for commission of a theft of telecommunication service or to acquire or facilitate the acquisition of telecommunication service without the consent of the telecommunication service provider or to conceal or to assist another to conceal from any telecommunication service provider or from any lawful authority the existence or place of origin or of destination of any communication is guilty of a misdemeanor and shall be punished by imprisonment not to exceed one (1) year, a fine to not exceed Ten Thousand Dollars (\$10,000.00), or both. Any person who possesses ten (10) or more

such unlawful telecommunication devices is guilty of a felony, and shall be punished by a fine not to exceed Fifty Thousand Dollars (\$50,000.00), commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(c) Any person who manufactures ten (10) or more telecommunications devices and intends to sell them to others intending to avoid the payment of any lawful charge for service to the device is guilty of a felony, and shall be punished by a fine not to exceed Fifty Thousand Dollars (\$50,000.00), commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(4) It shall be unlawful for any person to publish the number or code of an existing, canceled, revoked, expired, or nonexistent credit card, or the numbering or coding which is employed in the issuance of credit cards, with the intent that it be used or with knowledge or reason to believe that it will be used to avoid the payment of any lawful telephone or telegraph toll charge. For the purposes of this section, "publishes" means the communication of information to any one or more persons, either orally, in person or by telephone, radio or television, or electronic means, including without limitation a bulletin board system, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper, magazine article, or book.

(5) It shall be unlawful for any person who is the holder of a calling card, credit card, calling code, or any other means or device for the legal use of telecommunications services and who receives anything of value for knowingly allowing another person to use the means or device in order to fraudulently obtain telecommunication services.

(6)(a) A person shall be guilty of theft of telecommunications services if, having control over the disposition of services of others to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto. Theft of telecommunications services when the value of the services obtained or diverted is less than Fifty Dollars (\$50.00) shall be a misdemeanor. Theft of telecommunications services when the value of the services obtained or diverted is Fifty Dollars (\$50.00) or more shall be a felony and shall be punished by a fine not to exceed Ten Thousand Dollars (\$10,000.00), or commitment to the custody of the State Department of Corrections for a period not to exceed ten (10) years, or both.

(b) Amounts involved in theft of services committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the gravity of the offense.

(7) The provisions of this section shall apply to any telecommunication service which either originates or terminates or both originates and terminates in this state or when the charges for service would have been billable, in normal course, by a person or entity providing telecommunication service in this state, but for the fact that the charge or service was avoided, or attempted to be avoided, by one or more means proscribed by this section.

(8) Except as otherwise provided herein, the first offense under this section shall be a misdemeanor and shall be punishable by a fine not to exceed

One Thousand Dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both. A second or subsequent offense under this section shall be a felony and shall be punishable by a fine not to exceed Fifty Thousand Dollars (\$50,000.00) or commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(9) Any person defrauded by any acts prohibited under this section shall be entitled to restitution for the entire amount of the charges avoided from any person or persons convicted under this section. The court may, in addition to any other sentence authorized by law, sentence a person convicted of violating this section to make restitution.

(10) A telecommunication service provider aggrieved by a violation of this section may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, costs of court and attorney fees.

(11) Any instrument, apparatus, device, plans, instructions, kit, or written publication described in subsection (2) or (3) of this section may be seized under warrant or incident to a lawful arrest, and, upon the conviction of a person for a violation of this section, the instrument, apparatus, device, plans, instructions, or written publication may be destroyed as contraband as provided by law.

SOURCES: Laws, 1995, ch. 411, § 1, eff from and after July 1, 1995.

Cross References — Unlawful use of telephone number, credit number, or other credit devise to obtain property or services, see § 97-19-31.

Obtaining signature on instrument, money, personal property, or thing of value with intent to defraud, see § 97-19-39.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Larceny § 74. **CJS.** 86 C.J.S., Telecommunications
74 Am. Jur. 2d, Telecommunications § 131.
§§ 188, 190, 191, 193-197.

§ 97-25-55. Aircraft piracy; boarding aircraft with dangerous or deadly weapon or instrument.

(1) The offense of aircraft piracy is defined as the seizure or exercise of control, by force or violence or threat of force or violence, of any aircraft within the airspace jurisdiction of the State of Mississippi. Any person convicted of the offense of aircraft piracy shall suffer death or imprisonment for life in the state penitentiary.

(2) The offense of assault with the intent to commit aircraft piracy is defined as an intimidation, threat, assault or battery toward any flight crew member or flight attendant (including any steward or stewardess) of such aircraft so as to interfere with the performance of duties by such member or attendant to perform his duties, with the intent to commit aircraft piracy as

defined in subsection (1) of this section. Any person convicted of the offense of assault with intent to commit aircraft piracy shall serve a term not to exceed twenty (20) years or be fined a sum not to exceed ten thousand dollars (\$10,000.00), or both.

Any person who, in the commission of such intimidation, threat, assault or battery with the intent to commit aircraft piracy, employs a dangerous or deadly weapon or other means capable of inflicting serious bodily injury shall serve a term not to exceed fifty (50) years or be fined a sum not to exceed twenty thousand dollars (\$20,000.00), or both.

(3) Any person who boards an aircraft with a dangerous or deadly weapon or other means capable of inflicting serious bodily injury concealed upon his person or effects shall, upon conviction, serve a term not to exceed ten (10) years or be fined a sum not to exceed five thousand dollars (\$5,000.00), or both. The prohibition of this subsection shall not apply to duly elected or appointed law enforcement officers or commercial security personnel who are in possession of weapons used within the course and scope of their employment; nor shall the prohibition apply to persons who are in possession of weapons or means with the consent of the owner of such aircraft, or his agent, or the lessee or bailee of such aircraft.

(4) Anyone accused of violating subsection (1), (2) or (3) of this section shall be indicted and tried as provided by section 99-11-19.

SOURCES: Laws, 1974, ch. 576, § 2; Laws, 1977, ch. 458, § 9, eff from and after passage (approved April 13, 1977).

Cross References — Construction of the terms “capital case,” “capital offense,” “capital crime,” and “capital murder,” see § 1-3-4.

Separate sentencing proceeding to determine punishment in capital cases, see §§ 99-19-101 et seq.

RESEARCH REFERENCES

ALR. Construction and application of § 902 (i-1) of Federal Aviation Act of 1958, as amended (49 USCS § 1472 (i-1), punishing aircraft piracy, interference with flight crew members, and certain other crimes aboard aircraft in flight. 10 A.L.R. Fed. 844.

Validity, under Federal Constitution, of preflight procedures used at airports to prevent hijacking of aircraft. 14 A.L.R. Fed. 286.

§ 97-25-57. Nuclear sabotage.

Any person who shall, by any act or omission, (a) wilfully and maliciously destroy or cause or attempt to cause damage or loss to a nuclear electrical generating facility or its components, including the electrical transmission lines or switching equipment used in direct connection with such a facility; or (b) feloniously take, steal and carry away or remove, alter or otherwise render unusable or unsafe the spent or unspent nuclear fuel used or stored in a nuclear electrical generating facility or nuclear storage facility shall be guilty

of the crime of nuclear sabotage and, upon conviction, shall be punished by imprisonment for a period of not less than one (1) year nor more than five (5) years or by a fine of not more than ten thousand dollars (\$10,000.00), or both.

This section shall be construed to cover acts and omissions of persons employed at such nuclear facilities, or persons otherwise rightfully upon the premises of such a facility, as well as all other persons; provided, however, that this section does not apply to acts or omissions carried out in accordance with official rules or directives relating to plant operation, or within the scope of responsibility of judgment delegated to persons employed at such nuclear facilities.

SOURCES: Laws, 1981, ch. 541, § 2, eff from and after July 1, 1981.

Cross References — Southern Interstate Nuclear Compact, see §§ 57-25-1 et seq.

CHAPTER 27

Crimes Affecting Public Health

SEC.

- 97-27-1. Adulteration of food, drugs or candy.
- 97-27-3. Animals and fowl; diseased animals and fowl to be confined and segregated; burial.
- 97-27-5. Animals and fowl; selling, exposing or using animal with infectious disease.
- 97-27-7. Animals and fowl; glandered animals to be reported to board of supervisors; destruction or quarantine of diseased animals.
- 97-27-9. Beaches; bringing or leaving breakable containers or other injurious debris upon established beaches.
- 97-27-10. Definition of harmful substances.
- 97-27-11. Introduction of harmful biological substances into Mississippi prohibited; development, manufacture or possession of harmful biological substances prohibited except for authorized purposes; penalties.
- 97-27-12. Unlawful hoaxes intended to cause belief that exposure to certain harmful substances or devices has occurred; penalties; imposition of costs for individual or governmental response to unlawful hoax.
- 97-27-13. Contagious diseases; smallpox patient not to go abroad.
- 97-27-14. Contagious diseases; causing exposure to human immunodeficiency virus (HIV).
- 97-27-15. Food sales; selling meat of animal not slaughtered, or unwholesome bread or drink.
- 97-27-17. Food sales; flour and other provisions.
- 97-27-19. Food sales; meat; sale of flesh of dead, diseased, and unclean animals; punishment.
- 97-27-21. Poisons; sale and giving away regulated.
- 97-27-23. Poisons; register to be kept; label.
- 97-27-25. Poisons; arsenic to be mixed with soot or indigo.
- 97-27-27. Poisons; arsenic or other deadly poison not to be used in embalming fluid.
- 97-27-29. Poisons; penalty for violation of certain sections.
- 97-27-31. Poisons; not to be sold to minors.
- 97-27-33. Poisons; inhalation of toxic vapors from model glue; unlawful glue sales to minors.
- 97-27-35. Repealed.

§ 97-27-1. Adulteration of food, drugs or candy.

If any person shall manufacture, sell or keep or offer or exhibit for sale any adulterated food, or drug, as defined by law; or if any person shall manufacture, sell, or keep or offer or exhibit for sale any candy, confection, or sweetmeat, in making which any preparation of lime or other deleterious substance is used, he shall, upon conviction, be fined not exceeding five hundred dollars, or be imprisoned in the county jail not more than six months, or both.

SOURCES: Codes, 1880, § 2744; 1892, § 952; Laws, 1906, § 1028; Hemingway's 1917, § 753; Laws, 1930, § 771; Laws, 1942, § 1997.

Cross References — Regulation of adulteration of food and drugs, see §§ 75-29-1 et seq.

Meat inspection to prevent adulteration and misbranding, see §§ 75-35-1 et seq.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Food §§ 74 et seq.

30 Am. Jur. Proof of Facts 2d 1, Foreign Substance in Food or Beverage.

31 Am. Jur. Proof of Facts 2d 81, Food Poisoning.

CJS. 2 C.J.S., Adulteration §§ 5 et seq. 36A C.J.S., Food §§ 24 et seq.

§ 97-27-3. Animals and fowl; diseased animals and fowl to be confined and segregated; burial.

Owners of cattle, horses, mules, sheep, jacks and jennets dying of charbon or glanders or anything of the fowl species dying of cholera, or hogs dying of any disease on their premises, and which fact may be known to them, are hereby required to quick lime and bury such two feet from surface of ground, or burn the same within twenty-four hours from the death thereof. Any person or persons having herds or flocks, infected with any of the diseases enumerated in this section shall be required to confine same, upon his or her premises, in a manner that will seclude them from contact with other non-infected herds or flocks. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined in a sum not less than five dollars or more than twenty-five dollars for each offense.

SOURCES: Codes, Hemingway's 1917, §§ 761 et seq.; Laws, 1930, § 779; Laws, 1942, § 2005; Laws, 1914, ch. 133.

Cross References — Compensation for destroyed diseased livestock, see § 69-15-113.

Penalty for driving or drifting livestock from area under tick quarantine, see § 69-15-325.

Penalty for violations of livestock sanitation regulations, see § 69-15-331.

Exposing, selling, or using animal with infectious disease, see § 97-27-5.

Sale of unwholesome bread, drink, or meat of diseased or unslaughtered animal, see § 97-27-15.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Animals §§ 20 et seq., 41 et seq.

CJS. 3B C.J.S., Animals §§ 104, 110-123, 125-127.

§ 97-27-5. Animals and fowl; selling, exposing or using animal with infectious disease.

If any person shall knowingly sell or offer for sale, or use or expose, or shall cause or procure to be sold or offered for sale, or used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other like contagious or infectious disease, he shall be guilty of a misdemeanor, and, on

conviction, shall be fined not less than twenty-five dollars nor more than two hundred dollars, or imprisoned in the county jail not exceeding four months; or both.

SOURCES: Codes, 1880, § 809; 1892, § 1010; Laws, 1906, § 1087; Hemingway's 1917, § 813; Laws, 1930, § 836; Laws, 1942, § 2062.

Cross References — Authority of state livestock sanitary board, see § 69-15-13. Penalty for driving or drifting livestock from area under tick quarantine, see § 69-15-325.

Penalty for violations of livestock sanitation regulations, see § 69-15-331.

Care of infected animals and disposition of dead bodies, see § 97-27-3.

Care and disposition of glandered animals, see § 97-27-7.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Extent of liability of seller of livestock infected with communicable disease. 14 A.L.R.4th 1096.

Am Jur. 39 Am. Jur. Trials, Fraud in the Sale of a Show Horse, §§ 1 et seq.

§ 97-27-7. Animals and fowl; glandered animals to be reported to board of supervisors; destruction or quarantine of diseased animals.

If any person, being the owner or having the charge of any animal diseased with the glanders or farcy, shall not deprive the animal of life or closely confine it remote from all other animals liable to contract the disease, he shall be guilty of a misdemeanor and, on conviction, shall be punished as provided in Section 97-41-13.

Whenever a case of glanders or farcy is reported to the president of the board of supervisors, he may employ a competent veterinary surgeon, if necessary, at the expense of the county. If such veterinary surgeon declare the animal or animals affected with the glanders or farcy the sheriff shall immediately kill the animal or animals, for which service he shall be allowed not more than two dollars for each animal destroyed, to be paid out of the county treasury. And the said board of supervisors are hereby authorized and empowered, in the discretion of said board, to allow to the owner of said animal or animals, to be paid out of the county treasury, such sum therefor as the board may deem proper. If any owner of stock, having good reason to suspect that his stock is diseased shall fail to report to the president of the board, or if any official named in this section shall fail to perform the duties herein imposed, such offender shall, on conviction, be fined not less than twenty-five dollars or more than two hundred dollars, or shall be imprisoned in the county jail for a term not exceeding two months or both. The board of supervisors when any animal shall have been exposed to glanders or farcy and not actually infected, may order all such animals to be quarantined until such time as the danger of contagion shall have passed, and the place where such animals are kept shall also be quarantined.

SOURCES: Codes, 1880, § 810; 1892, § 1019; Laws, 1906, § 1096; Hemingway's 1917, § 822; Laws, 1930, § 846; Laws, 1942, § 2072; Laws, 1914, ch. 136.

Cross References — Authority of state livestock sanitary board, see § 69-15-13.
 Compensation for destroyed diseased livestock, see § 69-15-113.
 Penalty for violations of livestock sanitation regulations, see § 69-15-331.
 Care of infected animals and disposition of dead bodies, see § 97-27-3.
 Exposing, selling, or using animal with infectious disease, see § 97-27-5.
 Cruelty to animals, see §§ 97-41-1 et seq.
 Penalty for violation of this section, see § 97-41-13.
 Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

<p>ALR. Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 A.L.R.3d 822.</p>	<p>Am Jur. 4 Am. Jur. 2d, Animals §§ 20 et seq., 41 et seq. CJS. 3B C.J.S., Animals §§ 128 et seq.</p>
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§ 97-27-9. Beaches; bringing or leaving breakable containers or other injurious debris upon established beaches.

(1) Whoever shall bring, put, throw, dump or leave on any established beach any cans, bottles, jars, glassware or broken glass, or any debris of any kind that might cause injury to barefoot persons using the beach, shall be guilty of a misdemeanor and punished as provided for in subsection (3) of this section.

(2) For the purposes of this section, “established beach” shall include any sand beach, natural or man-made, along any natural coastline or inland lake within the State of Mississippi designated or used for public recreational purposes.

(3) Any person who shall be found guilty of the violation of this section shall, upon conviction, be fined in a sum not exceeding twenty dollars (\$20.00) for each offense.

SOURCES: Codes, 1942, § 2018.7; Laws, 1964, ch. 342, §§ 1-3, eff from and after passage (approved May 15, 1964).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-27-10. Definition of harmful substances.

As used in Sections 97-27-10 through 97-27-12:

(a) “Harmful biological substance” means a bacteria, virus or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury or disease in humans, animals or plants.

(b) “Harmful biological device” means a device designed or intended to release a harmful biological substance.

(c) “Harmful chemical substance” means a solid, liquid, or gas that through its chemical or physical properties, along or in combination with one or more other chemical substances, can be used to cause death, injury or disease in humans, animals or plants.

(d) “Harmful chemical device” means a device that is designed or intended to release a harmful chemical substance.

(e) “Harmful radioactive material” means material that is radioactive and that can be used to cause death, injury or disease in humans, animals or growing plants by its radioactivity.

(f) “Harmful radioactive device” means a device that is designed or intended to release a harmful radioactive material.

SOURCES: Laws, 2002, ch. 310, § 1, eff from and after passage (approved Mar. 14, 2002.)

§ 97-27-11. Introduction of harmful biological substances into Mississippi prohibited; development, manufacture or possession of harmful biological substances prohibited except for authorized purposes; penalties.

(1) It shall be unlawful for any person to willfully and knowingly import, bring or send into this state a harmful biological substance including smallpox, anthrax or any other contagious or infectious disease, with the design to unlawfully spread the same or assist in spreading the same with intent to cause harm to human, animal or plant life and it shall likewise be unlawful for any person to develop, manufacture or possess such harmful biological substances, except for purposes authorized by law.

(2) A person convicted of subsection (1) shall be guilty of a felony and, upon conviction, shall be fined not more than One Hundred Thousand Dollars (\$100,000.00), and be imprisoned not more than twenty (20) years in the State Penitentiary, or both.

SOURCES: Codes, 1857, ch. 64, art. 64; 1871, § 2719; 1880, § 2760; 1892, § 1008; Laws, 1906, § 1085; Hemingway’s 1917, § 811; Laws, 1930, § 834; Laws, 1942, § 2060; Laws, 2002, ch. 310, § 2, eff from and after passage (approved Mar. 14, 2002.)

Cross References — Quarantine for venereal disease, see § 41-23-27.

JUDICIAL DECISIONS

1. In general.

Venereal disease is not within the scope

of this section [Code 1942, § 2060]. *Austin v. State*, 100 Miss. 189, 56 So. 345 (1911).

§ 97-27-12. Unlawful hoaxes intended to cause belief that exposure to certain harmful substances or devices has occurred; penalties; imposition of costs for individual or governmental response to unlawful hoax.

(1) It shall be unlawful for any person to commit an act intended to cause another person or persons to falsely believe that said person or persons have been exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material or harmful radioactive device.

(2) Any person convicted of subsection (1) of this section shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the State Penitentiary for not more than five (5) years or shall be fined not more than Ten Thousand Dollars (\$10,000.00), or both.

(3) In addition to any such imprisonment and/or fine which may be imposed upon a violation of subsection (1) of this section, the court shall also order that any person convicted for such violation shall reimburse any individual or governmental agency for the expenses incurred as a result of the violation.

SOURCES: Laws, 2002, ch. 310, § 3, eff from and after passage (approved Mar. 14, 2002.)

§ 97-27-13. Contagious diseases; smallpox patient not to go abroad.

A person having recently had the smallpox shall not, until after having obtained a certificate of the attending physician, and of his person qualified to give such certificate, of his recovery, or other being perfectly clean in his person and clothes, remove from the place where he shall have had the smallpox, to go abroad in the company of other persons who have not had the disease, or go into any public road or highway where travelers usually pass, without retiring out of the same or giving notice on the approach of any passenger, or go into any public place, or into any railroad car or coach, or upon any steamboat, under the penalty of one hundred dollars fine, or thirty days imprisonment in the county jail, or both.

SOURCES: Codes, 1871, § 2738; 1880, § 2761; 1892, § 1009; Laws, 1906, § 1086; Hemingway's 1917, § 812; Laws, 1930, § 835; Laws, 1942, § 2061.

JUDICIAL DECISIONS

1. In general.

Teacher refusing request of county health officer and school authorities to remain away from school until he recovered from smallpox held subject to discharge. *Overstreet v. Lord*, 160 Miss. 444, 134 So. 169 (1931).

Even if teacher's discharge because,

while suffering from smallpox, he exposed pupils to disease was illegal because without notice and opportunity for hearing, he was not entitled to mandamus to compel payment of salary for months following discharge. *Overstreet v. Lord*, 160 Miss. 444, 134 So. 169 (1931).

§ 97-27-14. Contagious diseases; causing exposure to human immunodeficiency virus (HIV).

(1) It shall be unlawful for any person to knowingly expose another person to a human immunodeficiency virus (HIV). Prior knowledge and willing consent to the exposure is a defense to the crime set forth herein.

(2) For a violation of this section where no cure is available for such disease such violation shall be a felony and, upon conviction, a violator shall be punished by imprisonment for not more than ten (10) years and a fine of not more than Ten Thousand Dollars (\$10,000.00).

(3) The provisions of this section shall be in addition to any other provisions of law for which the actions described in this section may be prosecuted.

SOURCES: Laws, 2004, ch. 468, § 1, eff from and after July 1, 2004.

§ 97-27-15. Food sales; selling meat of animal not slaughtered, or unwholesome bread or drink.

Any butcher or other person who shall knowingly sell the flesh of any animal dying otherwise than by slaughter, or slaughtered when diseased, or any baker, brewer, distiller, or other person, who shall knowingly sell unwholesome bread or drink, shall, on conviction thereof, be punished by imprisonment in the penitentiary not more than five years nor less than one year.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(14); 1857, ch. 64, art. 216; 1871, § 2703; 1880, § 2939; 1892, § 1262; Laws, 1906, § 1337; Hemingway's 1917, § 1071; Laws, 1930, § 1100; Laws, 1942, § 2336.

Cross References — Sale and inspection of food and drugs, see §§ 75-29-1 et seq. Care of infected animals and disposition of dead bodies, see § 97-27-3.

JUDICIAL DECISIONS

1. In general.

There is nothing in either this section [Code 1942, § 2336] or Code 1942, § 2338 to indicate that the legislature intended to make it a crime for the owner to use a carcass of an animal described within those sections. *King v. Mississippi Power & Light Co.*, 244 Miss. 486, 142 So. 2d 222 (1962).

Guaranties against unreasonable searches and seizures do not apply to routine inspections by sanitary officers, nor do they apply to inspections made pursuant to advance information that the health laws have been, or are about to be, violated. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Search and seizure of diseased hog meat found in accused's restaurant by city health officers without a search warrant, upon advance information that the health laws had been, or were about to be, violated, did not constitute a violation of the constitutional prohibition against unreasonable searches and seizures. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Evidence that friendly policemen told restaurant proprietor that meat of diseased hog was fit for human consumption if it had been inoculated against cholera did not furnish a valid excuse for slaughtering such hog and bringing it to accused's restaurant for the purpose of selling it for human consumption, but could

be considered only by way of extenuation. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Upon conviction of restaurant proprietor of attempt to sell diseased flesh of an animal for human consumption, under indictment bringing offense either under this section [Code 1942, § 2336] or Code 1942, § 2338, but specifically referring to neither section, nor charging that defendant was a butcher or that his occupation might be classified as that of a butcher, sentence should be that imposed by Code

1942, § 2338, under rule that when the facts which constitute a criminal offense may fall under either of two sections, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment, having regard for the rule that under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Food §§ 74 et seq.

30 Am. Jur. Proof of Facts 2d 1, Foreign Substance in Food or Beverage.

31 Am. Jur. Proof of Facts 2d 81, Food Poisoning.

CJS. 36A C.J.S., Food §§ 1 et seq.

§ 97-27-17. Food sales; flour and other provisions.

Any person who shall knowingly and wilfully sell, or hold or offer for sale, any tainted, putrid, unsound, unwholesome, unmerchantable flour, or other provisions, as sound and good; or shall practice any fraud or deception, to put off and sell any damaged, unsound, or unmerchantable provisions, shall, upon conviction, be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than thirty days, or both.

SOURCES: Codes, 1857, ch. 64, art. 217; 1871, § 2704; 1880, § 2940; 1892, § 1263; Laws, 1906, § 1338; Hemingway's 1917, § 1072; Laws, 1930, § 1101; Laws, 1942, § 2337.

Cross References — Sale and inspection of food and drugs, see §§ 75-29-1 et seq. Care of infected animals and disposition of dead bodies, see § 97-27-3.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Food §§ 74 et seq.

30 Am. Jur. Proof of Facts 2d 1, Foreign Substance in Food or Beverage.

31 Am. Jur. Proof of Facts 2d 81, Food Poisoning.

CJS. 36A C.J.S., Food §§ 1 et seq.

§ 97-27-19. Food sales; meat; sale of flesh of dead, diseased, and unclean animals; punishment.

If any person shall sell or offer for sale as human food, the flesh of any animal which shall have died a natural death, or been killed or injured by any accident; or shall sell, or offer for sale, or ship for sale, as human food, the flesh of any diseased animal, or of any dog, cat, or other like unclean animal, such person shall be fined, on conviction, not less than one hundred dollars and imprisoned not less than thirty days.

SOURCES: Codes, 1892, § 1264; Laws, 1906, § 1339; Hemingway's 1917, § 1073; Laws, 1930, § 1102; Laws, 1942, § 2338.

Cross References — Sale and inspection of food and drugs, see §§ 75-29-1 et seq. Care of infected animals and disposition of dead bodies, see § 97-27-3.

JUDICIAL DECISIONS

1. In general.

There is nothing in either this section [Code 1942, § 2338] or Code 1942, § 2336 to indicate that the legislature intended to make it a crime for the owner to use a carcass of an animal described within those sections. *King v. Mississippi Power & Light Co.*, 244 Miss. 486, 142 So. 2d 222 (1962).

Guaranties against unreasonable searches and seizures do not apply to routine inspections by sanitary officers, nor do they apply to inspections made pursuant to advance information that the health laws have been, or are about to be, violated. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Search and seizure of diseased hog meat found in accused's restaurant by city health officers without a search warrant, upon advance information that the health laws had been, or were about to be, violated, did not constitute a violation of the constitutional prohibitions against unreasonable searches and seizures. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Evidence that friendly policemen told restaurant proprietor that meat of diseased hog was fit for human consumption if it had been inoculated against cholera

did not furnish a valid excuse for slaughtering such hog and bringing it to accused's restaurant for the purpose of selling it for human consumption, but could be considered only by way of extenuation. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

Upon conviction of restaurant proprietor of attempt to sell diseased flesh of an animal for human consumption, under indictment bringing offense either under Code 1942, § 2336 or this section [Code 1942, § 2338], but specifically referring to neither section, nor charging that defendant was a butcher or that his occupation might be classified as that of a butcher, sentence should be that imposed by this section [Code 1942, § 2338], under the rule that when the facts which constitute a criminal offense may fall under either of two sections, or when there is substantial doubt as to which of the two is to be applied, the case will be referred to the statute which imposes the lesser punishment, having regard for the rule that under the attempt statute no greater punishment may be administered than that prescribed for the actual commission of the offense attempted. *Grillis v. State*, 196 Miss. 576, 17 So. 2d 525 (1944).

RESEARCH REFERENCES

ALR. Cat as subject of larceny. 55 A.L.R.4th 1080.

Am Jur. 35 Am. Jur. 2d, Food §§ 74 et seq.

CJS. 36A C.J.S., Food § 69.

§ 97-27-21. Poisons; sale and giving away regulated.

It shall not be lawful for any apothecary, druggist, or other person to sell or give away any article belonging to the class of medicines usually denominated poisons, except in compliance with Sections 97-27-23 and 97-27-25.

SOURCES: Codes, 1857, ch. 31, art. 1; 1871, § 2742; 1880, § 2930; 1892, § 1248; Laws, 1906, § 1323; Hemingway's 1917, § 1056; Laws, 1930, § 1087; Laws, 1942, § 2320.

Cross References — Regulation of poisons, drugs and other controlled substances, see §§ 41-29-1 et seq.

Poisoning food or drink, generally, see § 97-3-61.

Poisoning person with intent to kill where death does not ensue, see § 97-3-63.

Poisoning animals, see § 97-41-17.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Drugs §§ 1, 2, **CJS.** 72 C.J.S., Poisons §§ 7 et seq.
4, 6, 18 et seq.

§ 97-27-23. Poisons; register to be kept; label.

Every druggist, apothecary, or other person, who shall sell or give away except on the written prescription of a physician, any article of medicine belonging to the class usually known as poisons, shall be required to register in a book kept for that purpose, the name, place of residence, age, sex, and color of the person obtaining such poison, the quantity sold, the purpose for which it was required, the day and date on which it was obtained, and the name and place of abode of the person for whom the article is intended; and he shall carefully mark the word “poison” upon the label or wrapper of each package.

SOURCES: Codes, 1857, ch. 31, art. 2; 1871, § 2743; 1880, § 2931; 1892, § 1249; Laws, 1906, § 1324; Hemingway’s 1917, § 1057; Laws, 1930, § 1088; Laws, 1942, § 2321.

Cross References — Regulation of poisons, drugs and other controlled substances, see §§ 41-29-1 et seq.

Penalty for violation of this section, see § 97-27-29.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Drugs §§ 1, 4, **CJS.** 72 C.J.S., Poisons §§ 7 et seq.
6, 8, 18.

§ 97-27-25. Poisons; arsenic to be mixed with soot or indigo.

A druggist, apothecary, or other person shall not sell or give away, except to physicians, any quantity of arsenic less than one pound without first mixing soot or indigo therewith in the proportion of one ounce of soot or half an ounce of indigo to the pound of arsenic.

SOURCES: Codes, 1857, ch. 31, art. 4; 1871, § 2744; 1880, § 2932; 1892, § 1250; Laws, 1906, § 1325; Hemingway’s 1917, § 1058; Laws, 1930, § 1089; Laws, 1942, § 2322.

Cross References — Regulation of poisons, drugs and other controlled substances, see § 41-29-1 et seq.

Penalty for violation of this section, see § 97-27-29.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Drugs §§ 1, 2, **CJS.** 72 C.J.S., Poisons §§ 7 et seq. 4, 6, 8, 18.

§ 97-27-27. Poisons; arsenic or other deadly poison not to be used in embalming fluid.

A druggist, apothecary, or other person shall not sell or give away any embalming fluid for embalming the dead, which contains arsenic or other deadly poisons; nor shall any embalmer use any fluid containing arsenic or other deadly poison in embalming the dead.

SOURCES: Codes, 1906, § 1326; Hemingway's 1917, § 1059; Laws, 1930, § 1090; Laws, 1942, § 2323.

Cross References — Penalty for violation of this section, see § 97-27-29.

§ 97-27-29. Poisons; penalty for violation of certain sections.

Any person who shall violate the provisions of Sections 97-27-23, 97-27-25, or 97-27-27, on conviction, shall be fined not exceeding five hundred dollars, or confined in the county jail thirty days, or both.

SOURCES: Codes, 1857, ch. 31, art. 5; 1871, § 2745; 1880, § 2933; 1892, § 1251; Laws, 1906, § 1327; Hemingway's 1917, § 1060; Laws, 1930, § 1091; Laws, 1942, § 2324.

§ 97-27-31. Poisons; not to be sold to minors.

A druggist, apothecary, or other person shall not sell or give away any poison to any minor, and for so doing he shall be punished as for a misdemeanor.

SOURCES: Codes, 1857, ch. 31, art. 3; 1880, § 2934; 1892, § 1252; Laws, 1906, § 1328; Hemingway's 1917, § 1061; Laws, 1930, § 1092; Laws, 1942, § 2325.

Cross References — Statutory definition of term "minor," see § 1-3-27.

Prohibition against sale or gift of tobacco to children, see § 97-32-1 et seq.

JUDICIAL DECISIONS

1. In general.

In an indictment under this section [Code 1942, § 2325], the declaration is insufficient in the case of a minor of the age of discretion, unless it charges that there was something in the character of the minor rendering it dangerous to put chloroform in his hands or that he was ignorant or inexperienced in its use. *Meyer v. King*, 72 Miss. 1, 16 So. 245 (1894).

Though one selling poison under this section [Code 1942, § 2325] is punishable under Code 1892, § 1954 (Code 1906, § 1527), and guilty of negligence per se, he is not liable for special damages sustained unless the sale is the proximate cause of the injury. *Meyer v. King*, 72 Miss. 1, 16 So. 245 (1894).

§ 97-27-33. Poisons; inhalation of toxic vapors from model glue; unlawful glue sales to minors.

(1) It shall be unlawful for any person to intentionally smell or inhale the fumes of any type of model glue for the purpose of causing a condition of, or inducing symptoms of, intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, paralysis, stupefaction, or dulling of the senses or nervous system; or for the purpose of, in any manner, changing, distorting or disturbing the audio, visual or mental processes.

(2) As used in this section, the term “model glue” shall mean any glue or cement of the type commonly used in the building of model airplanes, boats and automobiles and which contains one or more of the following volatile solvents: (a) toluol, (b) hexane, (c) trichlorethylene, (d) acetone, (e) toluene, (f) ethyl acetate, (g) methyl ethyl ketone, (h) trichlorochthane, (i) isopropanol, (j) methyl isobutyl ketone, (k) methyl cellosolve acetate, (l) cyclohexanone, or (m) any other solvent, material, substance, chemical or combination thereof having the property of releasing toxic vapors.

(3) It shall be unlawful for any person to sell or otherwise transfer possession of any type of model glue to any minor for any purpose whatsoever, unless the minor receiving possession of the model glue is the child or ward of and under the lawful custody of such person.

(4) Any person violating any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars (\$500.00), or imprisoned for not more than ninety (90) days, or both, for each such offense.

SOURCES: Codes, 1942, § 2329.5; Laws, 1968, ch. 347, §§ 1-4, eff from and after thirty days after passage (approved July 12, 1968).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Penal offense of sniffing glue or similar volatile intoxicants. 32 A.L.R.3d 1438.

§ 97-27-35. Repealed.

Repealed by Laws, 1997, ch. 578, § 15, eff from and after February 1, 1998.

[Laws, 1994, ch. 486, § 9]

Editor’s Note — Former § 97-27-35 related to a requirement that tobacco products be sold in sealed containers.

Laws, 2004, ch. 396, § 1 provides:

“Sections 5, 6, 7 and 9 of Chapter 486, General Laws of 1994, are repealed.”

CHAPTER 29

Crimes Against Public Morals and Decency

In General	97-29-1
Obscene Materials, Performances and Devices	97-29-101

IN GENERAL

SEC.

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97-29-3.	Adultery and fornication; between teacher and pupil.
97-29-5.	Adultery and fornication; between certain persons forbidden to intermarry.
97-29-7.	Adultery and fornication; between guardian and ward.
97-29-9.	Adultery and fornication; going out of state to marry.
97-29-11.	Illegitimate children; person becoming natural parent of second illegitimate child; jurisdiction.
97-29-13.	Bigamy; definition; penalty.
97-29-15.	Bigamy; exceptions.
97-29-17.	Bribery; participant in professional or amateur games or other athletic contests; wrestling excepted.
97-29-19.	Dead bodies; disinterment for sale or wantonness.
97-29-21.	Dead bodies; buying or receiving.
97-29-23.	Dead bodies; opening graves for certain purposes.
97-29-25.	Desecration of cemetery; desecration of human corpse.
97-29-27.	Incest; marriage within prohibited degrees.
97-29-29.	Incest; persons divorced for incest not to cohabit or copulate.
97-29-31.	Indecent exposure.
97-29-33.	Repealed.
97-29-35.	Repealed.
97-29-37 through 97-29-41.	Repealed.
97-29-43.	Polygamy; teaching of.
97-29-45.	Obscene electronic communications.
97-29-47.	Profanity or drunkenness in public place.
97-29-49.	Prostitution.
97-29-51.	Prostitution; procuring females; accepting money, etc. from prostitute.
97-29-53.	Prostitution; penalty.
97-29-55.	Seduction of female over age of eighteen by promised or pretended marriage.
97-29-57.	Stallion or jack not to be kept in public view or permitted to run at large.
97-29-59.	Unnatural intercourse.
97-29-61.	Voyeurism; trespass by "peeping Tom".
97-29-63.	Photographing or filming another without permission where there is expectation of privacy.
97-29-65.	Strip clubs prohibited within one-fourth mile of church, school, kindergarten, or courthouse.

§ 97-29-1. Adultery and fornication; unlawful cohabitation.

If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary, to constitute the offense, that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 1(58); 1857, ch. 64, art. 8; 1871, § 2486; 1880, § 2700; 1892, § 953; Laws, 1906, § 1029; *Hemingway's* 1917, § 754; Laws, 1930, § 772; Laws, 1942, § 1998.

Cross References — Adultery as cause for divorce, see § 93-5-1.

Prohibition against cohabitation by divorced persons, see § 93-5-29.

Incestuous marriage between kindred, see § 97-29-27.

Prohibition against cohabitation or copulation by persons divorced for incest, see § 97-29-29.

JUDICIAL DECISIONS

1. In general.
2. Indictment or affidavit charging offense.
3. Evidence.
4. —Admissibility.
5. —Sufficiency.
6. Instructions.
7. Miscellaneous.
8. Child Custody.

1. In general.

Sections 97-29-1, 97-29-3, 97-29-5, 97-29-7, and 97-29-9, which prohibit adultery and fornication under specified circumstances, do not give any individual a private cause of action for their breach. *Saunders v. Alford*, 607 So. 2d 1214 (Miss. 1992).

One acquitted of a charge under this section [Code 1942, § 1998] is not put twice in jeopardy when charged under Code 1942, § 2000, penalizing incest. *Ratcliff v. State*, 234 Miss. 724, 107 So. 2d 728 (1958).

This section [Code 1942, § 1998] is no obstacle to a bona fide attempt to invest unlawful cohabitation with the attributes of a common-law marriage. *Oatis v. Mingo*, 199 Miss. 896, 26 So. 2d 453 (1946).

Cohabitation defined. *Spikes v. State*, 98 Miss. 483, 54 So. 1 (1911).

Habitual sexual intercourse held gist of offense under statute. *Spikes v. State*, 98 Miss. 483, 54 So. 1 (1911).

A teacher who, during a short period of time, commits a few acts of sexual intercourse with a pupil, openly in the schoolroom is not guilty of cohabitation with her. *Brown v. State*, 8 So. 257 (Miss. 1890).

It is not necessary to constitute the crime, that the parties should represent themselves as married. *Kinard v. State*, 57 Miss. 132 (1879).

Criminal intercourse once shown is presumed to continue if the parties be living under the same roof, although those who dwell with them are not prepared to depose to the fact. *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465 (1868).

2. Indictment or affidavit charging offense.

Indictment against defendants charging them with the crime of unlawful cohabitation and adultery on a certain date and then continuously until the day of the filing and the returning of the indictment, defendants not being married to each other, was sufficient to apprise defendants of the nature and character of the accusation against them, and, if the indictment was deficient in any particular, the defect would have been amendable if the point had been raised in the trial court, which was not done. *Patterson v. State*, 190 Miss. 643, 1 So. 2d 499 (1941).

Affidavit held insufficient to charge habitual sexual intercourse. *Jones v. State*, 133 Miss. 801, 98 So. 342 (1923).

Indictment for unlawful cohabitation need not allege that one was a man and the other a woman. *Tynes v. State*, 93 Miss. 119, 46 So. 535, 136 Am. St. R. 540 (1908).

3. Evidence.

State must show parties were not married to each other as alleged in indictment. *Dean v. State*, 139 Miss. 515, 104 So. 295 (1925).

Proof of acts within two years before indictment makes a case in prosecution for unlawful cohabitation. *State v. Meyer*, 135 Miss. 878, 101 So. 349 (1924).

It is necessary to show that the parties, whether dwelling together or not, habitu-

ally indulge in sexual intercourse. *Granberry v. State*, 61 Miss. 440 (1884).

4. —Admissibility.

Where evidence in prosecutions for unlawful cohabitation disclosed cohabitation by the defendants within the period of limitation, evidence of continuous cohabitation by them for several years prior, and up to the beginning of, the limitation period was admissible to illustrate or characterize the relation and conduct of the defendants shown to have existed or to have occurred within the time covered by the indictment. *Housley v. State*, 198 Miss. 837, 23 So. 2d 749 (1945); *Strong v. State*, 199 Miss. 17, 23 So. 2d 750 (1945).

In prosecution for unlawful cohabitation, the fact that the defendants had been acquitted of a similar offense some time prior to the finding of the indictment under which they were tried did not preclude the admission of evidence of improper familiarity and criminal intimacy between the defendants prior to the findings of the former indictment. *Housley v. State*, 198 Miss. 837, 23 So. 2d 749 (1945); *Strong v. State*, 199 Miss. 17, 23 So. 2d 750 (1945).

Evidence tending to show improper familiarity and criminal intimacy subsequent to the finding of the indictment is admissible to illustrate and characterize the relations and conduct of the parties, shown to have existed or occurred within the time covered by the indictment, if such act be not too remote in point of time. *Stewart v. State*, 64 Miss. 626, 2 So. 73 (1887).

5. —Sufficiency.

Evidence of acts of sexual intercourse, without showing cohabitation, was insufficient to sustain conviction for unlawful cohabitation. *Cutrer v. State*, 154 Miss. 80, 121 So. 106 (1929).

Uncorroborated testimony of female co-defendant is sufficient to sustain conviction for unlawful cohabitation. *Cutrer v. State*, 154 Miss. 80, 121 So. 106 (1929).

Proof necessary to sustain conviction for unlawful cohabitation stated; when one or two acts relied on, proof must show habitual existence of relation. *Lee v. City of Oxford*, 134 Miss. 647, 99 So. 509 (1924).

It is unnecessary to show that the parties dwell together or publicly avow the relationship; it is sufficient to show habitual concubinage or lying together. *Granberry v. State*, 61 Miss. 440 (1884).

6. Instructions.

Conviction of unlawful cohabitation in adultery would be reversed where instruction granted on behalf of state wholly failed to require jury to believe beyond a reasonable doubt from the circumstances or otherwise, that either of defendants was married to some other person at the time complained of before the jury could return a verdict of guilty, and all the proof disclosed that the relations between defendants were such as to constitute a valid common law marriage between them except for the fact that one of the defendants denied the relationship in toto. *Patterson v. State*, 190 Miss. 643, 1 So. 2d 499 (1941).

7. Miscellaneous.

Decedent's survivors sought to recover proceeds from a bank account that a joint tenant shared with decedent; because the two were cohabitating and were not married, a confidential relationship existed, which led to a presumption of undue influence. The joint tenant failed to rebut the presumption. *Dean v. Kavanaugh*, 920 So. 2d 528 (Miss. Ct. App. 2006).

A chancellor did not err in dismissing a complaint in which a woman sought "equitable division of partnership assets" accumulated during 13 years of cohabitation with her companion where the parties never entered into a ceremonial marriage, the woman was not an innocent partner to a void marriage, and she was not destitute but was well-compensated during and after the relationship; the legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit, and cohabitation remains a "crime against public morals and decency" under this section. *Davis v. Davis*, 643 So. 2d 931 (Miss. 1994).

While remarks in argument to jury by district attorney in prosecution for unlawful cohabitation can be shown either by special bill of exceptions or the reporter's notes, in either case they must be shown before the supreme court can know

whether they were harmful. *Strong v. State*, 199 Miss. 17, 23 So. 2d 750 (1945).

Error of justice in failing to properly sentence accused did not deprive him of right to plead former conviction. *Smithey v. State*, 93 Miss. 257, 46 So. 410 (1908).

Where in the trial of the accused for unlawful cohabitation no imprisonment was inflicted, the justice of the peace trying him should have an alias capias served on defendant and impose some imprisonment. *Smithey v. State*, 93 Miss. 257, 46 So. 410 (1908).

A white man and a negro woman cannot maintain an assignment of error in the

supreme court based on the fact that the district attorney appealed to the jury to discountenance miscegenation. *Stewart v. State*, 64 Miss. 626, 2 So. 73 (1887).

8. Child Custody.

After the parties' divorce in which the former wife was awarded primary custody of the son, she moved four times, dated several men, and cohabited with a man. The chancellor found that the child's best interests required a change in custody and awarded the former husband primary physical custody. *Hill v. Hill*, — So. 2d —, 2006 Miss. App. LEXIS 250 (Miss. Ct. App. Apr. 4, 2006).

RESEARCH REFERENCES

ALR. Validity of statute making adultery and fornication criminal offense. 41 A.L.R.3d 1338.

Admissibility, in rape case, of evidence that accused rape or attempted to rape person other than prosecutrix. 2 A.L.R.4th 330.

Am Jur. 2 Am. Jur. 2d, Adultery and Fornication §§ 1 et seq.

1 Am. Jur. Proof of Facts, Adultery, Proofs 1-6.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 37 C.J.S., Fornication §§ 1 et seq.

§ 97-29-3. Adultery and fornication; between teacher and pupil.

If any teacher and any pupil under eighteen (18) years of age of such teacher, not being married to each other, shall have sexual intercourse, each with the other, they shall, for every such offense, be fined in any sum, not more than five hundred dollars (\$500.00) each, and the teacher may be imprisoned not less than three (3) months nor more than six (6) months.

SOURCES: Codes, 1892, § 954; Laws, 1906 § 1030; Hemingway's 1917, § 755; Laws, 1930, § 773; Laws, 1942, § 1999; Laws, 1980, ch. 517, eff from and after passage (approved May 20, 1980).

Cross References — Dissemination of sexually oriented material to persons under eighteen, see § 97-5-27.

Crime of adultery or fornication, generally, see § 97-29-1.

JUDICIAL DECISIONS

1. In general.

Sections 97-29-1, 97-29-3, 97-29-5, 97-29-7, and 97-29-9, which prohibit adultery and fornication under specified circum-

stances, do not give any individual a private cause of action for their breach. *Saunders v. Alford*, 607 So. 2d 1214 (Miss. 1992).

RESEARCH REFERENCES

ALR. Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 A.L.R.4th 330.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Am Jur. 2 Am. Jur. 2d, Adultery and Fornication §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 37 C.J.S., Fornication §§ 1 et seq.

§ 97-29-5. Adultery and fornication; between certain persons forbidden to inter-marry.

Persons being within the degrees within which marriages are prohibited by law to be incestuous and void, or persons who are prohibited from marrying by reason of blood and between whom marriage is declared to be unlawful and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(5); 1857, ch. 64, art. 9; 1871, § 2787; 1880, § 2701; 1892, § 955; Laws, 1906, § 1031; Hemingway's 1917, § 756; Laws, 1930, § 774; Laws, 1942, § 2000; Laws, 1956, ch. 241; Laws, 1960, ch. 240.

Cross References — Unlawful and incestuous marriages, generally, see §§ 93-1-1, 93-1-3.

Crime of adultery or fornication, generally, see § 97-29-1.

Crime of incestuous marriage, see § 97-29-27.

Persons divorced for incest being prohibited from having copulation, see § 97-29-29.

JUDICIAL DECISIONS

1. In general.
2. Evidence.

1. In general.

Sections 97-29-1, 97-29-3, 97-29-5, 97-29-7, and 97-29-9, which prohibit adultery and fornication under specified circumstances, do not give any individual a private cause of action for their breach. Saunders v. Alford, 607 So. 2d 1214 (Miss. 1992).

Consent is not a necessary element of incest. Where a defendant is charged with incest with a minor female, the consent of the minor female will not change the character of the act of the defendant. The defendant will be held to answer for his own conduct and it is his acts which complete the crime of incest. The defendant's guilt is measured by his knowledge

and his intent and not by the knowledge or intent of the minor female on whom he committed the offense. Keeton v. State, 549 So. 2d 960 (Miss. 1989).

This section [Code 1942, § 2000], as amended by Chapter 241, Laws of 1956, was not violated by the mere cohabitation between negroes and whites. Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728 (1958); Rose v. State, 234 Miss. 731, 107 So. 2d 730 (1958).

Since a marriage between a white person and a negro is not incestuous but is miscegenetic, and an incestuous relationship is an element of the denounced offense, Code 1942, § 2000 is not violated where a white person and a negro cohabit, or live together as husband and wife, in absence of allegations as to an incestuous

relationship. *Ratcliff v. State*, 234 Miss. 724, 107 So. 2d 728 (1958); *Rose v. State*, 234 Miss. 731, 107 So. 2d 730 (1958).

One is not put twice in jeopardy by being charged under this section [Code 1942, § 2000] after having been acquitted under Code 1942, § 1998, penalizing adultery and fornication. *Ratcliff v. State*, 234 Miss. 724, 107 So. 2d 728 (1958).

Cohabitation, adultery or fornication with one's adopted daughter is not incest within the purview of this section [Code 1942, § 2000]. *State v. Lee*, 196 Miss. 311, 17 So. 2d 277, 151 A.L.R. 1143 (1944).

This section [Code 1942, § 2000], by omitting the words "of consanguinity" after the word "degrees," as in Code 1871, evidently changes the law as announced in *Chancellor v. State*, 47 M 278, where it is said that "cohabitation by a man with his step-daughter is not incestuous." *Chancellor v. State*, 47 Miss. 278 (1872).

2. Evidence.

In a prosecution for incest, the trial court did not err in failing to order a blood test of the prosecuting witness to ascertain whether she was actually the defen-

dant's blood relative where the defendant had never denied that the girl was his daughter and had admitted on direct examination that she was his daughter; nor was it error for the court to admit evidence of prior sexual acts between the defendant and the prosecuting witness. Insofar as *Skinner v. State* (1945) 198 Miss 505, 23 So. 2d 501, held that evidence of more than one crime of incest was inadmissible in a prosecution for a single incestuous offense, that decision was in error. *Speagle v. State*, 390 So. 2d 990 (Miss. 1980).

A conviction for adultery would be reversed where the state did not prove that at least one of the parties to the alleged act was married at the time; the trial court also erred in permitting the state to amend the indictment to change the date of the alleged offense where, in light of the fact that each separate act of adultery constitutes a separate offense, the amendment in effect charged a new and distinct offense from that for which the grand jury indicted defendant. *Van Norman v. State*, 365 So. 2d 644 (Miss. 1978).

RESEARCH REFERENCES

ALR. Consent as element of incest. 36 A.L.R.2d 1299.

Sexual intercourse between persons related by half blood as incest. 72 A.L.R.2d 706.

Incest as included within charge of rape. 76 A.L.R.2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused. 97 A.L.R.3d 967.

Admissibility, in rape case, of evidence that accused rape or attempted to rape person other than prosecutrix. 2 A.L.R.4th 330.

Am Jur. 2 Am. Jur. 2d, Adultery and Fornication §§ 1 et seq.

41 Am. Jur. 2d, Incest §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 37 C.J.S., Fornication §§ 1 et seq.
42 C.J.S., Incest §§ 1 et seq.

§ 97-29-7. Adultery and fornication; between guardian and ward.

If any guardian and ward of such guardian, not being married to each other, shall have sexual intercourse each with the other, they shall for every such offense be fined in any sum not more than five hundred dollars (\$500.00) each and the guardian shall be imprisoned not less than three (3) months nor more than six (6) months.

SOURCES: Codes, 1892, § 956; Laws, 1906, § 1032; Hemingway's 1917, § 757; Laws, 1930, § 775; Laws, 1942, § 2001; Laws, 1980, ch. 388, eff from and after passage (approved April 28, 1980).

Cross References — Crime of adultery or fornication, generally, see § 97-29-1.

JUDICIAL DECISIONS

1. In general.

Sections 97-29-1, 97-29-3, 97-29-5, 97-29-7, and 97-29-9, which prohibit adultery and fornication under specified circum-

stances, do not give any individual a private cause of action for their breach. *Saunders v. Alford*, 607 So. 2d 1214 (Miss. 1992).

RESEARCH REFERENCES

ALR. Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Am Jur. 2 Am. Jur. 2d, Adultery and Fornication §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 37 C.J.S., Fornication §§ 1 et seq.

§ 97-29-9. Adultery and fornication; going out of state to marry.

If any persons, citizens or residents of this state, who are prohibited by the laws thereof from marrying, because of kindred, shall go out of this state for the purpose of marrying, and shall marry in any other state or country and return to this state and live together and cohabit as man and wife, or be guilty of a single act of copulation, they shall, on conviction, be punished, notwithstanding their marriage out of this state, by imprisonment in the penitentiary not longer than ten years, or be fined five hundred dollars, or both.

SOURCES: Codes, 1892, § 957; Laws, 1906, § 1033; Hemingway's 1917, § 758; Laws, 1930, § 776; Laws, 1942, § 2002.

Cross References — Unlawful marriages, generally, see §§ 93-1-1, 93-1-3.

Incestuous marriages, see § 97-29-27.

Persons divorced for incest being prohibited from having copulation, see § 97-29-29.

JUDICIAL DECISIONS

1. In general.

Sections 97-29-1, 97-29-3, 97-29-5, 97-29-7, and 97-29-9, which prohibit adultery and fornication under specified circum-

stances, do not give any individual a private cause of action for their breach. *Saunders v. Alford*, 607 So. 2d 1214 (Miss. 1992).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. 2d, Adultery and Fornication §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 37 C.J.S., Fornication §§ 1 et seq.

§ 97-29-11. Illegitimate children; person becoming natural parent of second illegitimate child; jurisdiction.

(1) If any person, who shall have previously become the natural parent of an illegitimate child within or without this state by coition within or without this state, shall again become the natural parent of an illegitimate child born within this state, he or she shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail for not less than thirty (30) days nor more than ninety (90) days or by a fine of not more than Two Hundred Fifty Dollars (\$250.00), or both. A subsequent conviction hereunder shall be punishable by imprisonment in the county jail for not less than three (3) months nor more than six (6) months or by a fine of not more than Five Hundred Dollars (\$500.00), or both. Provided, however, that for the purpose of this section, multiple births shall be construed to be the birth of one (1) child.

(2) The circuit court of the county in which said illegitimate child is born shall have jurisdiction of any action brought under this section. No male person shall be convicted solely on the uncorroborated testimony of the female person giving birth to the child.

SOURCES: Codes, 1942, § 2018.6; Laws, 1964, ch. 341, §§ 1-3(¶¶ 1-3); Laws, 2004, ch. 399, § 1, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment deleted former (3), which read: “On or before the tenth day of each month, the Mississippi State Health Department shall notify in writing the district attorney of each district in Mississippi and the county attorney of all counties having county attorneys of the name and address of each person shown as a parent on the birth certificate of any illegitimate child filed with said department during the preceding month.”

Cross References — Uniform law on paternity, see §§ 93-9-1 et seq.

Another section derived from same 1942 code section, see § 99-11-9.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-29-13. Bigamy; definition; penalty.

Every person having a husband or wife living, who shall marry again, and every unmarried person who shall knowingly marry the husband or wife of another living, except in the cases hereinafter named, shall be guilty of bigamy, and imprisoned in the penitentiary not longer than ten years.

SOURCES: Codes, Hutchinson’s 1848, ch. 64, art. 12, Title 7(1); 1857, ch. 64, art. 28; 1871, § 2505; 1880, § 2721; 1892, § 975; Laws, 1906, § 1051; Hemingway’s 1917, § 779; Laws, 1930, § 795; Laws, 1942, § 2019.

Cross References — Unlawful marriages, see §§ 93-1-1 et seq.

Annulment of marriage, see §§ 93-7-1 et seq.

Preaching of polygamy, see § 97-29-43.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. —Sufficiency of indictment.
4. Proof.
5. —Presumptions and burden of proof.
6. Defenses.
7. Instructions.

1. In general.

A substantive element of the charge of bigamy and of the testimony is the fact that the first wife was alive at the time of the second marriage. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

Where a district attorney represented the wife in divorce proceedings and a decree was rendered on February 6, 1950 instead of February 7, 1950, when defendant married second wife, the district attorney should have foreseen that more than likely he would be called upon to testify in bigamy prosecution and he should have withdrawn from the prosecution or refrain from testifying. *Turner v. State*, 212 Miss. 590, 55 So. 2d 228 (1951).

2. Indictment.

Indictment for bigamy must set forth something in nature of allegation with reference to time, place and circumstance of former marriage, or it must name person with whom former marriage is alleged to have been contracted. *Wash v. State*, 206 Miss. 858, 41 So. 2d 29 (1949).

An indictment charging bigamy under Code 1942, § 2019 need not set out the exceptions contained in succeeding section [Code 1942, § 2020]. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Essential averments with respect to first and second marriages stated; indictment must sufficiently charge each element of offense to enable accused to prepare defense. *Graves v. State*, 134 Miss. 547, 99 So. 364 (1924).

3. —Sufficiency of indictment.

Insufficiency of bigamy indictment may be raised for first time on appeal when indictment is fatally defective for failure to set forth time, place and circumstance of former marriage, or name of person with whom former marriage is alleged to

have been contracted. *Wash v. State*, 206 Miss. 858, 41 So. 2d 29 (1949).

An indictment charging that defendant married a certain party when he was then and there legally married to another was sufficient to charge that such other was living when the second marriage was consummated. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Indictment charging that defendant on a certain day and at a certain place, being legally married to a certain party, did wilfully, unlawfully, feloniously, knowingly, and bigamously marry and have for his wife a certain other, was sufficient. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

An indictment charging that marriage relation still existed then and there between accused and a certain party when he then and there married another sufficiently alleged that accused had two living wives at the same time. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Indictment held to sufficiently negative statutory exceptions. *McQueen v. State*, 143 Miss. 787, 109 So. 799 (1926).

4. Proof.

It is necessary to allege and prove that a spouse of a first marriage is living when a second marriage is contracted, to constitute bigamy. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

In prosecution for bigamy, where guilt of defendant was fully established by other evidence, introduction of first wife who was sworn but withdrawn before she had testified against defendant was harmless error. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Proof by state of ceremonial marriage by person introduced by defendant as minister at parsonage or home of such alleged preacher was sufficient without proof that minister was ordained or authorized to perform ceremony. *McQueen v. State*, 143 Miss. 787, 109 So. 799 (1926).

Corroborative proof of ceremonial marriage under law of Louisiana by showing cohabitation and birth of children is not error. *McQueen v. State*, 143 Miss. 787, 109 So. 799 (1926).

State must prove valid marriage contracted before second marriage; common-law marriage relied on must be recognized in state where contracted; defendant's common-law marriage in Louisiana not former marriage constituting basis for bigamy prosecution. *Graves v. State*, 134 Miss. 547, 99 So. 364 (1924).

If the first marriage be proven by the minister who solemnized the rites, and the marriage license with the certificate thereon, it will be sufficient. It is not a valid objection that the minister was not properly ordained as a minister of the gospel according to the rules and regulations of his church. *Taylor v. State*, 52 Miss. 84 (1876).

5. —Presumptions and burden of proof.

In a prosecution for bigamy there is no presumption of a dissolution of the former marriage. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

Burden is on the state to prove that a former spouse is still living at the time of a defendant's second marriage in order to establish the crime of bigamy since such fact is a vital part of the corpus delicti, and while the presumption of continuance of life may be recognized, such presumption is at least neutralized if not overcome by the presumption of innocence in a criminal case, so that in the absence of evidence in addition to the presumption of continuance of life there is no case for submission to the jury, and a defendant is entitled to a directed verdict. *White v. State*, 183 Miss. 351, 184 So. 303 (1938).

A presumption of innocence at least neutralizes, if it does not overcome, the presumption of life and in the absence of other competent evidence of probative value to aid the presumption that the former spouse is living there is no case for submission to the jury; the fact that the former spouse is living must not depend upon presumption merely, but must be established by proof, for the presumption

of innocence supplemented by the presumption of the validity of the second marriage must prevail over the presumption that the former spouse is still living. *White v. State*, 183 Miss. 351, 184 So. 303 (1938).

Burden was on accused to prove that his second marriage was within the exception of Code 1906, § 1052. *Bennett v. State*, 100 Miss. 684, 56 So. 777 (1911).

6. Defenses.

In a prosecution for bigamy the fact that a subsequent divorce is a matter of affirmative defense and the state need not initially negative such defense by either allegation or proof. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

The good faith of the defendant in contracting a second marriage on a mistake of law is no defense to a charge of bigamy. *Burnley v. State*, 201 Miss. 234, 29 So. 2d 94 (1947).

Defendant's misinterpretation of a summons in his wife's divorce action against him as setting the date of trial, and his mistaken belief that a decree for temporary allowances constituted a decree of divorce, were mistakes of law and no defense to a charge of bigamy predicated on his remarriage pending the divorce action. *Burnley v. State*, 201 Miss. 234, 29 So. 2d 94 (1947).

7. Instructions.

Where the first wife was known by two names, the question to be considered by the jury is the identity of the woman, and not her name, and the court may so instruct. *Taylor v. State*, 52 Miss. 84 (1876).

It is improper to charge the jury that a "marriage was good without any ceremony, and by the mere consent of the parties, if the parties intended marriage and that intent sufficiently appear." It is deficient (under statutes then in force) in not adding that such consent and intent must be followed by actual cohabitation thereunder as man and wife. *Taylor v. State*, 52 Miss. 84 (1876).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bigamy §§ 1 et seq.

CJS. 10 C.J.S., Bigamy §§ 1 et seq.

§ 97-29-15. Bigamy; exceptions.

Section 97-29-13 shall not extend to any person whose husband or wife shall have been absent for seven successive years, without being known to such person, within the time, to be living; nor to any person whose husband or wife shall have absented himself or herself from his or her husband or wife, and remained without the United States continually for seven years; nor to any person, by reason of any former marriage which shall have been dissolved by the decree of a competent court, unless the said decree provide that such person shall not be at liberty to marry again; nor to any person, by reason of any former marriage which shall have been pronounced void by the sentence or decree, of a competent court, for the nullity of the marriage contract; nor to any person by reason of any former marriage, contracted by such person within the age of legal consent, and which shall have been annulled by the decree of a competent court.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(2); 1857, ch. 64, art. 29; 1871, § 2506; 1880, § 2722; 1892, § 976; Laws, 1906, § 1052; Hemingway's 1917, § 780; Laws, 1930, § 796; Laws, 1942, § 2020.

Cross References — Presumption of death, see § 13-1-23.
Preaching of polygamy, see § 97-29-43.

JUDICIAL DECISIONS

1. In general.
2. Absence of spouse.
3. Dissolution of first marriage.

1. In general.

A substantive element of the charge of bigamy is the fact that the first wife was alive at the time of the second marriage. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

The good faith of the defendant in contracting a second marriage on a mistake of law is no defense to a charge of bigamy. *Burnley v. State*, 201 Miss. 234, 29 So. 2d 94 (1947).

An indictment charging bigamy under a certain section of the statute need not set out the exceptions contained in this section [Code 1942, § 2020]. *Bryant v. State*, 179 Miss. 739, 176 So. 590 (1937).

Indictment held to sufficiently negative statutory exceptions. *McQueen v. State*, 143 Miss. 787, 109 So. 799 (1926).

Burden was on accused to prove that his second marriage was within the exception of Code 1906, § 1052. *Bennett v. State*, 100 Miss. 684, 56 So. 777 (1911).

2. Absence of spouse.

The law presumes, in favor of the validity of a marriage contracted by a person, where a husband or wife by a former marriage has been absent, and not heard from, and not known by such person to be living for the statutory number of years preceding the second marriage, that the absentee is dead; and the presumption will be acted on in a prosecution for bigamy. *Gibson v. State*, 38 Miss. 313 (1860).

So as to the presumptions of the validity of a marriage within the statutory number of years where the first spouse was not afterwards heard from, it will prevail. *Spears v. Burton*, 31 Miss. 547 (1856).

3. Dissolution of first marriage.

In a prosecution for bigamy there is no presumption of a dissolution of the former marriage. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

In a prosecution for bigamy the fact of a subsequent divorce is a matter of affirmative defense and the state need not initially negative such defense by either allegation or proof. *Grace v. State*, 212 Miss. 784, 55 So. 2d 495 (1951).

Where a district attorney represented the wife in divorce proceedings and a decree was rendered on February 6, 1950 instead of February 7, 1950, when defendant married second wife, the district attorney should have foreseen that more than likely he would be called upon to testify in bigamy prosecution and he should have withdrawn from the prosecution or refrained from testifying. *Turner v. State*, 212 Miss. 590, 55 So. 2d 228 (1951).

Defendant's misinterpretation of a summons in his wife's divorce action against him as setting the date of trial, and his mistaken belief that a decree for temporary allowances constituted a decree of divorce, were mistakes of law and no defense to a charge of bigamy predicated on his remarriage pending the divorce action. *Burnley v. State*, 201 Miss. 234, 29 So. 2d 94 (1947).

RESEARCH REFERENCES

ALR. Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy or allied offense. 56 A.L.R.2d 915.

Am Jur. 11 Am. Jur. 2d, Bigamy §§ 15 et seq.

CJS. 10 C.J.S., Bigamy §§ 1 et seq.

§ 97-29-17. Bribery; participant in professional or amateur games or other athletic contests; wrestling excepted.

(1) Whoever gives, promises, or offers to any professional or amateur baseball, football, basketball, or tennis player, or any player who participates in or expects to participate in any professional or amateur game or sport, or any person participating or expecting to participate in any other athletic contest or any coach, manager, or trainer of any team or participant or prospective participant in any such game, contest, or sport, anything of value with the intent to influence such participant to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in any baseball, football, basketball or tennis game, boxing, or other athletic contest in which such player or participant is taking part or expects to take part or has any duty in connection therewith shall be guilty of a felony and upon conviction shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(2) Any professional or amateur baseball, football, basketball, or tennis player or any boxer or participant or prospective participant in any sport or game or a manager, coach, or trainer of any team or individual participant or prospective participant in such game, contest, or sport who solicits or accepts anything of value to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in any baseball, football, basketball, tennis or boxing contest or any other game or sport in which he is taking part or expects to take part or has any duties in connection therewith shall be guilty of a felony and upon conviction shall be punished by imprisonment in the county jail for not less than six (6) months nor more than five (5) years in the penitentiary, or by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by both such fine and imprisonment.

(3) The provisions of this section shall not be deemed to include any wrestling matches, it being expressly provided hereby that wrestling matches shall be deemed to be shows or exhibitions and not athletic contests.

SOURCES: Codes, 1942, § 2034.5; Laws, 1954, ch. 232, §§ 1-3(¶¶ 1-3).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Bribery in athletic contests. 49 A.L.R.2d 1234.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 A.L.R.4th 1048.

Am Jur. 12 Am. Jur. 2d, Bribery § 22.
CJS. 11 C.J.S., Bribery §§ 1 et seq.

§ 97-29-19. Dead bodies; disinterment for sale or wantonness.

Every person who shall remove the dead body of any human being from the grave or other place of interment for the purpose of selling the same or for mere wantonness, or who shall wantonly dig into or open the grave or other place of interment where the remains of any dead human body is interred, or wantonly disturb the remains of any dead human body therein interred, shall upon conviction be imprisoned in the penitentiary not exceeding five years or in the county jail not more than one year, or be fined not more than five hundred dollars or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art 12, Title 7(10); 1857, ch. 64, art. 66; 1871, § 2715; 1880, § 2764; 1892, § 1023; Laws, 1906, § 1100; Hemingway's 1917, § 826; Laws, 1930, § 850; Laws, 1942, § 2076; Laws, 1920, ch. 300.

Cross References — Delivery of unclaimed dead bodies of hospital patients to medical schools, see § 41-39-7.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2076] does not apply in a situation where the question of guilt or innocence of the accused cannot be determined except by exhumation and autopsy of the body of the deceased, the court in this case may and should order disinterment even against the will of the relatives. *Roberts v. State*, 210 Miss. 777, 50 So. 2d 356 (1951).

RESEARCH REFERENCES

ALR. Removal and reinterment of remains. 21 A.L.R.2d 472.

Construction and application of grave-robbing statutes. 52 A.L.R.3d 701.

Am Jur. 22A Am. Jur. 2d, Dead Bodies §§ 90 et seq., 94 et seq., 98, 126.

CJS. 25A C.J.S., Dead Bodies §§ 7, 10 and 11.

§ 97-29-21. Dead bodies; buying or receiving.

Every person who shall purchase or receive the dead body of any human being, knowing the same to have been disinterred contrary to Section 97-29-19, shall, on conviction, be subjected to the punishment therein prescribed.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(11); 1857, ch. 64, art. 67; 1871, § 2716; 1880, § 2765; 1892, § 1024; Laws, 1906, § 1101; Hemingway's 1917, § 827; Laws, 1930, § 851; Laws, 1942, § 2077.

Cross References — Delivery of unclaimed dead bodies of hospital patients to medical schools, see § 41-39-7.

RESEARCH REFERENCES

ALR. Removal and reinterment of remains. 21 A.L.R.2d 472.

Construction and application of grave-robbing statutes. 52 A.L.R.3d 701.

Am Jur. 22A Am. Jur. 2d, Dead Bodies §§ 90 et seq., 94 et seq., 98, 126.

CJS. 25A C.J.S., Dead Bodies §§ 7, 10 and 11.

§ 97-29-23. Dead bodies; opening graves for certain purposes.

Every person who shall open a grave or other place of interment with intent to move the dead body of any human being for the purpose of selling the same, or for the purpose of dissection, or to steal the coffin or any part thereof, or the vestments or other articles interred with the dead body, or any of them, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or in the county jail not more than six months, or by fine of not more than three hundred dollars or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(12); 1857, ch. 64, art. 68; 1871, § 2717; 1880, § 2766; 1892, § 1025; Laws, 1906, § 1102; Hemingway's 1917, § 828; Laws, 1930, § 852; Laws, 1942, § 2078.

Cross References — Delivery of unclaimed dead bodies of hospital patients to medical schools, see § 41-39-7.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2078] does not apply in a situation where the question of guilt or innocence of the accused cannot be determined except by exhumation and autopsy of the body of the deceased, the court in this case may and should order disinterment even against the will of the relatives. *Roberts v. State*, 210 Miss. 777, 50 So. 2d 356 (1951).

RESEARCH REFERENCES

ALR. Construction and application of graverobbing statutes. 52 A.L.R.3d 701.

Am Jur. 22A Am. Jur. 2d, Dead Bodies §§ 90 et seq., 94 et seq., 98, 126.

CJS. 25A C.J.S., Dead Bodies §§ 7, 10 and 11.

§ 97-29-25. Desecration of cemetery; desecration of human corpse.

(1)(a) Every person who shall knowingly and willfully dig up, except as otherwise provided by law, obliterate, or in any way desecrate any cemetery where human dead are interred, or cause through word, deed or action the same to happen, shall upon conviction be imprisoned for not more than one (1) year in the county jail or fined not more than Five Hundred Dollars (\$500.00), or both, in the discretion of the court. In addition to any penalties that the court is otherwise authorized to impose the court may, in its discretion, order such restitution as it deems appropriate.

(b) In construing this subsection (1), a cemetery shall mean any plot of ground (i) on which are grave markers of stone, wood, metal or any other material recognizable as marking graves, or (ii) the boundaries of which are defined by a recorded plat, a fence line or corner markers, or trees, or are defined in any other discernible manner.

(2)(a) Every person who shall knowingly and willfully dig up, except as otherwise provided by law, or in any way desecrate any corpse or remains of any human being, or cause through word, deed or action the same to happen, shall upon conviction be guilty of a felony and shall be imprisoned for not more than three (3) years or fined not more than Five Thousand Dollars (\$5,000.00), or both, in the discretion of the court.

(b) The prohibitions of this subsection (2) shall not apply to the good faith harvesting of any organ for transplant or to any good faith use of a cadaver or body part for medical or scientific education or research.

SOURCES: Codes, 1942, § 2076.5; Laws, 1971, ch. 398, § 1; Laws, 1972, ch. 351, § 1; Laws, 1983, ch. 406; Laws, 2004, ch. 387, § 1, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment designated the formerly undesignated first and second paragraphs as present (1)(a) and (1)(b); added (2); and made minor stylistic changes.

Federal Aspects — Native American graves protection and repatriation act, P. L. 101-601.

RESEARCH REFERENCES

ALR. Liability for desecration of graves and tombstones. 77 A.L.R.4th 108. (Rev), Cemeteries, Forms 71 et seq. (desecration of, or trespass on, graves).
Am Jur. 5A Am. Jur. Pl & Pr Forms

§ 97-29-27. Incest; marriage within prohibited degrees.

If any person shall marry within the degrees prohibited by law, he shall be guilty of incest, and on conviction thereof he shall be fined five hundred dollars or imprisoned in the penitentiary not longer than ten years, or punished by both such fine and imprisonment, and such marriage shall be void.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(5); 1857, ch. 64, art. 184; 1871, § 2647; 1880, § 2895; 1892, § 1168; Laws, 1906, § 1246; Hemingway's 1917, § 976; Laws, 1930, § 1004; Laws, 1942, § 2234.

Cross References — Computation of relationship, see §§ 1-3-71, 1-3-73.

Unlawful marriages, see §§ 93-1-1, 93-1-3.

Marriage between kindred as cause for divorce, see § 93-5-1.

Adultery and fornication between kindred, see § 97-29-5.

JUDICIAL DECISIONS

1. In general.

Since a marriage between a white person and a negro is not incestuous but is miscegenetic, and an incestuous relationship is an element of the denounced offense, Code 1942, § 2000 is not violated where a white person and a negro cohabit, or live together as husband and wife, in absence of allegations as to an incestuous relationship. *Ratcliff v. State*, 234 Miss. 724, 107 So. 2d 728 (1958); *Rose v. State*, 234 Miss. 731, 107 So. 2d 730 (1958).

Construing Code 1942, §§ 457 and 458, as setting forth conditions under which marriages are prohibited as incestuous under this section [Code 1942, § 2234], there is no provision which clearly deals with specific act of son-in-law in marrying his mother-in-law and order sustaining demurrer to indictment should be affirmed. *State ex rel. Dist. Att'y v. Winslow*, 208 Miss. 753, 45 So. 2d 574 (1950).

RESEARCH REFERENCES

ALR. Sexual intercourse between persons related by half blood as incest. 72 A.L.R.2d 706.

Prosecutrix in incest case as accomplice or victim. 74 A.L.R.2d 705.

Incest as included within charge of rape. 76 A.L.R.2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused. 97 A.L.R.3d 967.

Am Jur. 41 Am. Jur. 2d, Incest §§ 1 et seq.

CJS. 42 C.J.S., Incest §§ 1 et seq.

§ 97-29-29. Incest; persons divorced for incest not to cohabit or copulate.

If persons divorced for incest shall, after such divorce, cohabit or live together as man and wife, or be guilty of a single act of adultery or fornication, such persons so offending shall be guilty of incest and fined, on conviction, five hundred dollars or be imprisoned in the penitentiary not longer than ten years or both.

SOURCES: Codes, 1857, ch. 64, art. 185; 1871, § 2648; 1880, § 2896; 1892, § 1169; Laws, 1906, § 1247; Hemingway's 1917, § 977; Laws, 1930, § 1005; Laws, 1942, § 2235.

Cross References — Prohibition against cohabitation or copulation by divorced persons, see § 93-5-29.

Adultery and fornication between kindred, see § 97-29-5.

RESEARCH REFERENCES

Am Jur. 41 Am. Jur. 2d, Incest §§ 1 et seq. **CJS.** 42 C.J.S., Incest §§ 1 et seq.

§ 97-29-31. Indecent exposure.

A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor and, on conviction, shall be punished by a fine not exceeding Five Hundred Dollars (\$500.00) or be imprisoned not exceeding six (6) months, or both. It is not a violation of this statute for a woman to breast-feed.

SOURCES: Codes, 1892, § 1218; Laws, 1906, § 1294; Hemingway's 1917, § 1027; Laws, 1930, § 1058; Laws, 1942, § 2290; Laws, 1971, ch. 448, § 1; Laws, 2006, ch. 520, § 5, eff from and after passage (approved Apr. 3, 2006.)

Amendment Notes — The 2006 amendment added the last sentence.

Cross References — Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Search and seizure.

1. In general.

Statute only prohibited nudity accompanied by lewdness, to be constitutional, the statute had to include an exception in the case of a person engaged in expressing a matter of serious literary, artistic, scientific, or political value. *Richmond v. City of Corinth*, 816 So. 2d 373 (Miss. 2002).

Wilfulness and lewdness are essential elements of the misdemeanor charged in this section [Code 1942, § 2290]. *Lott v. Potacocowa Creek Drainage Dist.*, 193 So. 2d 126 (Miss. 1966).

A woman sun-bathing in the nude on her husband's private tract of approximately 14½ acres of wooded land, not visible from any public road, who immediately began to clothe herself when uninvited visitors appeared on the premises was not guilty of wilfully and lewdly ex-

posing her person under the provisions of this section [Code 1942, § 2290]. *Pendergrass v. State*, 193 So. 2d 126 (Miss. 1966).

It is necessary under this section [Code 1942, § 2290] to charge that the exposure was "lewdly" made. *Stark v. State*, 81 Miss. 397, 33 So. 175 (1903).

2. Search and seizure.

Defendant's act of removing her shirt in a public parking lot, although not a violation of Miss. Code Ann. § 97-29-31 (Rev. 2000), gave an officer sufficient reasonable suspicion to authorize an investigatory stop; the question as to whether an officer acts reasonably in making an investigatory stop is not whether a driver is suspected of a felony or misdemeanor, but whether a law enforcement officer acts reasonably in stopping a vehicle to investigate a complaint short of arrest. *Ginn v. State*, 860 So. 2d 675 (Miss. 2003).

RESEARCH REFERENCES

ALR. Criminal offense predicated upon indecent exposure. 94 A.L.R.2d 1353.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place. 96 A.L.R.3d 692.

Indecent exposure: what is "person". 63 A.L.R.4th 1040.

Search and seizure: reasonable expectation of privacy in public restroom. 74 A.L.R.4th 508.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 A.L.R.5th 229.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1, 2, 17.

34 Am. Jur. Trials 1, Representing Sex Offenders and the Chemical Castration Defense.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 67 C.J.S., Obscenity §§ 9, 10.

§ 97-29-33. Repealed.

Repealed by Laws, 1983, ch. 498, § 7, eff from and after July 1, 1983.

[Codes, Hemingway's 1921 Supp. §§ 1142a, 1142b; 1930, § 1054; 1942, § 2286; Laws, 1920, ch. 213]

Editor's Note — Former § 97-29-33 was entitled: Moving pictures; obscene or immoral exhibitions unlawful.

§ 97-29-35. Repealed.

Repealed by Laws, 1979, ch. 475, § 4, eff from and after July 1, 1979.

[Codes, 1942, §§ 2286.3, 2286.4; Laws, 1970, ch. 329, §§ 1, 2]

Editor's Note — Former § 97-29-35 was entitled: Motion pictures; previews of restricted pictures not to be shown general audiences; penalties.

§§ 97-29-37 through 97-29-41. Repealed.

Repealed by Laws, 1983, ch. 498, § 7, eff from and after July 1, 1983.

§ 97-29-37. [Codes, 1892, § 1216; 1906, § 1292; Hemingway's 1917, § 1025; 1930, § 1056; 1942, § 2288; Laws, 1884, p. 81; 1904, ch. 143]

§ 97-29-39. [Codes, 1942, §§ 2674-02, 2674-03; Laws, 1962, ch. 322, §§ 2, 3]

§ 97-29-41. [Codes, 1942, § 2674-12; Laws, 1962, ch. 322, § 12]

Editor's Note — Former § 97-29-37 was entitled: Obscene pictures or indecent articles; sale, distribution or advertising prohibited.

Former § 97-29-39 was entitled: Obscene printed or written material; publication, sale or distribution prohibited.

Former § 97-29-41 was entitled: Obscene printed or written material; contempt; penalty for disobeying injunction or restraining order.

§ 97-29-43. Polygamy; teaching of.

If any person shall teach another the doctrines, principles, or tenets, or

any of them, of polygamy; or shall endeavor so to do; or shall induce or persuade another by words or acts, or otherwise, to embrace or adopt polygamy, or to emigrate to any other state, territory, district, or country for the purpose of embracing, adopting, or practicing polygamy, or shall endeavor so to do, he shall, on conviction, be fined not less than twenty-five dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than one month nor more than six months, or both.

SOURCES: Codes, 1892, § 1257; Laws, 1906, § 1333; Hemingway's 1917, § 1066; Laws, 1930, § 1097; Laws, 1942, § 2330.

Cross References — Bigamy, see §§ 97-29-13, 97-29-15.

§ 97-29-45. Obscene electronic communications.

(1) It shall be unlawful for any person or persons:

(a) To make any comment, request, suggestion or proposal by means of telecommunication or electronic communication which is obscene, lewd or lascivious with intent to abuse, threaten or harass any party to a telephone conversation, telecommunication or electronic communication;

(b) To make a telecommunication or electronic communication with intent to terrify, intimidate or harass, and threaten to inflict injury or physical harm to any person or to his property;

(c) To make a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at the called number;

(d) To make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number;

(e) To make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(f) Knowingly to permit a computer or a telephone of any type under his control to be used for any purpose prohibited by this section.

(2) Upon conviction of any person for the first offense of violating subsection (1) of this section, such person shall be fined not more than Five Hundred Dollars (\$500.00) or imprisoned in the county jail for not more than six (6) months, or both.

(3) Upon conviction of any person for the second offense of violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than One Thousand Dollars (\$1,000.00) or imprisoned in the county jail for not more than one (1) year, or both.

(4) For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not more than Two Thousand Dollars (\$2,000.00) and/or imprisoned in the State Penitentiary for not more than two (2) years, or both.

(5) The provisions of this section do not apply to a person or persons who make a telephone call that would be covered by the provisions of the federal Fair Debt Collection Practices Act, 15 USCS Section 1692 et seq.

(6) Any person violating this section may be prosecuted in the county where the telephone call, conversation or language originates in case such call, conversation or language originates in the State of Mississippi. In case the call, conversation or language originates outside of the State of Mississippi then such person shall be prosecuted in the county to which it is transmitted.

(7) For the purposes of this section, telecommunication and electronic communication mean and include any type of telephonic, electronic or radio communications, or transmission of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, cable, radio, electromagnetic, photoelectronic or photo-optical system or the creation, display, management, storage, processing, transmission or distribution of images, text, voice, video or data by wire, cable or wireless means, including the Internet.

(8) No person shall be held to have violated this section solely for providing access or connection to telecommunications or electronic communications services where the services do not include the creation of the content of the communication. Companies organized to do business as commercial broadcast radio stations, television stations, telecommunications service providers, Internet service providers, cable service providers or news organizations shall not be criminally liable under this section.

SOURCES: Codes, 1942, § 2291.5; Laws, 1956, ch. 261; Laws, 1964, ch. 351, § 1; Laws, 1982, ch. 385; Laws, 2001, ch. 468, § 1; Laws, 2002, ch. 503, § 1, eff from and after July 1, 2002.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Telephone harassment.

1. In general.

Statutory language clearly prescribed for punishment only a class of true threats, and not social or political advocacy. *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

Because trial judge's jury instructions tracked language of statute, jury's verdict represented finding that defendant, on trial for violating statute by placing telephone call to former supervisor stating that next time supervisor came by defendant's premises he would be "toting an ass whippin," engaged in unprotected, threat-

ening speech. *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

Telephone harassment statute prohibiting making telephone call threatening to inflict injury or physical harm, with intent to terrify, intimidate, or harass, is not unconstitutionally overbroad on its face. *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

Conviction of defendant for violation of state telephone harassment statute was upheld, and did not violate First Amendment, where defendant placed telephone call to former supervisor stating that next time supervisor came by defendant's premises he would be "toting an ass whippin." *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991).

The State could properly proceed against a defendant under subsection (1)(c) of this section, which prohibits making a harassing telephone call, rather than under subsection (1)(e) of this section, which prohibits repeated harassing telephone calls, even though the defendant allegedly made 7 harassing telephone calls to a single individual, so long as the indictment was clear and unequivocal. *Gray v. State*, 549 So. 2d 1316 (Miss. 1989).

An indictment improperly joined 8 counts of making harassing telephone calls where the indictment charged the defendant with 2 different crimes on 2 different dates against 2 different victims. *Gray v. State*, 549 So. 2d 1316 (Miss. 1989).

A prosecutor's comments during closing argument in a prosecution for making harassing telephone calls that the defendant was "a coward and a terrorist" and that the calls were "a form of terrorism...that is employed by a coward" did not warrant a mistrial. Making harassing phone calls is a cowardly act and a strong argument could be made that in the context of the case, the terms used by the prosecutor were accurate to describe the sort of person who calls someone up for the purpose of making harassing phone calls. *Gray v. State*, 549 So. 2d 1316 (Miss. 1989).

Evidence was sufficient to support conviction for making an obscene telephone call, where an obscene call was traced to the defendant's residence, which was three doors down from the victim's, the victim positively identified defendant's voice as that of the caller's, and where the caller had stated his first name and his telephone number, and they were the same as defendant's; the testimony of the victim as to obscene calls she had received, in addition to the call for which defendant had been prosecuted, was properly admitted where the calls were interrelated, and were admissible to prove identity, guilty knowledge, intent, and motive. *Weeks v. State*, 465 So. 2d 334 (Miss. 1985).

Evidence of obscene telephone calls other than call charged in indictment is admissible if interrelated to charged call

or if relevant to proof of identity, guilty knowledge, intent and motive. *Weeks v. State*, 465 So. 2d 334 (Miss. 1985).

Evidence obtained by use of telephone trapping device is sufficient to support conviction for making obscene telephone call. *Weeks v. State*, 465 So. 2d 334 (Miss. 1985).

The words "I want you," standing alone, were neither profane, vulgar, indecent, threatening, obscene, nor insulting, and defendant's demurrer to an indictment under this section [Code 1972, § 97-29-45] should have been sustained. *Sanders v. State*, 306 So. 2d 636 (Miss. 1975).

In a prosecution for using obscene language over the telephone, the testimony of the complainant that she had received other obscene calls was admissible to explain why a holding device was placed on her telephone by the telephone company, but it was error for the trial court to allow her to testify on redirect examination, over the objection of the defendant, that the voice of the person making the previous calls, for which the defendant was not charged, was the same as the one who made the call which was the basis of the indictment. *Younger v. State*, 301 So. 2d 300 (Miss. 1974).

Where the indictment fails to specify the allegedly profane language used by the defendant, a motion to quash should be granted. *Spears v. State*, 253 Miss. 108, 175 So. 2d 158 (1965).

It is reversible error not to require the state's prosecuting witness to testify orally to the jury the allegedly indecent words which were spoken to her by the defendant, such words being the gravamen of the indictment. *Spears v. State*, 253 Miss. 108, 175 So. 2d 158 (1965).

In a prosecution under this section [Code 1942, § 2291.5] it was reversible error to ask the defendant if he had not called up 17 women (naming them) in addition to the prosecuting witness and used the same indecent language to them. *Spears v. State*, 253 Miss. 108, 175 So. 2d 158 (1965).

Where the accused had not objected to the prosecuting witness testifying, the contention that the trial court erred in permitting the witness to testify that she was the former wife of the accused could

not be considered for the first time on appeal. Likewise, contentions as to the amendment of an affidavit to show the language used, and the sufficiency of a justice of the peace court judgment which failed to state the name of the threatened person, could not be considered for the first time on appeal. *Shortridge v. State*, 243 Miss. 710, 140 So. 2d 89 (1962).

2. Telephone harassment.

In defendant's trial on charges of telephone harassment, a violation of Miss. Code Ann. § 97-29-45(1)(a), the trial court did not err in admitting the sheriff's re-

buttal testimony in which the sheriff relied on his notes because defendant failed to establish that the prosecution violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A) by failing to tender the sheriff's notes during discovery. The sheriff's testimony was not exculpatory; the notes were used during rebuttal and not in the State's case-in-chief; and the testimony did not consist of a statement by defendant. Therefore, the notes did not constitute a written statement required to be provided to the defense during discovery under Rule 9.04(A). *Yates v. State*, 919 So. 2d 1122 (Miss. Ct. App. 2005).

ATTORNEY GENERAL OPINIONS

Defendant may be prosecuted for obscene phone call violations in either county where call originated or county where call was received. *Green*, Sept. 30, 1992, A.G. Op. #92-0526.

Obscene phone call violations, under this section, may be prosecuted in either county where call originated or in county

where call was received. *Gentry*, June 7, 1993, A.G. Op. #93-0362.

A conviction for violating this section permits a possible punishment of confinement in the state penitentiary, and therefore a violation of the statute is a felony offense. *Blakney*, Aug. 8, 1997, A.G. Op. #97-0425.

RESEARCH REFERENCES

ALR. Misuse of telephone as minor criminal offense. 97 A.L.R.2d 503.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language. 32 A.L.R.3d 1041.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass. 95 A.L.R.3d 411.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing. 5 A.L.R.4th 956.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state. 37 A.L.R.4th 852.

Prohibition of obscene or harassing telephone calls in interstate or foreign communication under 47 USCA § 223. 50 A.L.R. Fed. 541.

Am Jur. 12 Am. Jur. 2d, Blasphemy and Profanity §§ 1 et seq.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 25.

12A Am. Jur. Pl & Pr Forms (Rev), Fright, Shock, and Mental Disturbance, Form 42 (complaint, petition, or declaration — damages resulting from defendant's harassing phone calls — by former spouse).

16 Am. Jur. Proof of Facts 2d 493, Liability for Abusive Language.

§ 97-29-47. Profanity or drunkenness in public place.

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two (2) or more persons, he shall, on conviction thereof, be fined not more than one hundred dollars (\$100.00) or be imprisoned in the county jail not more than thirty (30) days or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 4(1); 1857, ch. 64, art. 340; 1871, § 2833; 1880, § 2974; 1892, § 1219; Laws, 1906, § 1295; Hemingway's 1917, § 1028; Laws, 1930, § 1059; Laws, 1942, § 2291; Laws, 1912, ch. 212; Laws, 1971, ch. 448, § 2, eff from and after passage (approved March 25, 1971).

Cross References — Ejection of disorderly and profane persons from hotels, see § 75-73-13.

Disorderly conduct and breach of the peace, see §§ 97-35-1 et seq.

JUDICIAL DECISIONS

1. Profanity.
2. Public drunkenness.

1. Profanity.

The circuit court committed manifest error in determining that the defendant's conduct gave rise to probable cause for his arrest for a violation of the statutory prohibition against public profanity where (1) during a conversation between the defendant and a police officer and another man, the defendant said, "I'm tired of this God d--- police sticking their nose in s--- that doesn't even involve them," (2) the officer warned the defendant not to use profanities, and (3) the defendant then voiced additional profane remarks towards the officer. *Brendle v. City of Houston*, 759 So. 2d 1274 (Miss. Ct. App. 2000).

The statute provides that the profanities uttered must be said in a public place and in the presence of two or more persons; however, there is no requirement that two or more persons testify that the vulgar words spoken were actually offensive or that the two present actually heard the words spoken. *Brendle v. City of Houston*, 759 So. 2d 1274 (Miss. Ct. App. 2000).

A state cannot, consistently with the constitutional guaranty of freedom of expression, excise, as offensive conduct, one particular scurrilous epithet from the public discourse, either upon the theory that its use is inherently likely to cause violent reaction, or upon a general assertion that the state, acting as the guardian of public morality, may properly remove this offensive word from the public vocabulary. *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), reh'g denied, 404 U.S. 876, 92 S. Ct. 26, 30 L. Ed. 2d 124 (1971).

The conviction for disturbing the peace by offensive conduct of one who entered a

county courthouse wearing a jacket bearing the plainly visible words "Fuck the Draft", would be reversed where the conviction rested solely upon speech and there was no showing of an intent to incite disobedience to or disruption of the draft, punishment for the mere assertion of a position on the draft being inconsistent with the First and Fourteenth Amendments. *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), reh'g denied, 404 U.S. 876, 92 S. Ct. 26, 30 L. Ed. 2d 124 (1971).

"Public place," within purview of city ordinance making it criminal offense to profanely swear or curse or use vulgar or indecent language in public place, is one wherein, by general invitation, members of the public attend for reasons of business, entertainment, instruction or the like, and are welcome so long as they conform to what is customarily done there. *Nelson v. City of Natchez*, 197 Miss. 26, 19 So. 2d 747 (1944).

Restaurant is a "public place" within the meaning of city ordinance making it criminal offense to profanely swear or curse or use vulgar or indecent language in public place, even though only white people are admitted thereat. *Nelson v. City of Natchez*, 197 Miss. 26, 19 So. 2d 747 (1944).

City ordinance making it criminal offense to profanely swear or curse or use vulgar or indecent language in public place must be construed in accordance with its purpose, although its letter would admit a narrower interpretation. *Nelson v. City of Natchez*, 197 Miss. 26, 19 So. 2d 747 (1944).

Defendant stating while standing in church door after Sunday school, "Well, the 'damn' thing is done broke up," held

guilty of "profanity." *Orf v. State*, 147 Miss. 160, 113 So. 202 (1927).

Evidence held not to sustain charge of using profane language in public highway; criminal statutes not enlarged or extended beyond letter. *Cleveland v. State*, 129 Miss. 400, 92 So. 555 (1922).

Affidavit charging use of profane language in a public place must allege the particular public place. *Files v. State*, 96 Miss. 257, 50 So. 979 (1910).

Code 1906, § 1295 is not violated by the use of the words, "Go to hell, you low down devils." *Stafford v. State*, 91 Miss. 158, 44 So. 801 (1907).

An indictment for blasphemy, under Code 1892, § 1219, is demurrable if it fail to designate the particular public place where defendant profanely swore or cursed. *State v. Shanks*, 88 Miss. 410, 40 So. 1005 (1906).

Under this section [Code 1942, § 2291] it is not necessary to profanity that the name of the Deity be used. *State v. Wiley*, 76 Miss. 282, 24 So. 194, 71 Am. St. R. 531 (1898).

The indictment must set out the profane language used since it constitutes the gist of the offense. *Walton v. State*, 64 Miss. 207, 8 So. 171 (1886).

2. Public drunkenness.

A defendant's arrest for driving while intoxicated was legal, and therefore the subsequent intoxilyzer test was not tainted, even though the arresting officer did not observe the defendant driving, where the defendant admitted to the arresting officer that he had been driving an automobile which was involved in an accident, and the defendant was publicly intoxicated in the presence of the officer and others in violation of this section.

Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

Defendant's conviction of being drunk in the presence of two or more persons in a public place was against the weight of the evidence where a doctor, who had examined defendant, testified that the injuries sustained by the defendant prior to his arrest rendered him unable to walk straight and caused him to stagger, and it appeared that opinion of police officers as to defendant's drunkenness was based on defendant's staggering and the odor of alcohol upon him. *Brown v. State*, 231 Miss. 5, 94 So. 2d 608 (1957).

A highway is public place within meaning of this section [Code 1942, § 2291]. *State, ex rel. Kelley, v. Yearwood*, 204 Miss. 181, 37 So. 2d 174 (1948).

Fact that person arrested under this section [Code 1942, § 2291] for public drunkenness was later docketed and tried upon charge of driving while intoxicated does not change lawful nature of original lawful arrest and detention. *State, ex rel. Kelley, v. Yearwood*, 204 Miss. 181, 37 So. 2d 174 (1948).

Drunkenness on public highway is drunkenness in public place within statute. *Thompson v. State*, 153 Miss. 593, 121 So. 275 (1929).

Authority to arrest defendants for drunkenness in public place carried with it authority to search their persons and automobile in which they were riding. *Thompson v. State*, 153 Miss. 593, 121 So. 275 (1929).

One cannot defend a charge of resisting an officer seeking to arrest him because drunk in a public place, to which he had necessarily been taken on account of his own wrongdoing. *Brown v. State*, 81 Miss. 137, 32 So. 952 (1902).

ATTORNEY GENERAL OPINIONS

Double jeopardy does not necessarily prohibit charging a defendant with public drunkenness under this section, even if that defendant has been acquitted of DUI

under Section 63-11-30. The two are separate and distinct criminal charges and contain different elements. *Moffett*, June 6, 1995, A.G. Op. #95-0277.

RESEARCH REFERENCES

ALR. Location of offense as "public" within requirement of enactments against

drunkenness. 8 A.L.R.3d 930.

Proximate cause: liability of tortfeasor

for injured person's subsequent injury or reinjury. 31 A.L.R.3d 1000.

Prosecution of chronic alcoholic for drunkenness offenses. 40 A.L.R.3d 321.

Validity of blasphemy statutes or ordinances. 41 A.L.R.3d 519.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing. 5 A.L.R.4th 956.

Civil liability for insulting or abusive language — modern status. 20 A.L.R.4th 773.

Validity and construction of statute or ordinance making it offense to have possession of open or unsealed alcoholic beverage in public place. 39 A.L.R.4th 668.

Am Jur. 12 Am. Jur. 2d, Blasphemy and Profanity §§ 1 et seq.

50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 25.

16 Am. Jur. Proof of Facts 2d 493, Liability for Abusive Language.

CJS. 67 C.J.S., Obscenity § 11.

§ 97-29-49. Prostitution.

It shall be unlawful to engage in prostitution or to aid or abet prostitution or to procure or solicit for the purposes of prostitution, or to reside in, enter, or remain in any place, structure, or building, or to enter or remain in any vehicle or conveyance for the purpose of lewdness, assignation, or prostitution, or to keep or set up a house of ill-fame, brothel or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure or building, or to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building, or to direct, take, or transport, or to offer or agree to take or transport, or aid or assist in transporting, any person to any vehicle, conveyance, place, structure, or building, or to any other person with knowledge or reasonable cause to know that the purpose of such directing, taking or transporting is prostitution, lewdness or assignation, or to lease or rent or contract to lease or rent any vehicle, conveyance, place, structure, or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited, or to aid, abet, or participate in the doing of any of the acts herein prohibited.

SOURCES: Codes, 1942, § 2333; Laws, 1942, ch. 284.

Cross References — Enticing children for prostitution, see § 97-5-5.

JUDICIAL DECISIONS

1. In general.

Omission of words, "from the evidence," in instruction that all that was required was that jury believe that defendant was guilty beyond a reasonable doubt of having leased or rented a room knowing, or

with good reason to know, that it was intended to be used for prostitution, constitutes reversible error, where such defect was not cured by any other instruction. *Imbraguglio v. State*, 196 Miss. 515, 18 So. 2d 294 (1944).

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases. 77 A.L.R.3d 519.

Entrapment defense in sex offense prosecutions. 12 A.L.R.4th 413.

Laws prohibiting or regulating “escort services,” “outcall entertainment,” or sim-

ilar services used to carry on prostitution. 15 A.L.R.5th 900.

Am Jur. 63C Am. Jur. 2d, Prostitution §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

34 Am. Jur. Trials 1, Representing Sex Offenders and the Chemical Castration Defense.

§ 97-29-51. Prostitution; procuring females; accepting money, etc. from prostitute.

It shall further be unlawful to procure a female inmate for a house of prostitution, or to cause, induce, persuade, or encourage by promise, threat, violence, or by scheme or device, a female to become a prostitute or to remain an inmate of a house of prostitution, or to induce, persuade, or encourage a female to come into or leave this state for the purpose of prostitution, or to become an inmate in a house of prostitution, or to receive or give, or agree to receive or give any money or thing of value for procuring, or attempting to procure any female to become a prostitute or an inmate in a house of prostitution, or to knowingly accept, receive, levy or appropriate any money or other thing of value without consideration from a prostitute or from the proceeds of any woman engaged in prostitution.

SOURCES: Codes, 1942, § 2334; Laws, 1942, ch. 284.

Cross References — Enticing children for prostitution, see § 97-5-5.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases. 77 A.L.R.3d 519.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping. 3 A.L.R.4th 1195.

Entrapment defense in sex offense prosecutions. 12 A.L.R.4th 413.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like. 41 A.L.R.4th 675.

Am Jur. 63C Am. Jur. 2d, Prostitution §§ 17 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

§ 97-29-53. Prostitution; penalty.

Any person, partnership, association or corporation violating any provision of Sections 97-29-49 or 97-29-51 shall, upon conviction, be punished by a

fine not exceeding two hundred dollars (\$200.00) or by confinement in the county jail for not more than six (6) months, or by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2335; Laws, 1942, ch. 284.

Cross References — Enticing children for prostitution, see § 97-5-5.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Laws prohibiting or regulating "escort services," "outcall entertainment," or similar services used to carry on prostitution. 15 A.L.R.5th 900.

Am Jur. 63A Am. Jur. 2d, Prostitution §§ 1 et seq.

CJS. 73 C.J.S., Prostitution §§ 53, 54 et seq.

§ 97-29-55. Seduction of female over age of eighteen by promised or pretended marriage.

If any person shall obtain carnal knowledge of any woman, or female child, over the age of eighteen years, of previous chaste character, by virtue of any feigned or pretended marriage or any false or feigned promise of marriage, he shall, upon conviction, be imprisoned in the penitentiary not more than five years; but the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction.

SOURCES: Codes, 1892, § 1298; Laws, 1906, § 1372; Hemingway's 1917, § 1108; Laws, 1930, § 1137; Laws, 1942, § 2374; Laws, 1888, p. 89.

Cross References — Unmarried female's action for seduction, see § 11-7-9.

Parent's action for seduction of daughter, see § 11-7-11.

Seduction of female child under 18 years of age, see §§ 97-3-65, 97-3-95, 97-3-101, and 97-5-23.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction and venue.
3. Indictment.
4. Evidence.
5. —Corroborating evidence.

1. In general.

Although consent, either actual or implied, of a female to the act of intercourse is an essential element of the crime of seduction, if the victim ultimately assents or yields to the act of intercourse, the fact that she resisted the advances of her seducer for a time does not preclude the perpetration of criminal seduction.

Aldridge v. State, 232 Miss. 368, 99 So. 2d 456 (1958).

One guilty under this section [Code 1942, § 2374] may not exempt himself from prosecution by an offer to marry the woman. *Williams v. State*, 92 Miss. 70, 45 So. 146, 15 Am. Ann. Cas. 1026 (1908).

Under this section [Code 1942, § 2374], the previous chaste character of the woman is an essential element of the crime. *Fooshee v. State*, 82 Miss. 509, 34 So. 148 (1903).

Actual chastity and not mere reputation for chastity is required. *Carroll v. State*,

74 Miss. 688, 22 So. 295, 60 Am. St. R. 539 (1897).

2. Jurisdiction and venue.

Where the promise of marriage occurred in Forrest County and the act of intercourse occurred in Jones County, since both of these acts constituted essential elements of the offense of seduction, the jurisdiction thereof was governed by Code 1942, § 2429; and it being proper to begin prosecution in either county, the circuit court of Forrest County had jurisdiction. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

Where the promise of marriage occurred in Forrest County and the act of intercourse occurred in Jones County, since both of these acts constituted essential elements of the offense of seduction, venue could be properly laid in Forrest County without contravening Mississippi Constitution § 26. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

3. Indictment.

It is not necessary under this section [Code 1942, § 2374] that the indictment should aver that the woman is a single woman, this being a matter of defense though it is better practice to so aver. *Norton v. State*, 72 Miss. 128, 16 So. 264 (1894), later proceeding, 18 So. 916 (Miss. 1894); *Hoff v. State*, 83 Miss. 488, 35 So. 950 (1904).

An indictment under this section [Code 1942, § 2374] though failing to allege that the promise was made to the woman is sufficient after verdict, if not demurred to under Code 1892, § 1341 (Code 1906, § 1413), where the indictment does charge that the defendant had knowledge of the woman by virtue of a false or feigned promise of marriage. *Norton v. State*, 72 Miss. 128, 16 So. 264 (1894), later proceeding, 18 So. 916 (Miss. 1894).

It is not necessary to allege that the man was unmarried, though if married and the woman knew it, no conviction can be had under this statute [Code 1942, § 2374]. *Norton v. State*, 72 Miss. 128, 16 So. 264 (1894), later proceeding, 18 So. 916 (Miss. 1894).

Though not in terms so provided, it is essential to aver and prove under this section [Code 1942, § 2374] that the

woman was of chaste character at the time of the intercourse. *Norton v. State*, 72 Miss. 128, 16 So. 264 (1894), later proceeding, 18 So. 916 (Miss. 1894).

There need not be positive averment and proof that the woman was unmarried; it is sufficient that the indictment and evidence reasonably show this. *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. R. 492 (1894).

4. Evidence.

Since evidence that after the commission of the crime of seduction the accused and the prosecutrix had lived together as man and wife for a number of months informed the jury that subsequent acts of intercourse had been committed, without regard to the question of admissibility of such evidence, the trial court did not commit reversible error in refusing to permit the accused to interrogate the prosecutrix relative thereto as bearing upon the question of the prosecutrix's previous chaste character. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

Testimony of the prosecutrix that she was afraid of the accused and that she had yielded to his demands under the inducement of his promise to marry her, was sufficient to create an issue for the determination of the jury on the question of her consent, and to warrant the jury in finding that while she was reluctant to do so, she yielded to the act of intercourse under the accused's promise to marry her, even though the prosecutrix had testified on cross-examination that the accused had forced himself on her and that she did not consent to the act of intercourse. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

While it is immaterial to the crime of seduction under this section [Code 1942, § 2374] whether the accused be married or unmarried, the fact that he is single is proper to be shown in evidence as illustrating the motive of the woman. *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. R. 492 (1894).

5. —Corroborating evidence.

Although Mississippi has required by statute that the complaining witness' testimony be corroborated in prosecutions for certain sexual offenses (e.g. Code 1942,

§§ 2359, 2374), the state courts have specifically held that the requirement for corroboration is confined to those offenses wherein the statute expressly so provides, and no such corroboration is required in prosecution of defendant for disturbing the peace of the complaining witness, on allegations that the defendant had touched complainant's private parts. *Henry v. Williams*, 299 F. Supp. 36 (N.D. Miss. 1969).

The requirement that testimony of the outraged female be corroborated does not extend to prosecutions for an indecent assault on a female under 13. *Pittman v. State*, 236 Miss. 592, 111 So. 2d 415 (1959).

While it is necessary that the prosecutrix be corroborated as to the act of intercourse, and the burden was upon the state to prove this essential element, it was not necessary that this be done by direct evidence, but may be established by circumstantial evidence. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

The fact that the accused and the prosecutrix spent the night together in a private room in a motel was a sufficient circumstance to be submitted to the jury for their determination as to whether the act of intercourse occurred, and to warrant the jury in finding that this was a sufficient corroborative circumstance to establish the fact of intercourse. *Aldridge v. State*, 232 Miss. 368, 99 So. 2d 456 (1958).

In seduction prosecution, testimony of prosecutrix as to her previous chaste character, the promise of marriage, and the act of seduction must be corroborated. *Glover v. State*, 117 Miss. 792, 78 So. 769 (1918).

Where there was no corroborating evidence, defendant was entitled to a peremptory instruction. *Lewis v. State*, 111 Miss. 833, 72 So. 241 (1916).

Letters alleged to have been written by defendant, identified only by the prosecutrix, cannot be regarded as corroborating the witness. *Lewis v. State*, 111 Miss. 833, 72 So. 241 (1916).

Evidence that defendant, with knowledge of her pregnancy, said that he would marry prosecutrix in a short time, was insufficient corroboration of prosecutrix. *Long v. State*, 100 Miss. 7, 56 So. 185 (1911).

To convict of seduction, seduced female must be corroborated as to her previous chaste character and the false or feigned promise of marriage. *Carter v. State*, 99 Miss. 206, 54 So. 805 (1911).

Although under this section [Code 1942, § 2374] the uncorroborated testimony of the woman is insufficient to convict, it is not necessary that she be corroborated in every fact essential to make out the crime; it is sufficient if she be corroborated as to the promise and the intercourse. *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. R. 492 (1894).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Seduction §§ 2 et seq.

§ 97-29-57. Stallion or jack not to be kept in public view or permitted to run at large.

A person shall not keep a stallion or jack nearer than one hundred yards to a church, or in public view in an inclosure bordering on a public highway, or nearer thereto, than one hundred yards; nor shall any person stand such animals in open view of any public place, or negligently keep such animal or suffer it to run at large. Any such offender, upon conviction, shall be fined not less than twenty-five dollars, and shall be liable for all damages done by such animals so kept or running at large.

SOURCES: Codes, 1892, § 1220; Laws, 1906, § 1296; Hemingway's 1917, § 1029; Laws, 1930, § 1060; Laws, 1942, § 2292.

§ 97-29-59. Unnatural intercourse.

Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 7(20); 1857, ch. 64, art. 238; 1871, § 2701; 1880, § 2968; 1892, § 1321; Laws, 1906, § 1396; Hemingway's 1917, § 1139; Laws, 1930, § 1170; Laws, 1942, § 2413.

Cross References — Applicability of certain evidentiary rules in criminal prosecutions for child abuse, see § 13-1-401.

Notification of Department of Education that certificated person has been convicted of sex offense, see § 37-3-51.

Prohibition of person convicted of crimes affecting children or other violent crimes from being licensed as foster parent or a foster home, see § 43-15-6.

Testing for HIV and AIDS of any person convicted under this section, see §§ 99-19-201, 99-19-203.

JUDICIAL DECISIONS

1. In general.

This section, which prohibits unnatural intercourse, is not unconstitutionally vague and overbroad. *McDonald v. Department of Human Servs.*, 636 So. 2d 391 (Miss. 1994), reh'g denied.

Person who attempts to perform anal intercourse on another person but is prevented from doing so when other person flees may be convicted of attempted unnatural intercourse. *Haymond v. State*, 478 So. 2d 297 (Miss. 1985).

Where defendant's 19-year-old daughter testified at trial that she and defendant had engaged in acts of fellatio and cunnilingus, defendant was properly indicted under this section, and not § 97-3-95 et seq., which were enacted subsequent to the violation for which he was convicted, in that § 97-3-103 expressly provides that the sexual battery statutes do not repeal, modify or amend any other criminal statute. *Contreras v. State*, 445 So. 2d 543 (Miss. 1984).

This section is constitutional, notwithstanding defendant's contentions that it discriminated against persons engaged in unnatural sexual intercourse with female

children and that the trial judge was given unconstitutionally wide discretion in the range of punishments he could impose. *Davis v. State*, 367 So. 2d 445 (Miss. 1979).

Statutory phrase "crime against nature" was not so vague as to violate the due process clause since long use of the phrase to characterize various offenses including sodomy, for which the defendant was indicted, gave fair warning of conduct proscribed. *State v. Mays*, 329 So. 2d 65 (Miss. 1976), cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 143 (1976).

A college newspaper run by students and operated with student funds could properly refuse to print an advertisement proffered by a primarily off campus and homosexual group, particularly in light of the statute [this section] proscribing unnatural intercourse, such statute not being unconstitutional, and in light of the fact that university officials had nothing to do with the rejection of the advertisement. *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), reh'g denied, 541 F.2d 281 (5th Cir. 1976), cert. denied, 430 U.S. 982, 97 S. Ct. 1678, 52 L. Ed. 2d 377 (1977).

Indictment properly charged the offense of an attempt to commit the crime of sodomy. *Taurasi v. State*, 233 Miss. 330, 102 So. 2d 120 (1958).

In a prosecution for murder, an instruction to the jury that even if the deceased attempted to have unnatural intercourse with the defendant, but the danger of accomplishment of the crime by the deceased was over and at a time when such danger was not imminent or impending the defendant tied and gagged the deceased, and if the jury finds robbery, then the crime was murder, was proper in pre-

sending defendant's theory of self-defense and the state's theory of felony murder. *Burns v. State*, 228 Miss. 254, 87 So. 2d 681 (1956).

Sodomy committed per os is punishable under this section. *State v. Davis*, 223 Miss. 862, 79 So. 2d 452 (1955).

Indictment charging accused with having unnatural carnal intercourse with a woman by sucking her private sexual organs with his mouth failed to show offense of sodomy, since penetration of the body is essential to the offense. *State v. Hill*, 179 Miss. 732, 176 So. 719 (1937).

RESEARCH REFERENCES

ALR. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 A.L.R.2d 748.

Consent as defense in prosecution for sodomy. 58 A.L.R.3d 636.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 A.L.R.3d 866.

Validity of statute making sodomy a criminal offense. 20 A.L.R.4th 1009.

Search and seizure: reasonable expectation of privacy in public restroom. 74 A.L.R.4th 508.

Am Jur. 70A Am. Jur. 2d, Sodomy, §§ 1 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

CJS. 81A C.J.S., Sodomy §§ 1 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

Comment: Recent amendments to the Mississippi Rules of Evidence—the rights of the victim v. the rights of the accused in child abuse prosecutions and dependency or neglect proceedings. 61 Miss. L. J. 367 (Fall 1991).

1984 Mississippi Supreme Court Review: Criminal Law. 55 Miss. L. J. 77, March, 1985.

§ 97-29-61. Voyeurism; trespass by “peeping Tom”.

Any person who enters upon real property whether the original entry is legal or not, and thereafter pries or peeps through a window or other opening in a dwelling or other building structure for the lewd, licentious and indecent purpose of spying upon the occupants thereof, shall be guilty of a felonious trespass; and upon conviction, shall be imprisoned in the state penitentiary not more than five (5) years.

SOURCES: Codes, 1942, § 2412.5; Laws, 1958, ch. 281; Laws, 1980, ch. 391, eff from and after passage (approved April 28, 1980).

JUDICIAL DECISIONS

1. In general.

Evidence was sufficient for reasonable and fair-minded jurors to find defendant guilty of voyeurism where defendant was

seen peeping into an apartment window and ran upon hearing someone approach; having run from a police officer, he was caught with his zipper down, and his car

with the keys in it was found on the property. *Ledford v. State*, 874 So. 2d 995 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

The fact that the accused is a "male person" is an essential or substantive element of the crime proscribed by this section [Code 1942 § 2412.5] which must be charged on the face of the indictment and proved at trial, and indictment failing to refer to or describe the accused as a male person was void. *Burchfield v. State*, 277 So. 2d 623 (Miss. 1973), but see *Monk v. State*, 532 So. 2d 592 (Miss. 1988).

The fact that this section [Code 1942, § 2412.5] applies only to persons of the male sex and is inapplicable to females is not, therefore, violative of the equal protection clause of the Fourteenth Amendment, for there exists rational justification for singling out males for punishment under Code 1942, § 2412.5 and the statute does not rest upon an invidious and patently arbitrary sex classification, but has a sound basis in the physical and psychological difference between men and

women. *Mississippi State Hwy. Comm'n v. Cook*, 270 So. 2d 695 (Miss. 1972).

For evidence sufficient to support a conviction under this section [Code 1942, § 2412.5]. *Thompson v. State*, 206 So. 2d 829 (Miss. 1968).

On a trial under this section [Code 1942, § 2412.5], evidence of similar acts of peeping on the part of the defendant was admissible to show a common pattern of action. *Riley v. State*, 254 Miss. 86, 180 So. 2d 321 (1965).

This section [Code 1942, § 2412.5] is constitutional. *Brown v. State*, 244 Miss. 78, 140 So. 2d 565 (1962).

There was no error in an instruction which followed the law itself and told the jury that it could find defendant guilty if he, at the time and place testified to entered upon the property of another and peeped through the window of the dwelling house of a named person for the lewd, licentious and indecent purpose of spying upon the occupants thereof. *Brown v. State*, 244 Miss. 78, 140 So. 2d 565 (1962).

RESEARCH REFERENCES

ALR. Eavesdropping as violating right of privacy. 11 A.L.R.3d 1296.

Criminal prosecution of video or photographic voyeurism. 120 A.L.R.5th 337.

Am Jur. 24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

§ 97-29-63. Photographing or filming another without permission where there is expectation of privacy.

Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars (\$5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both.

SOURCES: Laws, 1999, ch. 514, § 2, eff from and after July 1, 1999.

JUDICIAL DECISIONS

1.5. Rulings on evidence.

In defendant's trial for unlawfully filming another person, the tape that the victim found, State's Exhibit 8, was not given to defendant by the State, however, the victim's personal attorney had pro-

vided defendant with a copy of that tape, and it was similar but not identical to Exhibit 14 (the second tape provided by the State), thus, if there was a discovery violation, it was harmless. *Moen v. State*, 861 So. 2d 1066 (Miss. Ct. App. 2003).

ATTORNEY GENERAL OPINIONS

A violation of § 97-23-63[Repealed], which prohibits photographing or filming another without permission where there is an expectation of privacy, is not a "sex

crime" for the purpose of determining eligibility for parole or the intensive supervision program. *Johnson*, June 14, 2002, A.G. Op. #02-0336.

§ 97-29-65. Strip clubs prohibited within one-fourth mile of church, school, kindergarten, or courthouse.

It shall be unlawful to locate within one-fourth (¼) of one (1) mile of any church, school, kindergarten or courthouse any establishment where public displays of nudity are present. Any person found guilty of violating this section shall, upon conviction, be fined not more than Ten Thousand Dollars (\$10,000.00) or imprisoned for not more than one (1) year, or both.

For the purposes of this section the term "nudity" and "public display" shall have the same meanings as those terms are defined in Section 19-5-103.

SOURCES: Laws, 2000, ch. 558, § 1, eff from and after July 1, 2000.

Cross References — Regulation of massage parlors and public displays of nudity, see § 19-5-103.

OBSCENE MATERIALS, PERFORMANCES AND DEVICES

SEC.

- 97-29-101. Distribution or wholesale distribution of obscene materials or performances; character and reputation as evidence; prosecutor's bond.
- 97-29-103. Definitions.
- 97-29-105. Distribution or wholesale distribution of unlawful sexual devices; prosecutor's bond.
- 97-29-107. Exemptions from application of Sections 97-29-101 through 97-29-109; procedure for claiming exemption; defenses.
- 97-29-109. Penalties.

§ 97-29-101. Distribution or wholesale distribution of obscene materials or performances; character and reputation as evidence; prosecutor's bond.

A person commits the offense of distributing obscene materials or obscene performances when he sells, rents, leases, advertises, publishes or exhibits to any person any obscene material or obscene performance of any description

knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so. A person commits the offense of wholesale distributing obscene materials or obscene performances when he distributes for the purpose of resale any obscene material or obscene performance of any description knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so. The word “knowing” as used in this section means either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. The character and reputation of an individual charged with an offense under Sections 97-29-101 through 97-29-109 and, if a commercial dissemination of obscene material or an obscene performance is involved, the character and reputation of the business establishment involved, may be placed in evidence by the defendant on the question of intent to violate Sections 97-29-101 through 97-29-109.

Any person, other than a city attorney, county prosecuting attorney or district attorney, who shall sign an affidavit charging an offense prescribed by this section shall file a bond in the amount of five hundred dollars (\$500.00) at the time such affidavit is lodged. Such bond shall be conditioned that the affidavit was not filed frivolously, maliciously or out of ill will.

SOURCES: Laws, 1983, ch. 498, § 1, eff from and after July 1, 1983.

Cross References — Exemptions from application of §§ 97-29-101 through 97-29-109, see § 97-29-107.

Penalties for violations of this section, see § 97-29-109.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
- 2.-10. [Reserved for future use.]

II. UNDER FORMER § 97-29-33.

11. Validity.
12. Construction and application.

I. UNDER CURRENT LAW.

1. In general.

Producers of child pornography may be convicted under Federal Protection of Children Against Sexual Exploitation Act of 1977, which prohibits interstate transportation, shipment, distribution, receipt, or reproduction of visual depictions of minors engaged in sexually explicit conduct, without proof that producers had actual knowledge of fact that performer was a minor. *United States v. X-Citement Video*,

Inc., 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), on remand, 77 F.3d 491 (9th Cir. 1996).

2.-10. [Reserved for future use.]

II. UNDER FORMER § 97-29-33.

11. Validity.

This section’s definition of “obscene, indecent, or immoral” was overbroad and violated the First Amendment to the United States Constitution according to the requirement set by the United States Supreme Court, and it could not be made constitutional by construing it and applying it or by reading into it the specificity and limitations required by the Supreme Court. *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123 (Miss. 1976).

Decision stating that this section [Code 1942, § 2286] is not unconstitutional on

its face or as applied would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *Hosey v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that a criminal obscenity statute to be valid does not have to precisely describe the crime, and incorporate all of the judicial tests for proper determination as to the guilt, or innocence, of the offense, for such is not the office or function of the criminal statute which simply must impart sufficient notice or warning of the crime to accord the offender, as a reasonable person, an opportunity to avoid its commission would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *McGrew v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that obscenity is not within the protection of the First Amendment to the United States Constitution under all of the authorities would be vacated and remanded for reconsideration in light of U.S. Supreme Court decisions concerning obscenity. *McGrew v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

12. Construction and application.

Decision stating that the absence of a requirement of scienter in this section [Code 1942, § 2286] is inapplicable to motion pictures would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *Hosey v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that it is neither possible nor is it the function of a criminal statute to set out all the judicial tests for a proper determination of whether a violation of the statute has been committed; all that is required is that the statute give adequate notice and warning of what is prohibited in order that one may avoid such conduct, and this was done by Code 1942, § 2286 would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *Hosey v. City of Jack-*

son, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that in view of the standards requiring that the dominant theme of the material taken as a whole appeals to prurient interest, it is necessary that arresting officers view an allegedly obscene film in its entirety before the commission of this offense in their presence can be validly established, and the viewing of portions or isolated excerpts of the film is not sufficient would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *Hosey v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that the seizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers (the public showing of such film) does not exceed constitutional bounds in the absence of a private judicial hearing on the question of obscenity would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *Hosey v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that under rules announced by the United States Supreme Court governing a decision in obscenity cases, this section [Code 1942, § 2286] cannot be justly said to be vague or overbroad would be vacated and remanded for reconsideration in light of recent U.S. Supreme Court decisions concerning obscenity. *McGrew v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

Decision stating that motion picture film which is a dull and offensive presentation of the illicit love life of two unmarried females and an unmarried male which, by the application of contemporary community standards, has a dominant theme which, taken as a whole, appeals to the prurient interest in sex and is patently offensive because it affronts contemporary community standards relating to the representation of sexual matters, and is utterly without redeeming social value would be vacated and remanded for reconsideration in light of recent U.S. Su-

preme Court decisions concerning obscenity. *McGrew v. City of Jackson*, 401 U.S. 987, 91 S. Ct. 1221, 28 L. Ed. 2d 525 (1971).

In a suit to enjoin a showing of a motion picture, where the bill did not charge a nuisance nor violation of a statute prescribing exhibition of obscene, indecent, or immoral pictures, the issuance of injunc-

tion would not be granted. *Forman ex rel. District Att'y v. Oberlin*, 222 Miss. 42, 75 So. 2d 56 (1954).

Statutes making unlawful exhibition of "obscene, indecent, or immoral picture" strictly construed. *Anderson v. City of Hattiesburg*, 131 Miss. 216, 94 So. 163 (1922).

RESEARCH REFERENCES

ALR. Entrapment to commit offense against obscenity laws. 77 A.L.R.2d 792.

Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214.

Validity and construction of federal statutes (18 USC Secs. 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 A.L.R.3d 1276.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Pornoshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place. 96 A.L.R.3d 692.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Processor's right to refuse to process or return film or video tape of obscene subject. 18 A.L.R.4th 1326.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials. 13 A.L.R.5th 567.

Admissibility of evidence of public-opinion polls or surveys in obscenity prosecution on issue whether materials in question are obscene. 59 A.L.R.5th 749.

Constitutionality of state statutes banning distribution of sexual devices. 94 A.L.R.5th 497.

Advertisements; validity, construction and application of provisions of Postal Reorganization Act of 1970 (18 USCS §§ 1735-1737; 39 USCS §§ 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified Postal Service that they wish to receive no such material. 15 A.L.R. Fed. 488.

Validity, construction, and application of Federal criminal statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

18 Am. Jur. Proof of Facts, Obscenity in Motion Pictures §§ 60 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S., Obscenity §§ 1 et seq.

§ 97-29-103. Definitions.

(1) Material or performance is obscene if:

(a) To the average person, applying contemporary community standards, taken as a whole, it appeals to the prurient interest, that is, a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion; and

(b) The material taken as a whole lacks serious literary, artistic, political or scientific value; and

(c) The material depicts or describes in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) Acts of masturbation;

(iii) Acts involving excretory functions or lewd exhibition of the genitals;

(iv) Acts of bestiality or the fondling of sex organs of animals; or

(v) Sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship.

(2) Undeveloped photographs, molds, printing plates and the like shall be deemed obscene material, notwithstanding that processing or other acts may be required to make the obscenity patent or to distribute it.

(3) "Performance" means a play, motion picture, dance or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Wholesale distributes" means to distribute for the purpose of resale.

(6) "Material" means any book, magazine, newspaper, advertisement, pamphlet, poster, print, picture, figure, image, drawing, description, motion picture film, phonographic record, recording tape, video tape, or other tangible thing producing, reproducing or capable of producing or reproducing an image, picture, sound or sensation through sight, sound or touch, but it does not include an actual three-dimensional sexual device as defined in Section 97-29-105.

SOURCES: Laws, 1983, ch. 498, § 2, eff from and after July 1, 1983.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. Former § 97-29-33.

I. UNDER CURRENT LAW.

1.-10. [Reserved for future use.]

II. UNDER FORMER LAW.

11. Former § 97-29-33.

The words "all you ladies that smoke

cigarettes throw your butts in here," painted on the hood of an automobile, left in a public place, are within the prohibition of the statute, notwithstanding that the statute deals primarily with obscene or indecent literature, the question whether such language, as it would be commonly understood or interpreted, was such as to offend the public sense of real decency as distinguished from mere prudery, being for the jury, and the fact that

the language may have been employed in the manner of a jest does not, under such public circumstances, alter the case. *City of Pascagoula v. Nolan*, 183 Miss. 164, 184 So. 165 (1938).

Law denouncing sale of obscene literature not denial of freedom of press. *Williams v. State*, 130 Miss. 827, 94 So. 882 (1923).

RESEARCH REFERENCES

ALR. Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214.

Validity and construction of federal statutes (18 USCS Secs. 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 A.L.R.3d 1276.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Pornoshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place. 96 A.L.R.3d 692.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Musical sound recording as punishable obscenity. 30 A.L.R.5th 718.

Admissibility of evidence of public-opinion polls or surveys in obscenity prosecution on issue whether materials in question are obscene. 59 A.L.R.5th 749.

Advertisements; validity, construction and application of provisions of Postal Reorganization Act of 1970 (18 USCS §§ 1735-1737; 39 USCS §§ 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified Postal Service that they wish to receive no such material. 15 A.L.R. Fed. 488.

Validity, construction, and application of Federal criminal statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Immoral or obscene materials as subject to copyright protection. 50 A.L.R. Fed. 805.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

18 Am. Jur. Proof of Facts, Obscenity in Motion Pictures, §§ 60 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S., Obscenity §§ 1 et seq.

§ 97-29-105. Distribution or wholesale distribution of unlawful sexual devices; prosecutor's bond.

A person commits the offense of distributing unlawful sexual devices when he knowingly sells, advertises, publishes or exhibits to any person any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs, or offers to do so, or possesses such devices with the intent to do so. A person commits the offense of wholesale

distributing unlawful sexual devices when he distributes for the purpose of resale any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs, or offers to do so, or possesses such devices with the intent to do so.

Any person, other than a city attorney, county prosecuting attorney or district attorney, who shall sign an affidavit charging an offense prescribed by this section shall file a bond in the amount of five hundred dollars (\$500.00) at the time such affidavit is lodged. Such bond shall be conditioned that the affidavit was not filed frivolously, maliciously or out of ill will.

SOURCES: Laws, 1983, ch. 498, § 3, eff from and after July 1, 1983.

Cross References — Sexual devices not being included in definition of “material,” see § 97-29-103.

Exemptions from application of §§ 97-29-101 through 97-29-109, see § 97-29-107.

Penalties for violations of this section, see § 97-29-109.

JUDICIAL DECISIONS

1. Constitutionality.

Sale of sexual devices, or the right of access to such devices by users, is not encompassed by the constitutionally pro-

tected right of privacy; advertising of the devices or their sale is not constitutionally protected speech. *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004).

RESEARCH REFERENCES

ALR. Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214.

Validity and construction of federal statutes (18 USC Secs. 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 A.L.R.3d 1276.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Pornoshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

What constitutes “public place” within meaning of statutes prohibiting commis-

sion of sexual act in public place. 96 A.L.R.3d 692.

Validity and construction of statute or ordinance prohibiting use of “obscene” language in public. 2 A.L.R.4th 1331.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Advertisements; validity, construction and application of provisions of Postal Reorganization Act of 1970 (18 USC §§ 1735-1737; 39 USC §§ 3010, 3011) (so-called “Goldwater Amendment”) prohibiting mailing of sexually oriented advertisements to persons who have notified Postal Service that they wish to receive no such material. 15 A.L.R. Fed. 488.

Validity, construction, and application of Federal criminal statute (18 USC § 1464) punishing utterance of obscene,

indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

18 Am. Jur. Proof of Facts, Obscenity in Motion Pictures, §§ 60 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S., Obscenity §§ 1 et seq.

§ 97-29-107. Exemptions from application of Sections 97-29-101 through 97-29-109; procedure for claiming exemption; defenses.

(1) Sections 97-29-101 through 97-29-109 shall not apply when the distribution or wholesale distribution of the material, performance or device was made by:

(a) A person, corporation, company, partnership, firm, association, business, establishment or other legal entity to a person associated with an institution of higher learning, either as a member of the faculty or as a matriculated student, teaching or pursuing a course of study related to such material, performance or device;

(b) A licensed physician or a licensed psychologist to a person whose receipt of such material or device was authorized in writing by such physician or psychologist in the course of medical or psychological treatment or care;

(c) A person who while acting in his capacity as an employee is employed on a full-time or part-time basis by (i) any recognized historical society or museum accorded charitable status by the federal government; (ii) any state, county or municipal public library; or (iii) any library of any public or private school, college or university in this state; or

(d) A community television antenna services system or a cable television system operating pursuant to a written agreement not in conflict with this paragraph granted by a county, municipality or other political subdivision of this state, or by an employee of such system while acting within the scope of his employment, when the signal transmitting the material or performance originates outside of the state of Mississippi.

(2) Any exemption from prosecution claimed under the provisions of this section may be raised at a pretrial hearing by motion, and the court shall determine whether sufficient evidence exists to constitute an exemption from prosecution under the provisions of Sections 97-29-101 through 97-29-109. If the motion is sustained, the case shall be dismissed; provided, however, if the motion is not sustained then the defendant may offer into evidence at trial as an affirmative defense to conviction under this act any matter which could have been raised by the defendant in the motion to dismiss.

SOURCES: Laws, 1983, ch. 498, § 4, eff from and after July 1, 1983.

JUDICIAL DECISIONS

1. Sale of sexual devices.

Sale of sexual devices, or the right of access to such devices by users, is not encompassed by the right of privacy; advertising of the devices or their sale is not

constitutionally protected speech. Novelty and gag gifts sold by vendors were not sexual devices. *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004).

RESEARCH REFERENCES

ALR. Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214.

Validity and construction of Federal statutes (18 USC secs. 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 A.L.R.3d 1276.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Pornoshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 A.L.R.3d 297.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place. 96 A.L.R.3d 692.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photogra-

pher, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials. 13 A.L.R.5th 567.

Advertisements; validity, construction and application of provisions of Postal Reorganization Act of 1970 (18 USCS §§ 1735-1737; 39 USCS §§ 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified Postal Service that they wish to receive no such material. 15 A.L.R. Fed. 488.

Validity, construction, and application of Federal criminal statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

18 Am. Jur. Proof of Facts, Obscenity in Motion Pictures, §§ 60 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

10 Am. Jur. Trials, Obscenity Litigation §§ 1 et seq.

§ 97-29-109. Penalties.

Any person, except one who wholesale distributes, who violates Section 97-29-101 or Section 97-29-105 shall be guilty of a misdemeanor and, upon conviction, shall, in the case of the first offense, be fined not more than five thousand dollars (\$5,000.00) or imprisoned in the county jail for a term not to exceed six (6) months, or both. If the person has been previously convicted of a violation of Section 97-29-101 or Section 97-29-105 or of Section 97-5-27 or

97-5-29, Mississippi Code of 1972, then the person shall be fined not less than two thousand five hundred dollars (\$2,500.00) nor more than ten thousand dollars (\$10,000.00) or imprisoned for a term not to exceed one (1) year, or both.

Any person who wholesale distributes in violation of Section 97-29-101 or Section 97-29-105 shall, upon conviction, be fined not more than ten thousand dollars (\$10,000.00) or imprisoned for a term not to exceed one (1) year, or both. If the person has been previously convicted of a violation of Section 97-29-101 or Section 97-29-105 or of Section 97-5-27 or 97-5-29, Mississippi Code of 1972, then the person shall, upon conviction, be fined not less than two thousand five hundred dollars (\$2,500.00) nor more than fifty thousand dollars (\$50,000.00) or imprisoned for a term not to exceed one (1) year, or both.

A corporation, company, partnership, firm, association, business, establishment, organization or other legal entity other than an individual convicted of distributing obscenity or unlawful sexual devices or wholesale distribution of obscenity or unlawful sexual devices shall be fined not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00). If such legal entity has been previously convicted of distributing obscenity or unlawful sexual devices or wholesale distribution of obscenity or unlawful sexual devices or of a violation of Section 97-5-27 or Section 97-5-29, Mississippi Code of 1972, then such legal entity shall be fined not less than five thousand dollars (\$5,000.00) nor more than fifty thousand dollars (\$50,000.00).

SOURCES: Laws, 1983, ch. 498, § 5, eff from and after July 1, 1983.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Modern concept of obscenity. 5 A.L.R.3d 1158.

Validity of procedures designed to protect the public against obscenity. 5 A.L.R.3d 1214.

Validity and construction of Federal statutes (18 USCS secs. 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 A.L.R.3d 1276.

Operation of nude-model photographic studio as offense. 48 A.L.R.3d 1313.

Topless or bottomless dancing or similar conduct as offense. 49 A.L.R.3d 1084.

Exhibition of obscene motion pictures as nuisance. 50 A.L.R.3d 969.

Pornshops or similar places disseminating obscene materials as nuisance. 58 A.L.R.3d 1134.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of

obscene materials to minors. 93 A.L.R.3d 297.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place. 96 A.L.R.3d 692.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 A.L.R.4th 1318.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

Advertisements; validity, construction and application of provisions of Postal Reorganization Act of 1970 (18 USCS

§§ 1735-1737; 39 USCS §§ 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified Postal Service that they wish to receive no such material. 15 A.L.R. Fed. 488.

Validity, construction, and application of Federal criminal statute (18 USCS § 1464) punishing utterance of obscene, indecent, or profane language by means of radio communication. 17 A.L.R. Fed. 900.

Am Jur. 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 et seq.

18 Am. Jur. Proof of Facts, Obscenity in Motion Pictures, §§ 60 et seq.

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

10 Am. jur. Trials, Obscenity Litigation §§ 1 et seq.

CJS. 67 C.J.S., Obscenity §§ 1 et seq.

CHAPTER 31

Intoxicating Beverage Offenses

SEC.

97-31-1 and 97-31-3. Repealed.

97-31-5. Alcoholic preparations; unlawful to sell or keep certain preparations; exceptions.

97-31-7. Alcoholic preparations; permit to solicit or take orders.

97-31-9. Alcoholic preparations; record of purchases required.

97-31-11. Ginger preparations; extracts.

97-31-13. Repealed.

97-31-15. Delivery of alcohol or wine to person other than consignee; affidavit required; penalty for false affidavit.

97-31-17. Denatured alcohol.

97-31-19. Law officers may store confiscated liquors, stills, etc.; consumption of liquor prohibited.

97-31-21. Manufacturing or distilling unlawful; making wine at home permitted; penalties.

97-31-23. Manufacturing or distilling unlawful; possession of still.

97-31-25. Patent medicines.

97-31-27. Sale, possession, etc. of intoxicating beverages prohibited; penalties.

97-31-29. Sale, possession, etc. of intoxicating beverages prohibited; agent or assistant of seller or buyer punished.

97-31-31. Sale, possession, etc. of intoxicating beverages prohibited; connivance by owner, occupant, etc. of house or boat where liquor kept.

97-31-33. Sale, possession, etc. of intoxicating beverages prohibited; exceptions; records to be kept by carrier; exceptions may be relied upon as defense.

97-31-35. Sale, possession, or use of alcoholic beverages within facilities; employee knowledge; punishment for violations.

97-31-37. Sale of alcohol by druggists; certain sales by retail and wholesale druggists permitted.

97-31-39. Sale of alcohol by druggists; medicinal purposes; physician's certificate.

97-31-41. Sale of alcohol by druggists; wine for sacramental purposes.

97-31-43. Sale of alcohol by druggists; statement of sales or prescriptions to be filed with circuit clerk; filing fee.

97-31-45. Sale of alcohol by druggists; penalties for certain violations.

97-31-47. Transportation of intoxicating liquors into or within state unlawful.

97-31-49. Solicitation of orders for liquors, etc. unlawful.

97-31-51. Witnesses; immunity from prosecution granted; penalty for refusing to testify.

97-31-53. Penalty for violations where punishment not specifically prescribed.

§§ 97-31-1 and 97-31-3. Repealed.

Repealed by Laws, 1988, ch. 562, § 3, eff from and after July 1, 1988.

§ 97-31-1. [Codes, Hemingway's 1917, §§ 2160, 2161; 1930, § 2025; 1942, § 2664; Laws, 1916, ch. 104; 1934, ch. 172]

§ 97-31-3. [Codes, Hemingway's 1917, §§ 2162, 2163; 1930, § 2026; 1942, § 2665; Laws, 1916, ch. 104]

Editor's Note — Former § 97-31-1 was entitled: Advertising of liquors prohibited. Former § 97-31-3 was entitled: Advertising of liquors prohibited; injunction; penalties.

§ 97-31-5. Alcoholic preparations; unlawful to sell or keep certain preparations; exceptions.

It shall be unlawful for any person, firm, corporation or association, to sell, barter, or give away, or keep for such purposes any sweet spirits of nitre, liquid ginger preparation, elixir of orange peel, pear extract, or any like drug, compound, bitters, elixir or preparation of any kind whatsoever, except where otherwise legalized under the laws of this state, which when drunk to excess, in the form sold, will produce intoxication, except when the same is kept, sold, bartered or given away for either medicinal, or household purposes, or for uses in cooking, baking, and purposes incidental to the treatment of disease.

This section shall have no effect whatsoever on the sections appearing in Chapter 1 of Title 67, Mississippi Code of 1972, cited as the "Local Option Alcoholic Beverage Control Law" of the State of Mississippi. If there is any conflict whatsoever between this section and the Local Option Alcoholic Beverage Control Law cited hereinabove, the provisions of the Local Option Alcoholic Beverage Control Law shall be paramount.

SOURCES: Codes, 1930, § 2021; Laws, 1942, § 2660; Laws, 1926, ch. 201; Laws, 1928, ch. 213; Laws, 1968, ch. 356, § 1, eff from and after passage (approved May 27, 1968).

Cross References — Ginger preparations, see § 97-31-11.

Sale of intoxicating proprietary or patent medicines, see § 97-31-25.

Illegality of possession, sale or gift of intoxicating beverages, generally, see § 97-31-27.

JUDICIAL DECISIONS

1. In general.
2. Indictment or affidavit charging offense.
3. Evidence.

1. In general.

Buyer could not hold seller liable on implied warranty in sale of extract of ginger as beverage, sale being in violation of criminal statutes. *Green v. Brown*, 159 Miss. 893, 133 So. 153 (1931).

It is not unlawful to possess intoxicating preparations with no intention to sell or give them away until permit has been secured. *Cutts v. State*, 148 Miss. 593, 114 So. 389 (1927).

State has burden of proving that defendant possessed allspice for purpose of sell-

ing, bartering, or giving same away in violation of statute. *Cutts v. State*, 148 Miss. 593, 114 So. 389 (1927).

2. Indictment or affidavit charging offense.

Where affidavit charged violation of general statute, defendant, admitting sale of lemon extract, could not be convicted of possessing liquor, though another statute required permit for sale of such extract. *McSwain v. State*, 158 Miss. 643, 130 So. 696 (1930).

3. Evidence.

Evidence held insufficient to sustain conviction for possessing and keeping for sale Jamaica ginger. *Dempsey v. State*, 145 Miss. 824, 111 So. 295 (1927).

§ 97-31-7. Alcoholic preparations; permit to solicit or take orders.

No person, firm or corporation, or any association whatsoever, except

traveling salesmen engaged in selling exclusively to wholesale and retail merchants shall sell, barter or give away or keep for such purposes, or solicit or take orders therefor, any of the preparations, compounds, bitters, elixirs or extracts mentioned in Section 97-31-5, until a permit so to do shall be granted by the mayor and board of aldermen or mayor and councilmen of any incorporated city, town or village within which said business is or may be proposed to be carried on, or the board of supervisors of the county if the same is or proposed to be carried on without corporate limits of any city, town or village. Such permits may be granted by said authorities upon written application of the person, firm or corporation desiring to deal in such preparation, and the permit, if granted, shall be in writing, shall be spread at large upon the minutes of the proceedings of the mayor and board of aldermen or councilmen or the board of supervisors, as the case may be, giving the name of the dealer, or dealers, the preparation or commodities which it covers, and shall be for a period of one year from the date of its being granted. The granting of a permit to any person, firm or corporation, to barter, sell, give away, keep for sale, or solicit orders for the sale of same shall be in the discretion of the mayor and board of aldermen or councilmen or the board of supervisors, as the case may be, and they shall likewise have full authority and power, in their discretion, to revoke the same.

SOURCES: Codes, 1930, § 2022; Laws, 1942, § 2661; Laws, 1926, ch. 201.

Cross References — Local option alcoholic beverage control, see §§ 67-1-1 et seq.
Regulation of sale of alcoholic beverages, generally, see §§ 67-3-1 et seq.
Sale of intoxicating proprietary or patent medicines, see § 97-31-25.

JUDICIAL DECISIONS

1. In general.

Where affidavit charged violation of general statute, defendant, admitting sale of lemon extract, could not be convicted of possessing liquor, though another statute required permit for sale of such extract. *McSwain v. State*, 158 Miss. 643, 130 So. 696 (1930).

Statute held constitutional. *Lindsey v. City of Louisville*, 156 Miss. 66, 125 So. 558 (1930).

It is not unlawful to possess intoxicating preparations with no intention to sell or give them away until permit has been secured. *Cutts v. State*, 148 Miss. 593, 114 So. 389 (1927).

RESEARCH REFERENCES

Am Jur. 45 Am. Jur. 2d, Intoxicating Liquors §§ 4 et seq., 106 et seq., 279.

CJS. 48 C.J.S., Intoxicating Liquors §§ 126, 127 et seq.

§ 97-31-9. Alcoholic preparations; record of purchases required.

Every person, firm, or corporation, selling, bartering or giving away, keeping for sale or soliciting orders for any of the preparations mentioned in Sections 97-31-5 and 97-31-7 shall keep a complete record of such preparations

so purchased, including invoice or freight bill, which record shall be open to the inspection of any member of the mayor and board of aldermen or councilmen or the board of supervisors, as the case may be, or any peace officer of the state.

SOURCES: Codes, 1930, § 2023; Laws, 1942, § 2662; Laws, 1926, ch. 201.

§ 97-31-11. Ginger preparations; extracts.

It shall be unlawful for any person, firm, corporation or association to have, control or possess in this state, or to transport from place to place in the state, or to bring into the state, any liquid ginger preparation, which might be used as an intoxicating beverage, elixir of orange peel, or pear extract by whatever name designated, whether intended for personal use or otherwise.

Any person, firm, corporation or association, violating any of the provisions of this section shall be guilty of a misdemeanor and on conviction shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail for a period of ninety days, or both such fine and imprisonment in the discretion of the court, for each violation.

SOURCES: Codes, 1930, § 2024; Laws, 1942, § 2663; Laws, 1930, ch. 39.

Cross References — Unlawful alcoholic preparations, see § 97-31-5.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Buyer could not hold seller liable on implied warranty in sale of extract of ginger as beverage, sale being in violation of criminal statutes. *Green v. Brown*, 159 Miss. 893, 133 So. 153 (1931).

Prior to 1930 it was not an offense to possess Jamaica ginger and like medicinal preparations. *Johnson v. State*, 158 Miss. 613, 131 So. 108 (1930).

§ 97-31-13. Repealed.

Repealed by Laws, 1980, ch. 453, eff from and after passage (approved May 1, 1980).

[Codes, Hemingway's 1921 Supp. § 2163d; 1930, § 2004; 1942, § 2643; Laws, 1918, ch. 189]

Editor's Note — Former § 97-31-13 was entitled: Banks not to handle drafts, etc., connected with liquor or shipments.

§ 97-31-15. Delivery of alcohol or wine to person other than consignee; affidavit required; penalty for false affidavit.

It shall be unlawful for any railroad company, express company, corporation or other common carrier, or any officer, agent or employee of any of them, or any other person, to deliver any of the alcohol or wine mentioned in this

chapter, when transported into or delivered into this state other than to consignees, provided that in any case where the consignee is unable on account of sickness of himself or family, to appear in person and sign for such liquor, the consignee may by written order or authority, authorize some reputable person to sign and receive same for him. In no case shall any delivery be made of a consignment or package of such alcohol or wine as aforesaid without first having such consignee or his lawful agent as aforesaid, sign and deliver to the person in whose charge such consignment or package may be for delivery, a written statement in substance as follows:

"I hereby state that my name is _____; that my postoffice address is _____ Mississippi; that I am more than twenty-one years of age; that I am the consignee to whom the package containing _____ of alcohol or wine (as it may be) was consigned at _____ on the _____ day of _____ 2____ to be used for (set out the use for which they are to be used). I will not use this liquor in violation of any law of this state.

Signed and dated at _____, Miss., this _____ day of _____ 2_____.

_____ Consignee.

By _____, Agent of the consignee."

In no case shall any railroad company, express company, corporation or common carrier or person, or agent of such railroad company, express company, corporation or other common carrier, or person, be liable for damages for not delivering such alcohol or wine or package containing the same until such statement is executed and delivered as herein provided.

Any person who shall make the statement provided in this section, knowing the same to be false, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days, in the discretion of the court.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163o; Laws, 1930, § 2015; Laws, 1942, § 2654; Laws, 1918, ch. 189.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-31-17. Denatured alcohol.

Nothing in this chapter shall affect or limit the manufacturing or shipping or receiving of wood or denatured alcohol which cannot be used for beverage purposes, and which can only be used for scientific or mechanical purposes.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163n; Laws, 1930, § 2014; Laws, 1942, § 2653; Laws, 1918, ch. 189.

§ 97-31-19. Law officers may store confiscated liquors, stills, etc.; consumption of liquor prohibited.

It shall be lawful under this chapter for any officer of the law to store in a public building where appropriate any liquors, stills, vehicles, or other appliances used for violating this chapter and taken by him or by authority of law and placed in his keeping, until such time as the court may order the same to be sold or destroyed, or until such time as the law requires the sale or destruction of them, or any of them. But such officer in charge or possession of such liquors shall not drink or consume any of them, nor shall he permit any other person to drink or consume them, or any of them, nor shall it be permissible for any person to use, consume, or give away or allow any of said liquors to be given away or used or consumed for any purpose, and any officer, or other person violating the provisions of this section shall be guilty of a misdemeanor, and punished as provided herein, and any officer convicted of violating the provisions of this section shall be removed from his office in addition.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163f; Laws, 1930, § 2005; Laws, 1942, § 2644; Laws, 1918, ch. 189.

Cross References — Search, seizure, and disposition of property seized pursuant to violation for unlawful possession of alcoholic beverages, see §§ 67-1-17, 67-1-18.

§ 97-31-21. Manufacturing or distilling unlawful; making wine at home permitted; penalties.

It shall be unlawful for any person, firm or corporation to manufacture, or distill any vinous, malt, spirituous, or intoxicating liquor or drink which if drunk to excess will produce intoxication. But this statute shall not prohibit citizens of this state from making wine from grapes or berries grown in this state, at their respective homes and using and consuming the same in the home where made, by the family residing therein and dispensing same to guests within said home. Any person convicted of violating this section shall be guilty of a felony and on conviction thereof shall serve a term in the state penitentiary of not less than one year, nor more than three years for the first offense under this section, and for the second or any subsequent conviction under this section such person shall serve a term of not less than five years, nor more than ten years in the state penitentiary.

SOURCES: Codes, Hemingway's 1917, § 2113; Hemingway's 1921 Supp. § 2163t; Laws, 1930, § 1992; Laws, 1942, § 2631; Laws, 1908, ch. 113; Laws, 1918, ch. 189.

Cross References — Permits concerning alcoholic beverages, see §§ 67-1-51, 67-1-53.

Right to make homemade wine for domestic use, see § 67-3-11.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.

1. In general.

Since the state at trial chose to proceed on the indictment charging the defendant with distilling wine in violation of this section, it could not argue for affirmance of his conviction on proof that he did not have a valid permit issued under the Native Wine Act. *Martin v. State*, 501 So. 2d 1124 (Miss. 1987).

Possession of homemade intoxicating wine through own fermentation for household purposes not prohibited. *Stepp v. State*, 132 Miss. 132, 95 So. 838 (1923).

Elements constituting unlawful manufacture of "intoxicating liquors" stated. *Anderson v. State*, 131 Miss. 584, 95 So. 637 (1923).

Conviction for unlawful possession does not bar prosecutions for manufacturing. *Gordon v. State*, 127 Miss. 396, 90 So. 95, 18 A.L.R. 1150 (1921).

Conviction for manufacturing intoxicants not warranted if defendant merely consented thereto. *Stribling v. State*, 124 Miss. 141, 86 So. 897 (1921).

Knowledge that whisky is being made held not sufficient to convict for manufacturing. *Powers v. State*, 124 Miss. 425, 86 So. 862 (1921).

Failure to interfere with one manufacturing intoxicants not an offense. *Powers v. State*, 124 Miss. 425, 86 So. 862 (1921).

One loaning another whisky with understanding that a similar amount was to

be returned cannot be convicted under this section [Code 1942, § 2631]. *Jones v. State*, 108 Miss. 530, 66 So. 987 (1915).

2. Indictment.

An indictment charging the defendant with violation of this section was not defective for failure to allege that the wine he possessed was not for personal or domestic use, but the case was reversed on the grounds that the charge for which the defendant was indicted and tried had been superseded, with regard to muscadine wine, by the Native Wine Act (§§ 67-5-1 et seq.). *Martin v. State*, 501 So. 2d 1124 (Miss. 1987).

Indictment charging manufacture of spirituous, vinous, malted, fermented and intoxicating liquors is not duplicitous. *State v. Schmitz*, 128 Miss. 463, 91 So. 129 (1922).

3. Evidence.

In prosecution for manufacturing liquor, evidence that witness at other times had seen things indicating liquor had been manufactured held improperly admitted. *Craft v. State*, 155 Miss. 465, 124 So. 488 (1929).

Evidence held sufficient to sustain conviction for unlawful manufacture. *Kidd v. State*, 137 Miss. 419, 102 So. 68 (1924).

Evidence showing preparation for manufacturing did not support conviction for manufacture. *Hughes v. State*, 96 So. 516 (Miss. 1923).

Evidence held sufficient to sustain conviction of attempt to distill. *Powell v. State*, 128 Miss. 107, 90 So. 625 (1922).

RESEARCH REFERENCES

Am Jur. 45 *Am. Jur.* 2d, Intoxicating Liquors §§ 451 et seq.

§ 97-31-23. Manufacturing or distilling unlawful; possession of still.

It shall be unlawful for any person, firm or corporation to own or control or have in his or its possession any distillery commonly called a still or any integral part thereof. But it shall not be unlawful to own or have in possession a distillery or still in the following circumstances:

(a) Where the same is used exclusively for the distillation of rosin products;

(b) Where the same is used exclusively for the distillation of water;

(c) Where the same is kept and lawfully used in any laboratory;

(d) Where the same is in the possession of any officers of the law, to be disposed of according to law;

(e) Where the person or corporation can prove that the same is in his or its possession for the purpose of being delivered up to an officer of the law to be disposed of according to law;

(f) Where the same is used exclusively for the distillation of ethyl alcohol to be used solely for fuel purposes.

Any person guilty of violating this section shall be guilty of a felony and on conviction shall be confined in the state penitentiary not less than one (1) year, nor more than three (3) years for his first offense, and for his second offense he shall be confined in the state penitentiary not less than five (5), nor more than ten (10) years.

SOURCES: Codes, 1930, §§ 1993, 1994; Laws, 1942, §§ 2632, 2633; Laws, 1924, ch. 245; Laws, 1980, ch. 348, § 2, eff from and after passage (approved April 23, 1980).

Cross References — Breweries, generally, see §§ 27-71-501 et seq.
Alcoholic content of wine and beer, see § 67-3-5.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.
4. —Admissibility.
5. —Sufficiency.
6. Instructions.
7. Miscellaneous.

1. In general.

Offense of possessing a complete still and offense of possessing integral parts of still are separate offenses. *Wilburn v. State*, 204 Miss. 92, 37 So. 2d 12 (1948).

Proof must be strict and facts applied with utmost caution before common articles of ordinary domestic use can be brought within statute prohibiting possession of integral parts of still. *Grice v. State*, 167 Miss. 771, 150 So. 659 (1933).

Articles of common domestic use, such as milk can and lid and discarded automobile gas line pipe, must have been used for successful production of intoxicating liquor, or must be about to be so successfully used, before statute prohibiting possession of parts of still is applicable. *Grice v. State*, 167 Miss. 771, 150 So. 659 (1933).

2. Indictment.

Indictment under this section [Code 1942, § 2632] charging in a single count that defendant owned, controlled and knowingly possessed a still for use in the unlawful manufacture of intoxicating liquor, did not include the alternative charge of possession of an integral part. *Black v. State*, 199 Miss. 147, 24 So. 2d 117 (1945).

The alternative offense under this section [Code 1942, § 2632] in respect to the integral parts of a still should be charged in a separate count or in a separate indictment so as to inform defendant of the exact nature of the charge in the indictment preferred against him. *Black v. State*, 199 Miss. 147, 24 So. 2d 117 (1945).

Indictment charging unlawful possession of still held not demurrable because it did not show that still was a whisky still. *Powe v. State*, 176 Miss. 455, 169 So. 763 (1936).

Indictment charging that defendant "wilfully" had in his possession part of still held sufficient without using word "know-

ingly." *Ousley v. State*, 154 Miss. 451, 122 So. 731 (1929).

Indictment for possession of integral part of still in language of statute held sufficient. *State v. Hinton*, 139 Miss. 513, 104 So. 354 (1925).

Exceptions in act, making possession of still offense, held negative by indictment. *Mitchell v. State*, 139 Miss. 108, 103 So. 815 (1925).

Indictment for possession of still must negative exceptions. *State v. Speaks*, 132 Miss. 159, 96 So. 176 (1923); *Dawsey v. State*, 136 Miss. 18, 100 So. 526 (1924); *State v. Clark*, 145 Miss. 207, 110 So. 447 (1926).

3. Evidence.

The prohibited possession may be established by circumstantial evidence and inferences from evidence. *Shaw v. State*, 248 Miss. 823, 161 So. 2d 629 (1964).

4. —Admissibility.

Evidence of search of defendant's premises and finding parts of still was admissible notwithstanding affidavit and search warrant were lost where state made oral proof of that fact and of the substance of those documents before the trial judge. *Jefferson v. State*, 207 Miss. 576, 42 So. 2d 772 (1949).

Evidence that parts of still were found by police officers while searching defendant's premises under warrant authorizing search for stolen beef is admissible in a prosecution under this section [Code 1942, § 2632]. *Jefferson v. State*, 207 Miss. 576, 42 So. 2d 772 (1949).

Evidence of finding of homemade whiskey on defendant's premises was competent in a prosecution for unlawful possession of an integral part of a still, since his possession of the distilled homemade whiskey at the same time he possessed a part of a distillery had a bearing upon whether he was engaged in that business by the use of a distillery. *Crafton v. State*, 200 Miss. 10, 26 So. 2d 347 (1946).

Evidence obtained under valid search warrant was admissible in prosecution for possessing integral parts of a distillery, where parts of the distillery were in possession of defendant at the place described in the search warrant. *Williams v. State*, 198 Miss. 848, 23 So. 2d 692 (1945).

Still seized may be offered in evidence on trial of persons arrested for possessing it. *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925).

Witness having knowledge of use of stills may testify as to use of particular still, to negative lawful use. *State v. Hinton*, 139 Miss. 513, 104 So. 354 (1925).

5. —Sufficiency.

Possession jointly with another may be the basis of a conviction. *Shaw v. State*, 248 Miss. 823, 161 So. 2d 629 (1964).

Testimony showing without question that accused possessed a complete distillery is sufficient to sustain a conviction under this section [Code 1942, § 2632] of offense of having in possession integral parts of a still. *Wilburn v. State*, 204 Miss. 92, 37 So. 2d 12 (1948).

The finding of moonshine whiskey and a part of a still, known as a "worm", on defendant's premises, and indications of recent removal of the rest of the still, held sufficient to convict defendant of unlawful possession of an integral part of a still. *Crafton v. State*, 200 Miss. 10, 26 So. 2d 347 (1946).

Evidence that officers found wagon loaded with several mash and cooking barrels and cooking utensils, but that the coil was missing which was an absolutely essential part of a complete still, was insufficient to sustain conviction for unlawful possession of a still under this section [Code 1942, § 2632]. *Black v. State*, 199 Miss. 147, 24 So. 2d 117 (1945).

Conviction for unlawful possession of distillery held proper, where proof was clear and convincing beyond a reasonable doubt and was entirely undisputed, and nothing suggested lawful use of distillery or its possession for any other purpose than distilling of whisky. *McLemore v. State*, 178 Miss. 525, 172 So. 139 (1937).

Evidence that defendant was seen standing with one hand on still which was not on his land or close thereto held insufficient to sustain conviction for owning or possessing still or an integral part thereof. *Ray v. State*, 175 Miss. 623, 168 So. 617 (1936).

Evidence held insufficient to sustain conviction for possession of integral parts of still. *Pickle v. State*, 151 Miss. 549, 118 So. 625 (1928).

Evidence held to sustain conviction for unlawful possession of still. *Reynolds v. State*, 136 Miss. 329, 101 So. 485 (1924); *Traxler v. State*, 244 Miss. 403, 142 So. 2d 14 (1962).

6. Instructions.

Where indictment charged that defendant wilfully, unlawfully, and feloniously had a still in his possession, omission of word "wilfully" in instruction defining offense was not fatal defect, in view of evidence conclusively showing that possession of still was wilful, unlawful, and felonious. *McLemore v. State*, 178 Miss. 525, 172 So. 139 (1937).

7. Miscellaneous.

Where there was not a free, voluntary and intelligent plea of guilty and no intelligent, understanding, and competent waiver of counsel on the part of a defendant convicted of possession of a whisky

still, his motion for permission to withdraw his plea of guilty should be granted. *Plummer v. State*, 252 Miss. 45, 172 So. 2d 547 (1965).

In prosecution for unlawful possession of still, affirmative defense of duress held not established in absence of proof of impending danger, present, imminent, and impending at time accused participated in crime of possessing still. *Powe v. State*, 176 Miss. 455, 169 So. 763 (1936).

Although evidence was insufficient to support conviction for owning or possessing a still or an integral part thereof, case would be remanded where defendant had not requested peremptory instruction at close of evidence. *Ray v. State*, 175 Miss. 623, 168 So. 617 (1936).

Law providing that it should become effective from and after passage was in effect when approved by Governor. *Moree v. State*, 130 Miss. 341, 94 So. 226 (1922).

RESEARCH REFERENCES

Am Jur. 45 *Am. Jur.* 2d, *Intoxicating liquors* § 451 et seq.

§ 97-31-25. Patent medicines.

The sale or giving away of any proprietary or patent medicine by whatsoever name called, which, if drunk to excess, will produce intoxication, shall be deemed and held to be a sale of intoxicating liquors, unless there shall be a printed label attached to each bottle or other receptacle containing the same, a facsimile of a certificate issued by the commissioner of internal revenue of the United States to the effect that such medicine has been examined by him or under his direction and that it does not contain such percentage of alcohol as to make the sale of same unlawful without an internal revenue license for the sale of liquors.

SOURCES: Codes, 1906, § 1767; *Hemingway's* 1917, § 2102; *Laws*, 1930, § 1989; *Laws*, 1942, § 2628; *Laws*, 1908, ch. 115.

Cross References — Alcoholic preparations and extracts, see §§ 97-31-5 through 97-31-11.

RESEARCH REFERENCES

Am Jur. 45 *Am. Jur.* 2d, *Intoxicating Liquors* §§ 15, 58.

CJS. 48 *C.J.S.*, *Intoxicating Liquors* §§ 10, 316, 319 and 320.

§ 97-31-27. Sale, possession, etc. of intoxicating beverages prohibited; penalties.

If any person shall sell or barter, or give away or keep or have in his possession, except as authorized in this chapter, any vinous, alcoholic, malt, intoxicating or spirituous liquor, or intoxicating bitters or drinks, which if drunk to excess will produce intoxication, such person, and all others who may have owned or had any interest at the time in the liquors, bitters or drinks sold or bartered, or kept or in possession contrary to law, shall on conviction, be punished as follows:

(a) By a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than one week nor more than three months, or both, for the first conviction under this section.

(b) By a fine of not less than one hundred dollars and by imprisonment in the county jail not less than sixty days, nor more than six months, for the second conviction for violating this section.

(c) By imprisonment in the state penitentiary not less than one year nor more than five years for conviction the third time under this section for the violation thereof after having been twice convicted of its violation.

SOURCES: Codes, Hutchinson's 1848, ch. 11, art. 8(3); 1857, ch. 20, art. 9; 1871, § 2690; 1880, § 1112; 1892, § 1592; Laws, 1906, § 1746; Hemingway's 1917, § 2086; Laws, 1930, § 1974; Laws, 1942, § 2613; Laws, 1908, ch. 115; Laws, 1912, ch. 214.

Cross References — Local option alcoholic beverage control, see §§ 67-1-1 et seq. Unlawful possession of alcoholic beverages or related personal property, see § 67-1-17.

Regulation of sale of alcoholic beverages, generally, see §§ 67-3-1 et seq.

Regulation of certain alcoholic preparations and extracts, see §§ 97-31-5 through 97-31-11.

Sales by druggists, see §§ 97-31-37 through 97-31-45.

Drunkenness of public officers, see § 97-11-23.

Exceptions to prohibited sale, possession, etc., generally, see § 97-31-33.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
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4. Intent; belief.
5. Sale, what amounts to.
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13. —Where general prohibition laws suspended.
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II. UNDER FORMER LAW.

24. Advertising of liquors prohibited.

I. UNDER CURRENT LAW.

1. In general.

The fact that in certain counties of the state local officials have openly refused to enforce the laws prohibiting the sale and possession of intoxicating liquor is not evidence of purposeful or intentional discrimination against a defendant charged with unlawful possession of liquor in a county where officers have made a determined and largely successful effort to enforce such laws, and for that reason such a defendant cannot assert that he has been denied equal protection and due process under the Fourteenth Amendment to the U.S. Constitution. *State v. Wood*, 187 So. 2d 820 (Miss. 1966).

There is no repugnancy between statutes imposing a tax upon the illegal sale of intoxicating beverages and a statute prohibiting the possession thereof. *State v. Wood*, 187 So. 2d 820 (Miss. 1966).

Where property misappropriated by dishonest employees consisted of a quantity of intoxicating liquors belonging to their employer engaged in an illegal business, the employer cannot recover for his loss under a blanket fidelity bond. *Smith v. Maryland Cas. Co.*, 252 Miss. 81, 172 So. 2d 574 (1965).

Despite the fact that the issuer of a blanket fidelity bond contracted that it would not defend any claim on the ground that the insured employer was engaged in an illegal business, no recovery was permitted for the misappropriation by dishonest employees of a quantity of intoxicating liquors, the possession of which was statutorily illegal. *Smith v. Maryland Cas. Co.*, 252 Miss. 81, 172 So. 2d 574 (1965).

Where it is impossible to determine, because of the confused state of the record, whether the defendant, charged with possession of intoxicating liquors, was convicted on the first or the second charge against him in a mayor's court or an ex officio justice court, the conviction must be reversed and the case remanded.

Suggs v. State, 250 Miss. 730, 168 So. 2d 514 (1964).

In view of the enactment of Code 1942, § 10112 the State of Mississippi does not have any sharply defined public policy affecting or relating to the practice of businesses entertaining or ingratiating themselves with their customers by serving or donating to them intoxicating liquors on which the state and its subdivisions have collected full tribute, and the deduction of the cost of such entertainment and donations by a taxpayer on his federal income tax returns is allowed. *Stacy v. United States*, 231 F. Supp. 304 (S.D. Miss. 1963).

This section [Code 1942, § 2613] does not make it illegal to drink intoxicants, hence consumer of liquor is not in *pari delicto* with seller, so as to preclude recovery for fall on dangerous steps in leaving premises. *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963).

Chapter relating to wine and beer repealed statute making it unlawful to sell beer. *Hays v. State*, 219 Miss. 808, 69 So. 2d 845 (1954).

Where a statute making it unlawful to sell beer was repealed by statute which authorized sale within the state and permitted counties to prohibit such sales, and where a majority of qualified electors in county determined that the sale of beer should not be permitted within the county, such a sale of beer thereafter was prohibited and punishable as violation of chapter relating to wine and beer. *Hays v. State*, 219 Miss. 808, 69 So. 2d 845 (1954).

In prosecution for unlawful possession of intoxicating liquors where defendant failed to file motion for continuance in a proper written form as prescribed by this section [Code 1942, § 2613], this was sufficient justification for the circuit court to refuse to grant the requested continuance. *Smith v. State*, 219 Miss. 741, 69 So. 2d 837 (1954).

The use of strong methods by collector to collect from delinquent taxpayers penalties on sale of intoxicating liquor, is not discrimination against such delinquents where such force is not necessary to secure payment by others. *Bishop v. Bailey*, 209 Miss. 892, 48 So. 2d 588 (1950).

Exceptions to this section [Code 1942, § 2613] are contained in Code 1942,

§§ 2634, 2635 and 2636, prescribing how licensed retail druggists may sell under certain conditions pure alcohol for medicinal purposes; grain alcohol to chemists and bacteriologists engaged in scientific work; and wine to be used for sacramental purposes. *Gilbert v. State*, 198 Miss. 175, 21 So. 2d 914, 169 A.L.R. 164 (1945).

Code 1906, § 1746, as amended, and Code 1906, § 1797, create separate and distinct offenses, and proof of possession with intent to sell, without more, is not sufficient to support a conviction under the former act, as to "keep for sale" means to have on hand habitually. *Collins v. State*, 107 Miss. 619, 65 So. 645 (1914).

Also within 5 miles of state university. *Wilburn v. State*, 101 Miss. 392, 58 So. 7 (1912).

Enactment of state-wide prohibition law impliedly repeals local laws, among others that forbidding sale of liquor within 5 miles of the courthouse of a named county. *Hughes v. State*, 97 Miss. 528, 52 So. 631 (1910).

But a statute prohibiting sale of liquor within 5 miles of state university does not prevent conviction under local option law. *Borroum v. State*, 94 Miss. 88, 47 So. 480 (1908).

2. Validity.

This section [Code 1942, § 2613] does not violate the constitution. *Dossett v. State*, 211 Miss. 650, 52 So. 2d 490 (1951).

This section [Code 1942, § 2613] does not violate § 32, Constitution 1890, though liquor be possessed by one solely for his own use and consumption. *Stepp v. State*, 202 Miss. 725, 32 So. 2d 447 (1947), error overruled, 202 Miss. 731, 33 So. 2d 307 (1948).

3. Purpose.

The primary intent of the legislature in the enactment of statutes taxing the illegal sale of intoxicating liquor was to impose a penalty and a tax upon those persons deliberately violating the state's prohibition laws. *State v. Wood*, 187 So. 2d 820 (Miss. 1966).

This statute [Code 1942, § 2613] was enacted in aid of, and to make more effective, the law as against sales and giving away of intoxicating liquor. *Stepp v. State*, 202 Miss. 725, 32 So. 2d 447 (1947), error

overruled, 202 Miss. 731, 33 So. 2d 307 (1948).

This section [Code 1942, § 2613] forbids sale of enumerated liquors without reference to whether or not they intoxicate, because they are known to be of an intoxicating character, and also any other drinks which will cause intoxication if taken to excess. *Fuller v. City of Jackson*, 97 Miss. 237, 52 So. 873 (1910).

4. Intent; belief.

Intent of possessor is immaterial. *Lowe v. City of Jackson*, 181 Miss. 296, 179 So. 568 (1938).

An intention to sell falls short of a violation of the statute. *J. Livelar & Co. v. State*, 98 Miss. 330, 53 So. 681 (1910).

Except in the case of pharmaceutical preparations, the law punishes selling intoxicants regardless of seller's intent. *Bacot v. State*, 94 Miss. 225, 48 So. 228, 136 Am. St. R. 574 (1909).

A seller is not protected by his ignorance of the fact that the liquor sold is intoxicating or his belief to the contrary. *King v. State*, 66 Miss. 502, 6 So. 188 (1889).

5. Sale, what amounts to.

One purchasing whisky with money of another is guilty of unlawful sale. *Walters v. State*, 127 Miss. 324, 90 So. 76 (1921).

One who loaned another whisky with the understanding that a similar amount was to be returned did not violate Laws 1908, ch. 113. *Jones v. State*, 108 Miss. 530, 66 So. 987 (1915).

One purchasing whisky for third person is liable. *Brantley v. State*, 107 Miss. 466, 65 So. 512 (1914).

Boardinghouse keeper serving beer or wine to boarders as part of dinner is guilty of selling liquor. *Skermetta v. State*, 107 Miss. 429, 65 So. 502 (1914).

One contributing to pool to buy whisky and helping consume it is guilty of selling liquor. *Horton v. State*, 105 Miss. 333, 62 So. 360 (1913).

Accused who ordered a keg of beer which was paid for and to be drunk by a number of persons, including himself, was not guilty of an unlawful sale. *Dantzler v. State*, 104 Miss. 233, 61 So. 305 (1913).

One may be convicted of illegal sale in this state although only delivery occurred here. *Anglin v. State*, 96 Miss. 215, 50 So.

492 (1909), error overruled, 96 Miss. 221, 50 So. 728 (1909).

Where accused wrote his name on a blank piece of paper and delivered it to persons who carried it to the express agent and gave it to him with \$3.50 and received 4 quarts of whisky from the agent, this constitutes a sale although no words passed between any of the parties. *Bennett v. State*, 87 Miss. 803, 40 So. 554 (1906).

Delivery of liquor to purchaser of ticket entitling him to a quantity thereof constitutes a sale although the money was paid by purchaser when he received the ticket. *Harper v. State*, 85 Miss. 338, 37 So. 956 (1905).

A sale of personal property is ordinarily completed by its delivery to the purchaser. Delivery to a carrier for shipment, in the usual course of trade, is prima facie a delivery to the consignee. *Pearson v. State*, 66 Miss. 510, 6 So. 243 (1889).

6. Possession.

Since a person who is intoxicated may or may not have had unlawful possession of liquor, guilt of the unlawful possession does not necessarily follow from the mere fact of voluntary intoxication. *Hutson v. Hutson*, 239 Miss. 413, 123 So. 2d 550 (1960).

That one was in illegal possession of the liquor prior to drinking it does not preclude him from seeking relief against one who obtained a deed from him for no consideration while he was so intoxicated as not to know what he was doing. *Hutson v. Hutson*, 239 Miss. 413, 123 So. 2d 550 (1960).

One cannot be convicted of unlawful possession of liquor found on his premises where it is equally probable that some other person had possession and control. *Hill v. State*, 234 Miss. 64, 105 So. 2d 478 (1958).

Responsible possession of intoxicating liquor must be shown by the state to justify a conviction of one accused of possession of intoxicating liquor. *Shumpert v. State*, 229 Miss. 730, 91 So. 2d 745 (1957).

A presumption of possession of whisky when found on householder's premises does not apply where the accused lived in five-room house with two other men as tenants and also other men slept at the

house and had access to the house, and where the officers found half gallon of whisky in the yard. *Foster v. State*, 49 So. 2d 258 (Miss. 1950).

Where evidence disclosed that officers, under proper warrant, searched defendant's place of business, followed a well used path therefrom, which divided into two forks, and uncovered liquor at end of each path, and that path served as access to no objective other than liquor, issue of whether defendant was guilty of possessing liquor was properly submitted to the jury. *Chamblee v. State*, 44 So. 2d 415 (Miss. 1950).

Unlawful possession by the owner of a public place of business is not shown where the whiskey is found in an unlocked cabinet frequently used by all employees of the establishment. *Sellers v. City of Picayune*, 202 Miss. 741, 32 So. 2d 450 (1947).

The rebuttable presumption that liquor found on premises of which a person is in possession and control is in that person's possession is warranted where whiskey is found at three different places near such person's place of business and from which places the person was seen coming to his place of business shortly before a search warrant was obtained. *Ratcliff v. State*, 199 Miss. 866, 26 So. 2d 69 (1946).

The presumption that liquor found on premises on which a person is in possession and control is in that person's possession is fully rebutted where it is undisputed that bottles of whiskey being broken when officers arrived had been brought by another less than a half hour before the arrival of the officers and that it belonged to such other person. *Ratcliff v. State*, 199 Miss. 866, 26 So. 2d 69 (1946).

Intoxicating liquor in bottles found in the pocket of a jacket of defendant's daughter on defendant's premises established the possession of defendant. *Quick v. State*, 192 Miss. 789, 7 So. 2d 887 (1942), cert. denied, 317 U.S. 630, 63 S. Ct. 51, 87 L. Ed. 509 (1942).

Where intoxicating liquor is found on the premises of which the defendant is in possession and control, a rebuttable presumption of fact arises that it was in his possession. *Williamson v. State*, 191 Miss. 643, 4 So. 2d 220 (1941); *Quick v. State*,

192 Miss. 789, 7 So. 2d 887 (1942), cert. denied, 317 U.S. 630, 63 S. Ct. 51, 87 L. Ed. 509 (1942); *Shumpert v. State*, 229 Miss. 730, 91 So. 2d 745 (1957).

Intent of possessor is immaterial. *Lowe v. City of Jackson*, 181 Miss. 296, 179 So. 568 (1938).

Wife's taking of jug of whisky brought in by another for her husband, and throwing it out and breaking jug held not unlawful "possession" within statute. *Garland v. State*, 165 Miss. 136, 146 So. 637 (1933).

The joint possession of husband and wife constitutes a prima facie case against the husband and not the wife. *Wylie v. State*, 151 Miss. 897, 119 So. 825 (1929).

On sufficiency of proof of possessing. *Schillings v. State*, 151 Miss. 361, 118 So. 137 (1928).

That liquor belonged to drunken person whom accused was helping home held no defense to prosecution for possession thereof. *Adair v. State*, 148 Miss. 240, 114 So. 345 (1927).

Mere visitor at home, knowing nothing of still therein, may not be convicted of having possession thereof. *Brewer v. State*, 142 Miss. 100, 107 So. 376 (1926).

Defendant's confession, without proof of corpus delicti, not sufficient to sustain conviction of having possession of liquor. *Morton v. State*, 136 Miss. 284, 101 So. 379 (1924).

7. Alcoholic content.

Where one is charged with the possession of "intoxicating liquors, to wit, whiskey, wine and beer", it is not necessary to prove that the alcoholic content of the wine and beer was such as to bring them within the description of intoxicating liquors. *Warbington v. State*, 234 Miss. 743, 107 So. 2d 578 (1958).

In prosecution for unlawful possession of intoxicating liquor for possessing malt liquor or beer, the affidavit must allege and the proof must show an alcoholic content in excess of 4 per cent by weight. *Hall v. State*, 199 Miss. 560, 24 So. 2d 780 (1946).

Mere fact that the malt liquor or beer may be intoxicating does not of necessity show that the alcoholic content exceeded 4 per cent by weight. *Hall v. State*, 199 Miss. 560, 24 So. 2d 780 (1946).

This section [Code 1942, § 2613] does not embrace a beverage which contains only .18% of alcohol by volume and .13% by weight. *Fuller v. City of Jackson*, 97 Miss. 237, 52 So. 873 (1910).

Malt ale which contains 2.71% alcohol by volume and 2.12% by weight is an intoxicant. *Fuller v. City of Jackson*, 97 Miss. 237, 52 So. 873 (1910).

8. Jamaica ginger; lemon extract.

Where affidavit charged violation of general statute, defendant, admitting sale of lemon extract, could not be convicted of possessing liquor, though another statute required permit for sale of such extract. *McSwain v. State*, 158 Miss. 643, 130 So. 696 (1930).

Defendant's admission of possessing lemon extract and sale thereof without license held insufficient to sustain conviction for possessing intoxicating liquors. *McSwain v. State*, 158 Miss. 643, 130 So. 696 (1930).

Sale of Jamaica ginger held for beverage purchases; buyers, detectives, asking for it for that purpose. *Brown v. State*, 142 Miss. 104, 107 So. 381 (1926).

Possession and sale of proprietary remedies or patent medicines with alcoholic percentage indicated thereon not unlawful, although producing intoxication if drunk to excess; tincture of ginger or Jamaica ginger, prepared in accordance with United States pharmacopoeia are not intoxicating liquors per se. *Young v. State*, 137 Miss. 188, 102 So. 161, 36 A.L.R. 717 (1924).

Mere possession of tincture of ginger or Jamaica ginger not unlawful, although sale as beverage unlawful. *Young v. State*, 137 Miss. 188, 102 So. 161, 36 A.L.R. 717 (1924).

Jamaica ginger is "spirituous" or "vinous liquor" within act imposing penalties for sale. *Payne v. State*, 125 Miss. 896, 88 So. 483 (1921).

A sale of tincture of ginger prepared in good faith as a medicine by a duly licensed druggist, does not violate this section. The test is whether the tincture, or essence, was sold in good faith as a medicine, or whether it was a sham preparation, really an intoxicating liquor and sold as a beverage. *Bertrand v. State*, 73 Miss. 51, 18 So. 545 (1895).

9. Indictment or information, generally.

To warrant conviction under this statute [Code 1942, § 2613], the indictment must refer to the statute. *Barnes v. State*, 239 Miss. 756, 125 So. 2d 293 (1960).

Circuit court had jurisdiction to try accused for unlawful possession of intoxicating liquor where no affidavit was filed with the justice of the peace so charging accused although justice placed accused under appearance bond to await action of grand jury. *Humble Oil & Ref. Co. v. State*, 40 So. 2d 307 (Miss. 1949).

It is unnecessary to charge in affidavit charging possession of whisky that the possession was unlawful, since possession of whisky is unlawful under all circumstances. *Gilbert v. State*, 198 Miss. 175, 21 So. 2d 914, 169 A.L.R. 164 (1945).

In charging offense of unlawful possession of wine, it is not necessary to negative exception of homemade wine. *Forbert v. State*, 179 Miss. 66, 174 So. 248 (1937).

An indictment under Laws 1908, ch. 115, may be amended by the insertion of the word "liquors" after "intoxicating." *Keys v. State*, 110 Miss. 433, 70 So. 457 (1916).

Neither justice nor circuit court could try accused on charge of illegally retailing liquor without proper affidavit. *Hall v. State*, 91 Miss. 216, 44 So. 826 (1907).

Upon appeal, it is error to permit the state to amend the affidavit charging a sale to certain persons by striking out their names and to prove a sale to a different person. Though the names were unnecessary in the first place, they became a part of the description of the offense. *Hudson v. State*, 73 Miss. 784, 19 So. 965 (1896).

Members of the grand jury are not competent to testify that the sale sought to be proved is or is not the one inquired of by it on which the indictment was found. *Newman v. State*, 72 Miss. 124, 16 So. 232 (1894).

It is unnecessary to aver the name of the buyer. *Riley v. State*, 43 Miss. 397 (1871); *Lea v. State*, 64 Miss. 201, 1 So. 51 (1886).

It is unnecessary to aver partnership in the indictment. *Gathings v. State*, 44 Miss. 343 (1870).

10. —Sufficiency.

Where an affidavit charged the defendant did wilfully and unlawfully sell one-half pint of liquor and it was amended to charge defendant with unlawful sale of intoxicating liquor, the affidavit sufficiently indicated the offense intended to be charged and the defect was on the face of it, it was amendable and the failure to demur to it constituted a waiver of defect. *Perciful v. Holley*, 217 Miss. 203, 63 So. 2d 817 (1953).

Where an indictment charged only that the accused did unlawfully sell intoxicating liquor, namely home brew, and there was no allegation that the sale of beer had been outlawed by an election in the county, the indictment was insufficient because no crime was stated. *Riley v. State*, 212 Miss. 746, 55 So. 2d 447 (1951).

Affidavit was not bad for failure to charge crime in that it did not aver that defendant unlawfully had in his possession intoxicating liquor commonly known as brandy, since it is unlawful under any and all circumstances to have brandy in possession except as to officers of the law who have seized it, and it is unnecessary to charge that defendant had it unlawfully. *Mason v. State*, 32 So. 2d 140 (Miss. 1947).

Affidavit charging sale of one pint of "intoxicating liquor" held sufficient. *Pope v. State*, 108 Miss. 706, 67 So. 177 (1915).

Affidavit need only allege facts which constitute the crime. *City of Gulfport v. Martin*, 96 Miss. 131, 50 So. 502 (1909).

Conviction reversed for failure of record to show affidavit charging crime in justice or circuit court. *Woodson v. State*, 94 Miss. 370, 48 So. 295 (1909).

It is not necessary for affidavit to allege sale was unlawful. *Irby v. State*, 91 Miss. 542, 44 So. 801 (1907).

An indictment is good which charges generally a sale of liquor without authority of law. *West v. State*, 70 Miss. 598, 12 So. 903 (1893).

An indictment is not bad as being double because it charges in the same count the unlawful sale of "vinous and spirituous liquors." *Lea v. State*, 64 Miss. 201, 1 So. 51 (1886).

11. —After previous conviction.

A proper indictment charging a defendant with a third offense of sale of intox-

icating liquors must make specific and express reference to the statute or statutes under which he was previously convicted; otherwise it will not support a judgment of conviction. *McGowan v. State*, 269 So. 2d 645 (Miss. 1972).

Where an indictment which was in three parts, the first of which alleged unlawful possession of intoxicating liquors in March 1937 and a conviction thereof and the second part set out such conviction and alleged that in June 1941 the defendant was again convicted of a similar offense, and the third part alleged that after the two prior convictions, he did, in December 1946 have possession, as aforesaid, that indictment does not properly charge a second or third offense as such. *White v. State*, 214 Miss. 235, 58 So. 2d 510 (1952).

Where indictment attempting to charge defendant with felonious commission of the act constituting a third offense was void in its entirety for failure to charge his conviction of a first offense as a first offense, and his conviction of a second offense as a second offense, all under the same statute, trial court erred in failing to sustain demurrer thereto and in permitting amendment of indictment so as to charge a first offense; and no effect could be given such indictment under Code 1942, § 2523, authorizing a conviction for the commission of some other offense, the commission of which is necessarily included in the offense with which the defendant is charged in the indictment, since it neither charged a third offense nor any constituent offense. *Ainsworth v. State*, 206 Miss. 559, 40 So. 2d 298 (1949).

Affidavit is void and judgment of conviction of second offense of possession of intoxicating liquors is invalid when affidavit does not specifically refer to this section, since statute requires that the second and third convictions must be "under this section [Code 1942, § 2613]." *Riley v. State*, 204 Miss. 562, 37 So. 2d 768 (1948).

Indictment charging that defendant unlawfully possessed intoxicating liquor for the second time in violation of paragraph (b) of this section [Code 1942, § 2613], having once been convicted for possession of intoxicating liquor on a designated date in the circuit court of a specified county,

was not invalid for failure to charge specifically that the first prosecution was had under this section [Code 1942, § 2613]. *McGowan v. State*, 200 Miss. 270, 25 So. 2d 131 (1946), error overruled, 200 Miss. 281, 26 So. 2d 70 (1946).

An indictment under paragraph (c) of this section [Code 1942, § 2613] charging possession of intoxicating liquor after having previously twice been convicted for the same offense, must specifically refer to this section [Code 1942, § 2613]. *Rogers v. State*, 198 Miss. 495, 22 So. 2d 550 (1945).

An indictment under paragraph (c) of this section, charging possession of intoxicating liquor after having been previously twice convicted for the same offense, was insufficient for failure to allege that the second conviction was on a charge of having intoxicating liquor in defendant's possession after a former conviction. *Rogers v. State*, 198 Miss. 495, 22 So. 2d 550 (1945).

Omissions in an indictment under paragraph (c) of this section charging possession of intoxicating liquor after having been previously twice convicted for the same offense, of specific reference to this section and of an allegation that defendant's second conviction was on a charge of having intoxicating liquor in his possession after a former conviction, go to the very essence of the offense charged, so that such omissions were not waived by defendant's failure to demur to the indictment. *Rogers v. State*, 198 Miss. 495, 22 So. 2d 550 (1945).

12. —Separateness of search warrant affidavit.

Recitals in both affidavit for search warrant and the search warrant itself that the possession of whisky by the accused was "in violation of law," were equivalent to recital that such possession was "unlawful." *Gilbert v. State*, 198 Miss. 175, 21 So. 2d 914, 169 A.L.R. 164 (1945).

Trial and conviction of accused for unlawful possession of intoxicating liquor in the circuit court on an indictment was valid, and fact that the intoxicating liquor in question was found and seized in accused's home under a search warrant issued to the sheriff by a justice of the peace did not place jurisdiction in the justice's court to the exclusion of the circuit court

where no affidavit was made before the justice of the peace charging her with unlawful possession of intoxicants, since a charging affidavit is essential to jurisdiction in the justice court. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

The affidavit for a search warrant is not, and cannot be, a substitute for the affidavit charging the offense of unlawful possession of intoxicating liquor so as to give a justice court jurisdiction of the offense. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

13. —Where general prohibition laws suspended.

An indictment which charges an unlawful sale of intoxicating liquor in violation of the general prohibition laws fails to charge an indictable offense where the act occurred in a county where those laws had been suspended by an election held under the local option alcoholic beverage control law. *Wortham v. State*, 219 So. 2d 923 (Miss. 1969).

In counties where the general prohibition laws have been suspended through legalization of the sale of alcoholic liquors by an election held under the local option alcoholic beverage control law, in order to charge an unlawful sale the indictment or affidavit must charge that the local option law is in effect in that county, and sufficient facts to show a violation of one of the provisions of the local option law. *Wortham v. State*, 219 So. 2d 923 (Miss. 1969).

In a county in which the general prohibition laws had been suspended, it was error to permit the amendment of an indictment charging a violation of those laws so as to charge the commission of an offense prohibited under the local option beverage control law. *Wortham v. State*, 219 So. 2d 923 (Miss. 1969).

14. Variance between allegations and proof.

An indictment charging a sale of intoxicating liquors is not sustained by proof of a barter. *Elkins v. State*, 229 Miss. 323, 90 So. 2d 662 (1956).

Where an indictment charged that the accused unlawfully sold intoxicating liquors, while the state proved that the accused gave the prosecuting witness a

gallon of liquor and \$1.50 in cash in exchange for a car battery, there was a fatal variance between the indictment and the proof, and the accused was entitled to a peremptory instruction. *Elkins v. State*, 229 Miss. 323, 90 So. 2d 662 (1956).

Indictment charging sale of intoxicating liquor, not supported by proof of barter. *Woodall v. State*, 129 Miss. 854, 93 So. 366 (1922).

Conviction for unlawful sale of intoxicating liquor, not set aside because of variance between proof of time for sale and date alleged in indictment. *Peebles v. State*, 105 Miss. 834, 63 So. 271 (1913).

Fact that under indictment based on this section [Code 1942, § 2613], proof showed also a violation of another section, did not constitute variance and accused was properly sentenced under this section [Code 1942, § 2613]. *Taylor v. State*, 101 Miss. 857, 58 So. 593 (1912).

One charged with selling "vinous and spirituous liquors" could not be convicted by proof of the sale of beer, which as commonly prepared is a malt liquor. *Smith v. State*, 94 Miss. 255, 49 So. 113 (1909).

Though it is unnecessary to charge in an indictment to whom the liquor was sold, yet if a sale to two named persons is averred, this becomes essential as descriptive of the offense, and it is a fatal variance if the evidence is of a sale to one only. *Tyler v. State*, 69 Miss. 395, 11 So. 25 (1891); *Dick v. State*, 30 Miss. 631 (1856).

15. Evidence.

16. —Admissibility.

In a prosecution for possession of intoxicating liquor, the trial court erred in overruling defendant's motion to suppress evidence seized during a search of his home, based on his contention that the warrant was defective, where the underlying facts and circumstances portion of the affidavit, stating that a deputy had called the affiant and said that after several observations of defendant over a period of time "he was apparently selling whiskey," was insufficient as a matter of law. *Washington v. State*, 382 So. 2d 1086 (Miss. 1980).

Where the record revealed that all persons who wanted to do business with the

defendant were impliedly invited to approach the house in which he was staying along a circular driveway to a point where the defendant met law enforcement officers to ascertain what he could do for them, and where the officers purchased and received from the defendant a bottle of intoxicating liquor but made no search of the person or premises of the defendant, the testimony of the officers was not inadmissible on the ground that the purchase was an illegal search or that their testimony was in effect a method of requiring the defendant to testify against himself. *Lyons v. State*, 195 So. 2d 91 (Miss. 1967).

Where, after prosecuting witness had obtained whisky from the defendant, he and two other witnesses were arrested while driving along the highway and the car searched without a warrant, and the whisky was found by the arresting officer, since the car searched was not the accused's, and he did not have it in his possession, nor was he anywhere near the place where the search was made, he could not complain, upon trial of the charge of unlawfully selling intoxicating liquor, that the whisky introduced in evidence was obtained by an illegal search. *Elkins v. State*, 229 Miss. 323, 90 So. 2d 662 (1956).

Evidence that defendant's place of business had a reputation of being place where intoxicating liquors were sold was properly excluded in a prosecution for unlawful possession of beer. *State v. Sisk*, 209 Miss. 174, 46 So. 2d 191 (1950).

Permitting two police officers to testify that defendant was under the influence of intoxicating liquor at the time they searched his car for intoxicating liquor, was reversible error. *Patton v. State*, 209 Miss. 138, 46 So. 2d 90 (1950).

Where sheriff hid himself near spot which he believed was being used to keep whisky in but without suspecting that defendant rather than someone else would appear, and shortly thereafter defendant appeared with something in his hand and sheriff after arresting him discovered whisky in the bottle, arrest was unlawful and evidence inadmissible. *Thomas v. State*, 208 Miss. 264, 44 So. 2d 403 (1950).

Where defendant failed to object to search warrant when offered in evidence

but did request preemptory instruction, and, after trial, made motion in arrest of judgment, the supreme court will treat the question as though defendant made timely objection. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

Evidence obtained by second search, under original search warrant, is inadmissible against defendant when second search is made after original search had been completed and evidence obtained, and after defendant was arrested, plead guilty and paid fine. *Riley v. State*, 204 Miss. 562, 37 So. 2d 768 (1948).

Passenger in truck being driven by its owner in compliance with contract of sale of cow and delivery thereof to defendant's home, could not object to the search of the truck cab by deputy sheriff without a search warrant, or to the admission of evidence secured thereby in prosecution for unlawful possession of intoxicating liquor. *Smith v. State*, 198 Miss. 788, 24 So. 2d 85 (1945).

Where arrest of defendant and the search of her person by a sheriff without a warrant therefor was illegal, evidence that he found on her person a key which fitted the lock of the door to a room in which whisky was found was inadmissible in prosecution for unlawful possession of whisky, notwithstanding that the room was in a house owned by the defendant for which the sheriff had a proper search warrant, where the defendant lived elsewhere. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401 (1945).

The admission of evidence in a prosecution for unlawful possession of whiskey that defendant's servant had on former occasions sold whiskey for defendant was not error since the testimony was relevant to show the fact and purpose of the employment and that the possession of the whiskey involved was with defendant's knowledge and consent, and under his direction. *Grantham v. State*, 190 Miss. 887, 2 So. 2d 150 (1941).

Evidence that accused believed wine in his possession did not contain over four per cent of alcohol, held inadmissible. *Lowe v. City of Jackson*, 181 Miss. 296, 179 So. 568 (1938).

Evidence obtained in search by city marshal and private citizen without war-

rant held properly excluded, although made outside of limits of municipality, where record shows marshal was acting under color of office. *State v. Messer*, 142 Miss. 882, 108 So. 145 (1926).

Where state's witness obtained whisky from defendant only once and was uncertain about the date, defendant should have been permitted to introduce testimony that sale occurred in another county. *Mosley v. State*, 107 Miss. 158, 65 So. 124 (1914).

Error to admit evidence that defendant had reputation of being a blind tiger keeper, where she had not placed her reputation in issue. *Smothers v. City of Jackson*, 92 Miss. 327, 45 So. 982 (1908).

Under indictment charging giving away liquor in town of D, evidence of giving away liquor outside of the town was inadmissible. *Stanley v. State*, 89 Miss. 63, 42 So. 284 (1906).

Under indictment charging giving away liquor, books of express company were inadmissible to show shipments of liquor from defendant's employer to parties in the town. *Stanley v. State*, 89 Miss. 63, 42 So. 284 (1906).

On prosecution for unlawful selling, evidence that defendant kept liquors of other parties on storage subject to their withdrawal at pleasure is immaterial and there was no error in its rejection. *Donald v. State*, 41 So. 4 (Miss. 1906).

17. —Sufficiency.

Where the state's witnesses testified that in response to their inquiry, the defendant stated that he had a named brand of whisky, giving the price thereof, and that defendant then disappeared but returned shortly with two half pints of whisky, which he delivered to the witnesses, receiving payment therefor, the evidence not only established a sale but was sufficient to warrant the jury in concluding that the defendant was in possession of whisky, and that the two half pints which he delivered to the state's witnesses were taken from the stored whisky which was in his control or charge; the state not being required to prove that defendant's control or possession of the whisky was exclusive, or that the defendant owned the whisky. *McLean v. State*, 230 Miss. 894, 94 So. 2d 231 (1957).

Where intoxicating liquor was found in an automobile, belonging to the accused's wife, parked upon the property of another, evidence, including undisputed testimony of the property owner that he could not estimate the number of times that he had seen the accused go to and from the parked automobile, and further that when he asked the accused to do something about the car being upon his premises the accused had replied that if the witness got caught the whisky would belong to the accused, was sufficient to sustain the conviction for the unlawful possession of intoxicating liquor. *Bolin v. State*, 229 Miss. 798, 91 So. 2d 847 (1957).

Where it was equally probable that a man found in a drunken condition upon the premises supposedly owned by the accused was in responsible possession of the intoxicating liquor found therein, and it was not shown when the accused had been on the premises in relation to the time the intoxicating liquor was found, the state failed to prove beyond a reasonable doubt that the accused was guilty of responsible possession of the liquor. *Shumpert v. State*, 229 Miss. 730, 91 So. 2d 745 (1957).

Evidence indicating a beaten path from turkey pen going by place where whisky was found, and finding of ten empty kegs in toolhouse on defendant's property, was too remote and inadequate to submit to jury. *Revette v. State*, 209 Miss. 860, 48 So. 2d 511 (1950).

The prosecution for unlawful possession of intoxicating liquors, the so-called "beaten path doctrine" should be confined in its application to route which terminates at or near contraband, coupled with a limited or no access to premises by others, and to other relevant circumstances which might justify jury in finding possession. *Revette v. State*, 209 Miss. 860, 48 So. 2d 511 (1950).

Evidence that no intoxicating liquor was found in the room where defendant was seated and absence of evidence by the state that defendant exercised any kind of possession or control over the liquor found, warranted reversal of conviction of unlawful possession of intoxicating liquor, since mere presence in the place was insufficient to establish guilt. *Baylis v. State*, 209 Miss. 335, 46 So. 2d 796 (1950).

Testimony that defendant was first seen lying down about 6 or 8 feet from the still, there being no direct testimony of actual participation in the operation of the still, was insufficient upon which to form the basis of a charge of unlawful control and possession. *Ratchliff v. State*, 32 So. 2d 151 (Miss. 1947).

Evidence that officers found in defendant's home one jar of apple juice and a jar containing about a half gallon of "home-brew" was insufficient to sustain conviction of unlawful possession of intoxicating liquor under this section [Code 1942, § 2613], where there was no competent evidence as to the ingredients of the latter liquid or that it was intoxicating. *Turner v. State*, 198 Miss. 839, 24 So. 2d 84 (1945).

Mere testimony by one witness that he smelled the "home-brew" was insufficient to constitute an affirmative statement that it was intoxicating liquor. *Turner v. State*, 198 Miss. 839, 24 So. 2d 84 (1945).

However, if the officers had testified that the "home-brew" was whisky or some other beverage commonly known to be intoxicating, the state would not have been required to prove either its alcoholic content or that it would intoxicate if drunk to excess. *Turner v. State*, 198 Miss. 839, 24 So. 2d 84 (1945).

Evidence was insufficient to sustain conviction of unlawful possession of whisky found in a room to which defendant had no access even though defendant occupied one of the other rooms of the house, where there was no evidence that defendant had any connection with the whisky. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401 (1945).

Testimony as to defendant's statement at the time the enforcement officer made the search of defendant's premises for intoxicating liquors, to the effect that the defendant asked the officer to give him a little time, that he had about a thousand dollars worth of liquor and he could dispose of it within an hour, and requesting that the officer allow another person to plead guilty to the offense, if believed to be true, was sufficient to show that the liquor belonged to him and was in his possession and constituted ample evidence to support conviction. *Smith v. State*, 187 Miss. 96, 192 So. 436 (1939).

Evidence, in a prosecution under this section, that the defendant admitted that the liquor was his, and stated that "if I ever get out of this I never intend to sell any more liquor," in response to the question of the sheriff, coupled with the circumstance that the whiskey was found on defendant's premises constituted sufficient reason for submitting the case to the jury. *Ross v. State*, 185 Miss. 378, 189 So. 526 (1939).

Conviction based on mere suspicion, reversed. *Benoit v. City of Bay St. Louis*, 103 Miss. 218, 60 So. 137 (1912).

Conviction for sale of intoxicating liquors, held sustained by proof of sale of both alcoholic and malt liquors without proof that they are intoxicating. *Edwards v. City of Gulfport*, 95 Miss. 148, 49 So. 620 (1909).

There need not be proof of payment, a sale on credit is within the statute. *Riley v. State*, 43 Miss. 397 (1871).

Where the indictment charges the prisoner with selling rum, whisky, brandy and gin, proof that he sold any one of them in violation of law is sufficient. *Murphy v. State*, 28 Miss. 637 (1855).

18. Instructions.

In a prosecution for the sale of intoxicating liquors, since defendant's admission, upon cross-examination, that on the day prior to the date of the alleged offense he had been convicted of possessing liquor went to his credibility as a witness, and the loss or impairment of credibility affected both defendant's character and reputation, the trial court committed reversible error in refusing to instruct that the jury was required to believe that the defendant made the particular sale of liquor, and was not warranted in convicting him for the sale merely because of his former conviction of possessing liquor and the probable attendant character and reputation arising therefrom. *Hassell v. State*, 229 Miss. 824, 92 So. 2d 194 (1957).

Instruction in a prosecution under this section [Code 1942, § 2613] that jury should find defendant guilty if they found that defendant was guilty "as charged in the indictment", constituted reversible error because the jurors themselves were referred to, and required to interpret the affidavit, instead of being informed by the

court as to the elements of the crime involved in the law violation charged. *Ellis v. State*, 203 Miss. 330, 33 So. 2d 837 (1948).

State's main instruction that defendant must have "wilfully" possessed the liquor is not erroneous as failing to charge that he "knowingly" possessed the liquor, since "wilfully" includes "knowingly". *Mason v. State*, 32 So. 2d 140 (Miss. 1947).

Refusal of requested instruction submitting to jury the factual issue whether the malt liquor or beer contained over the maximum alcoholic content of 4 per cent by weight, constituted reversible error, where the testimony, although showing that the liquor or beer was intoxicating, did not disclose what percentage of alcohol by weight it contained. *Hall v. State*, 199 Miss. 560, 24 So. 2d 780 (1946).

While an instruction in prosecution for having intoxicating liquor in one's possession, which undertakes to define the offense, should use the word "unlawfully," in view of the fact that under some conditions certain intoxicating liquors may be lawfully possessed, omission to do so does not constitute reversible error where the intoxicating liquor in question is "whisky." *Gilbert v. State*, 198 Miss. 175, 21 So. 2d 914, 169 A.L.R. 164 (1945).

In prosecution for unlawful possession of wine, omission of word "unlawful" in instruction to jury held not prejudicial to defendant where bottle containing wine tended to show that it was not homemade and there was no evidence suggesting that it was homemade wine, since possession of wine containing more than fifteen per cent of alcohol by weight was necessarily unlawful. *Forbert v. State*, 179 Miss. 66, 174 So. 248 (1937).

Instruction in liquor prosecution that law took judicial notice that whiskey was intoxicating held not to constitute substantial error. *Norris v. State*, 143 Miss. 365, 108 So. 809 (1926).

Where defense was that the intoxicant was sold as a medicine, instruction was erroneous which ignored the defense and told the jury that if the defendant asked no question as to whether the purchaser wanted to use the bitters as a beverage or a medicine, he was guilty. *Goode v. State*, 87 Miss. 495, 40 So. 12 (1906).

It is not error to refuse an instruction submitting to the jury the question whether the homemade wine sold by the accused was or was not an intoxicant. *Reyfelt v. State*, 73 Miss. 415, 18 So. 925 (1895).

19. Repeating offense.

Where a docket showed that defendant had previously pleaded guilty to a charge of unlawful possession of beer, not shown to be of an alcoholic content greater than four per cent by weight, this did not disclose conviction of a crime and could not be used as the basis for sentencing the accused as a second offender of unlawful possession of intoxicating liquors. *Brown v. State*, 222 Miss. 863, 77 So. 2d 694 (1955).

This section [Code 1942, § 2613] does not impose the graduated penalties merely for successive or repeated offenses and unless the accused is charged as a subsequent offender, any number of offenses may be treated as first offenses. *Miles v. State*, 51 So. 2d 214 (Miss. 1951).

A second offense within the meaning of this section [Code 1942, § 2613] must have been committed after the conviction of the prior offense, and a third offense after the conviction of the second offense. *Miles v. State*, 51 So. 2d 214 (Miss. 1951).

Before there can be a conviction of second offense of unlawful possession of intoxicating liquor, it is absolutely necessary that former conviction or plea of guilty be proven by state, and this is best shown by introduction of judgment of conviction although judgment may show dismissal of other charges against defendant. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

In prosecution for second offenses, as to unlawful possession of intoxicating liquors, it is proper to show first conviction by record of first conviction identified by justice of peace who succeeded one who tried defendant, as succeeding justice is custodian of record and proper witness to identify it and all docket entries made by his predecessor. *Outlaw v. State*, 208 Miss. 13, 43 So. 2d 661 (1949).

Affidavit is void and judgment of conviction of second offense of possession of intoxicating liquors is invalid when affidavit does not specifically refer to this sec-

tion [Code 1942, § 2613], since statute requires that the second and third convictions must be "under this section [Code 1942, § 2613]." *Riley v. State*, 204 Miss. 562, 37 So. 2d 768 (1948).

The issue as to a prior conviction is not whether the accused was therein properly convicted, but whether as an affirmative matter he was finally convicted. *Vincent v. State*, 200 Miss. 423, 27 So. 2d 556 (1946).

Authentication by a justice of the peace in form substantially that provided by Code 1942, § 1725, is sufficient evidence of prior conviction if the authenticated record shows former charge, issuance of warrant, trial, plea of guilty, fine and payment of fine; it is not necessary to introduce a complete transcript as on appeal from the first conviction. *Vincent v. State*, 200 Miss. 423, 27 So. 2d 556 (1946).

Conviction as a second offender hereunder is not precluded by the two year statute of limitations by reason of the fact that the prior conviction charged occurred more than two years prior to the indictment therefor, since the limitation applies solely to prosecutions and does not operate to recast the status of a defendant as a prior offender. *McGowan v. State*, 200 Miss. 270, 25 So. 2d 131 (1946), error overruled, 200 Miss. 281, 26 So. 2d 70 (1946).

Conviction as a second offender under this statute may not be predicated upon a prior conviction under a city ordinance. *Trivillion v. State*, 195 Miss. 308, 15 So. 2d 285 (1943).

Conviction of defendant for an offense hereunder as a second offender could not stand, although the jury necessarily found the defendant guilty of the subsequent offense and therefore in any event punishable thereunder. *Trivillion v. State*, 195 Miss. 308, 15 So. 2d 285 (1943).

Notwithstanding the repeal of the former statute on this subject by § 2, Code 1930, with respect to the question of gradation of punishment for repeating offenders, such former statute must be considered by way of aid to a proper construction or interpretation of this section [Code 1942, § 2613] which took its place. *Millwood v. State*, 190 Miss. 750, 1 So. 2d 582 (1941), aff'd, 6 So. 2d 619 (Miss. 1942).

When the procedure seeks to hold the accused as a repeating offender, it must be charged in the affidavit or indictment and shown by the proof that previously to the commission of the offense then being prosecuted, the accused had been convicted of a distinct prior offense or offenses under the statute, as against the contention that this section [Code 1942, § 2613] now requires for a felony charge that there shall only have been two previous convictions, even though the three offenses may have been committed on the same day and before any conviction for either of them. *Millwood v. State*, 190 Miss. 750, 1 So. 2d 582 (1941), aff'd, 6 So. 2d 619 (Miss. 1942).

Where the prosecution sought to charge the defendant with a felony grounded upon a third offense hereunder, and the proof failed to show two distinct prior convictions before the offense for which he was then being prosecuted, the conviction would be reversed and remanded in its entirety rather than a reversal only as to the felony sentence and a remand for the proper sentence as a misdemeanor. *Millwood v. State*, 190 Miss. 750, 1 So. 2d 582 (1941), aff'd, 6 So. 2d 619 (Miss. 1942).

Evidence insufficient to show conviction of prior offenses under statute. *Williams v. State*, 125 Miss. 347, 87 So. 672 (1921).

Indictment properly set forth the two former convictions and records thereof were admissible. *Robinson v. State*, 109 Miss. 284, 68 So. 249 (1915).

First offense must have been under this statute to authorize conviction for second offense. *Boroum v. State*, 105 Miss. 887, 63 So. 297 (1913), error overruled, 105 Miss. 893, 63 So. 457 (1913).

20. Punishment.

Where the maximum permissible sentence is three months, a 90 day sentence which will run during February is improper. *Warbington v. State*, 234 Miss. 743, 107 So. 2d 578 (1958).

A defendant, represented by brother of the judge, who gave the defendant a maximum penalty on conviction of the unlawful sale of intoxicating liquor, had been denied a fair and impartial trial. *Barnes v. State*, 220 Miss. 248, 70 So. 2d 920 (1954).

Where defendant pleaded guilty to first offense of possession of intoxicating liquors, a misdemeanor, at a term of court which expired without imposition of sentence and the court thereafter sentenced defendant for confinement of two years on the mistaken belief that defendant was convicted as third offender, he was not entitled to a habeas corpus since the custody by the sheriff was proper to the extent that the defendant was made answerable to the court in further proceedings to impose sentence as for the misdemeanor. *White v. State*, 214 Miss. 235, 58 So. 2d 510 (1952).

Subdivision (b), in failing to fix a maximum fine, is incomplete and brings into effect Code 1942, § 2562, fixing a maximum fine of \$500 for misdemeanors where no other statute prescribes penalty. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

Where fine greater than that permitted by Code 1942, § 2562, providing for maximum penalties in misdemeanors was imposed for violation of subdivision (b) of this section [Code 1942, § 2613], supreme court, upon reversal, would remand cause to trial court for imposition of sentence. *Jenkins v. State*, 207 Miss. 281, 42 So. 2d 198 (1949).

A judgment imposing a fine of \$500 and sentence of 120 days' imprisonment on conviction of unlawful possession of intoxicating liquors was improper, but, it being apparent that the trial court had intended to fix the maximum penalty but exceeded it by one month, the supreme court reduced the sentence to that authorized by the statute, leaving the fine standing and fixing the imprisonment at three months. *Crosby v. State*, 8 So. 2d 464 (Miss. 1942).

Under statute providing maximum imprisonment for possession of intoxicating liquor, "month" meant calendar month, in computing which, time must be reckoned by looking at calendar and not by counting days. Where beginning is not coincident with first day of calendar month, month is computed to day numerically corresponding thereto in following month less one, if following month has so many days, and if not to last day thereof. *Langley v. State*, 154 So. 544 (Miss. 1934).

Where bail bond required accused to surrender to sheriff within one week after

judgment of affirmance by supreme court was certified to circuit court, and suggestions of error in affirmance were overruled June 5, accused's sentence of ninety days would not include month of February, and was not invalid as exceeding maximum of three calendar months. *Langley v. State*, 154 So. 544 (Miss. 1934).

Sentence imposing fine and jail term on conviction for selling liquor, in accordance with law later held unconstitutional, will be set aside. *Thomas v. State*, 150 Miss. 504, 117 So. 119 (1928).

Accused tried for first offense cannot be imprisoned for 6 months under Laws 1912, ch. 214. *Gaston v. State*, 107 Miss. 484, 65 So. 563 (1914).

Bond for good behavior may be required of one convicted third time of violation of liquor law. *Caldwell v. State*, 87 Miss. 420, 39 So. 896 (1906).

Fine of \$200 and imprisonment for 3 months in county jail for violation of local option act, not excessive. *Haynes v. State*, 23 So. 182 (Miss. 1898).

21. Former acquittal or conviction.

Where the record in a criminal proceeding charging the defendant with the unlawful sale of intoxicating liquors showed a confusion of jurisdiction as to whether the trial magistrate acted as a police justice or as an ex officio justice of the peace, the conviction could not be sustained since because of such confusion the defendant would not be in a position to make a plea of former conviction or former acquittal against a further prosecution for violation either of the city ordinance or of the state laws. *Wright v. City of Belzoni*, 188 Miss. 334, 194 So. 919 (1940).

To avail of a former acquittal for unlawful retailing, the record must be introduced and the identity of the offense shown by evidence aliunde. *Brown v. State*, 72 Miss. 95, 16 So. 202 (1894).

22. Appeal.

Upon an appeal from a conviction of unlawful possession of intoxicating liquor, defendant's contention, made for the first time in the supreme court, that the circuit court had no jurisdiction on an appeal from a justice of the peace court because there was no certified copy of the proceedings had in the justice of the peace court

could not avail defendant whose only objection made to the transcript at the time of the trial was that it was not under seal by the justice of the peace. *Jones v. State*, 230 Miss. 887, 94 So. 2d 234 (1957), overruled on other grounds, *Mattox v. State*, 243 Miss. 402, 137 So. 2d 920 (1962).

Where defendant convicted under this section [Code 1942, § 2613] perfects an appeal from a justice court to circuit court, and on return day, defaults, the circuit court may dismiss such appeal and order a writ of procedendo to the lower court without determining validity of the proceedings. *Hegwood v. State*, 208 Miss. 517, 44 So. 2d 850 (1950).

On appeal from conviction of unlawful possession of intoxicating liquor all supreme court can grant defendant is new trial where evidence against him was so lacking in weight that court is justified in reversing case and defendant failed to ask for directed verdict in lower court at end of all evidence for both sides but incorporation in motion for new trial ground that verdict of jury was against overwhelming weight of evidence. *Faust v. State*, 43 So. 2d 379 (Miss. 1949).

The right of a defendant, convicted of unlawfully possessing intoxicating liquor, to appeal upon the record, and to stand thereon, was not affected by his failure to give timely notice to the court reporter to transcribe the notes of the evidence, where the transcript of the testimony was nevertheless sent up with the record, and he filed the proper bond; and such omission, regardless of its effect upon the right of the appellant to avail of the reporter's transcript, did not justify a summary dismissal of his appeal. *Redmond v. City of McComb*, 192 Miss. 61, 4 So. 2d 494 (1941).

23. Miscellaneous.

Forfeiture applies when the prohibition law is violated using a vehicle for concealing or transporting of liquor in excess of 6 gallons; the burden is upon the State to prove that the forfeiture comes within the statute imposing liability by a preponderance of the evidence. Thus, an automobile which was used by the defendant to transport more than 6 gallons of intoxicating liquor into a "dry" county, was subject to forfeiture following the defendant's con-

viction for unlawful possession of intoxicating liquor in violation of this section. *Mississippi State Tax Comm'n v. One (1) 1984 Black Mercury Grand Marquis*, 568 So. 2d 707 (Miss. 1990).

In determining whether a juror is "disqualified" within the meaning of § 13-5-67 when he or she has withheld information or misrepresented material facts on voir dire examination, the test is whether the juror withheld substantial information or misrepresented material facts in the face of a clearly worded question which was relevant to the case at bar. Voir dire examination is often the most crucial crucible in forging the primary instrument of justice—the fair and impartial jury. When offering challenges for cause and challenges peremptory, parties and their lawyers must rely on the objective candor and responsiveness of prospective jurors, and nothing turns on who asks the question, so long as it was clearly worded. Following a jury's verdict, where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court must grant a new trial; prejudice is presumed. Where, as a matter of common experience, a full and correct response would have provided the basis for a peremptory challenge, not rising to the dignity of a challenge for cause, the courts have greater discretion, though a discretion that should always be exercised against the backdrop of the duty to secure to each party trial before a fair and impartial jury. Thus, in a prosecution for felony sale of alcoholic and intoxicating beverages, the circuit court's action in removing a juror was within the scope of its authority where the juror failed to respond on 3 separate occasions during voir dire to defense counsel's questions as to whether any prospective juror or any "relative or member of the juror's immediate family" had been involved in a criminal proceeding, and the juror's husband had 2 liquor-related criminal convictions. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

A person charged with unlawful possession of intoxicating liquor need not wait until he has actually been fined or com-

mitted to jail before he can exercise his rights to contest the constitutionality of discrimination which he alleges has been practiced against him, for the controlling question is whether he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of a statute he contends is illegal. *State v. Wood*, 187 So. 2d 820 (Miss. 1966).

In a prosecution for unlawful possession of intoxicating liquors, where defendant moved that the jury panel be quashed on the ground of prejudice and showed that one of the jurors was related to the sheriff and a state witness, the circuit court committed no error in disposing of the motion by dismissing the juror. *Smith v. State*, 219 Miss. 741, 69 So. 2d 837 (1954).

Overruling of motion to withdraw plea of guilty after conviction of unlawful possession of intoxicating liquor and to enter plea of not guilty was proper where motion did not allege defendant was innocent of the offense charged or any facts upon which innocence could be assumed or a legal defense predicated. *Edwards v. State*, 209 Miss. 325, 46 So. 2d 790 (1950).

One accused of unlawful possession of intoxicating liquor did not come within the protection of Code 1942, §§ 2634 to 2638 inclusive, on the theory that she was ill and that her attending physician had prescribed whisky as a stimulant, where physician issued no written prescription and it did not appear where or from whom accused obtained the whisky. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

A provision of statute permitting sale of intoxicating liquor under certain conditions, to be effective only in county electing to come under it, is not unconstitutional as delegation of legislative power as applied to prosecution under law allegedly repealed thereby. *Stewart v. State*, 179 Miss. 31, 174 So. 579 (1937).

Eighteenth amendment and Volstead Act do not supersede or abrogate existing

state prohibition law. *Meriwether v. State*, 125 Miss. 435, 87 So. 411 (1921).

A proceeding for the seizure and destruction of intoxicating liquors unlawfully kept can be instituted only before a justice of the peace, who is required to destroy all liquor so seized for which no claim is made. *Holberg Mercantile Co. v. State*, 95 Miss. 21, 48 So. 622 (1909).

Sale of intoxicating liquor disguised under unusual and unfamiliar labels, not encouraged by courts. *Bacot v. State*, 94 Miss. 225, 48 So. 228, 136 Am. St. R. 574 (1909).

Every sale without license presumed in violation of law. *Goode v. State*, 87 Miss. 495, 40 So. 12 (1906).

II. UNDER FORMER LAW.

24. Advertising of liquors prohibited.

Former § 97-31-1 was an unconstitutional infringement of commercial free speech. *Dunagin v. City of Oxford*, 701 F.2d 335 (5th Cir. 1983), reh'g granted, 701 F.2d 336 (5th Cir. 1983), on reh'g, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984).

Mississippi's intrastate liquor advertising ban, former §§ 97-31-1 et seq., violated Mississippi Media Businesses' First Amendment guaranty of freedom of speech, where the law did little to directly advance the government's interest of promoting health and safety for Mississippi residents, in light of uncontradicted evidence that Mississippi residents were literally inundated with liquor advertisements from sources originating outside the state. *Lamar Outdoor Adv., Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314 (5th Cir. 1983), on reh'g, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984), cert. denied, 467 U.S. 1259, 104 S. Ct. 3554, 82 L. Ed. 2d 855 (1984).

RESEARCH REFERENCES

ALR. Operation and effect, in dry territory, of general state statute making sale or possession for sale of intoxicating liquor, without a license, an offense. 8 A.L.R.2d 750.

Provision as to sale of liquor to women

as affecting validity of regulatory statute. 9 A.L.R.2d 541.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction. 11 A.L.R.2d 870.

Validity and construction of measure

prohibiting retail alcoholic beverage seller from furnishing free food or drink. 66 A.L.R.2d 758.

Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 A.L.R.3d 589.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle. 35 A.L.R.3d 1418.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 A.L.R.5th 263.

Am Jur. 45 Am. Jur. 2d, Intoxicating Liquors §§ 1 et seq.

CJS. 48 C.J.S., Intoxicating Liquors §§ 311, 313, 324, 380.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 19:19.

§ 97-31-29. Sale, possession, etc. of intoxicating beverages prohibited; agent or assistant of seller or buyer punished.

If any person shall act as agent or assistant of either the seller or purchaser, in effecting the sale of any liquor, bitters or drinks, the sale of which is forbidden under this chapter, he shall be guilty of a misdemeanor and on conviction shall be fined not less than one hundred dollars, or be imprisoned in the county jail not less than thirty days, or both.

SOURCES: Codes, 1892, § 1604; Laws, 1906, § 1771; Hemingway's 1917, § 2103; Laws, 1930, § 1990; Laws, 1942, § 2629; Laws, 1890, p. 71; Laws, 1908, ch. 115.

Cross References — Unlawful possession of alcoholic beverages or related personal property, see § 67-1-17.

Accessories before the fact, see § 97-1-3.

Solicitation of unlawful orders for intoxicating liquors, see § 97-31-49.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 2629] is constitutional. *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 112 Am. St. R. 446 (1905).

2. Construction and application.

Accused who was not acting as agent for seller did not violate law by aiding purchaser. *Harris v. State*, 113 Miss. 457, 74 So. 323 (1917).

Fact that accused purchased liquor jointly with another did not alter nature of the offense. *Simmons v. State*, 102 Miss. 605, 59 So. 849 (1912).

Where accused is not charged with selling liquor, the place where sale was actually consummated is immaterial. *Powell v. State*, 96 Miss. 608, 51 So. 465 (1910).

Where accused wrote his name on blank piece of paper and delivered it to others who gave it to the express agent with \$3.50 and received whisky from the agent, this constituted sale by accused though no word had passed between any of parties. *Bennett v. State*, 87 Miss. 803, 40 So. 554 (1906).

Indictment charging defendant with having assisted a third person to buy whisky in a place outside the state charged no offense. *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 112 Am. St. R. 446 (1905); *Anderson v. State*, 109 Miss. 521, 68 So. 770 (1915).

Person engaged in liquor business in Louisiana who took orders and collected purchase-price for whisky in Mississippi which subsequently was delivered to express company in Louisiana for transport-

tation and delivery, violated the statute. *Sinclair v. State*, 87 Miss. 330, 39 So. 522, 112 Am. St. R. 446 (1905).

RESEARCH REFERENCES

CJS. 48 C.J.S., Intoxicating Liquors
§ 339.

§ 97-31-31. Sale, possession, etc. of intoxicating beverages prohibited; connivance by owner, occupant, etc. of house or boat where liquor kept.

Every owner, lessee, sub-lessee, or occupant of any boat, house, outhouse, or other building, or tenement in which the liquors described in Section 97-31-27 are unlawfully kept, sold, bartered, or given away, shall be guilty of a misdemeanor, if he shall connive therein, directly or indirectly, in any manner, or shall fail to give information thereof when he knows of the same, or of circumstances indicating the same, to some conservator of the peace. Proof of an unlawful keeping of such liquors, or of an unlawful sale, barter, or giving away thereof, in such building, shall constitute presumptive evidence of a violation of this section by any owner, lessee, sub-lessee, or occupant who has not given the information herein required. Any person convicted of violating the provisions of this section shall be fined not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than one week nor more than three months, or by both such fine and imprisonment.

SOURCES: Codes, 1857, ch. 20, art. 21; 1871, § 2694; 1880, § 1117; 1892, § 1598; Laws, 1906, § 1764; Hemingway's 1917, § 2100; Laws, 1930, § 1987; Laws, 1942, § 2626.

Cross References — Unlawful possession of alcoholic beverages or related personal property, see § 67-1-17.

Temporary injunction against nuisance, see § 95-3-11.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The trial and acquittal of the owner on the charge of unlawfully selling, is not a bar to a subsequent prosecution for conniving at a sale, although both prosecutions be predicated on the same sale. *Carroll v. State*, 80 Miss. 349, 31 So. 742 (1902).

On the trial of a storekeeper for conniving at a sale by his clerk, it being shown that the clerk sold what appeared to be

whisky, evidence that the clerk besought a witness to withhold the transaction from the grand jury is admissible, as it tends to show that the liquor sold was whisky, although the sale did not occur in the presence or hearing of defendant. *Carroll v. State*, 80 Miss. 349, 31 So. 742 (1902).

Proof of sale by another constitutes presumptive evidence that the owner connived thereat, if he failed to give information thereof to some conservator of the

peace. *Carroll v. State*, 80 Miss. 349, 31 So. 742 (1902).

RESEARCH REFERENCES

CJS. 48 C.J.S., *Intoxicating Liquors* Handbook for Mississippi Lawyers § 376, 377 and 379. § 19:19.

Practice References. Young, *Trial*

§ 97-31-33. Sale, possession, etc. of intoxicating beverages prohibited; exceptions; records to be kept by carrier; exceptions may be relied upon as defense.

Nothing in this chapter shall make it unlawful:

(a) For any minister or priest of any religious sect or denomination in actual charge of a church, religious order or congregation to order, purchase, and have shipped, transported and delivered, wine for sacramental purposes, nor for any common carrier to ship, transport, carry or deliver wine for said purposes to any such minister or priest, nor for any such minister or priest to have, receive, control or possess wine for sacramental purposes, but the said wine shall remain in the possession of such minister or priest save when the wine is being administered in the sacramental service or in the service in commemoration of the Lord's Supper.

(b) For any practicing physician, who is the sole proprietor of a drugstore, any licensed druggist, wholesale druggist, pharmacist, manufacturer, college, medical or pharmaceutical college, public or charity hospital, or state institution or chemists or bacteriologists, to order, purchase and have shipped and delivered, or to have, receive and possess, nor for any common carrier to transport, ship and deliver to any of said persons, firms, corporations or institutions grain or pure alcohol for any purpose now permitted by the laws of the state, to any such person, college, hospital, or institution, and to be used only for medicinal, mechanical, and scientific purposes not contravening in any way the prohibition laws of this state. Nor for any dentist to order, purchase, nor for any dentist to have, control, receive and possess alcohol as is herein provided in the case of a physician.

(c) But, records shall be kept by the carrier, or delivering party, of such wines for sacramental purposes, and of all such alcohol and statement thereof shall be filed with the clerk of the circuit court as provided by law.

(d) The exceptions defined in this section may be relied upon as a defense and the burden of establishing the same shall be upon the person claiming the benefits thereof.

SOURCES: Codes, *Hemingway's 1921 Supp.* §§ 2163m, 2163n; Laws, 1930, §§ 2012, 2013; Laws, 1942, §§ 2651, 2652; Laws, 1918, ch. 189.

Cross References — Prohibition of alcoholic beverages except as authorized by law, see § 67-1-9.

Unlawful possession of alcoholic beverages or related personal property, see § 67-1-17.

Sales by druggists, see §§ 97-31-37 through 97-31-45.

Sale of certain alcoholic preparations and extracts, see §§ 97-31-5 et seq.

Lawful ownership of distillery or still, see § 97-31-23.

Another section derived from same 1942 code sections, see § 99-7-29.

JUDICIAL DECISIONS

1. In general.

In charging offense of unlawful possession of wine, it is not necessary to negative exception of homemade wine, and state is not required to prove that wine was not homemade wine used for domestic and household purposes only. *Forbert v. State*, 179 Miss. 66, 174 So. 248 (1937).

Indictment charging unlawful possession of still held not demurrable because it did not show it was a whisky still. *Powe v. State*, 176 Miss. 455, 169 So. 763 (1936).

Indictment for possession need not negative exceptions in statute. *Frazier v. State*, 141 Miss. 18, 106 So. 443 (1925).

An indictment for unlawful possession of a still must negative exceptions. *State v. Speaks*, 132 Miss. 159, 96 So. 176 (1923); *Dawsey v. State*, 136 Miss. 18, 100 So. 526 (1924); *State v. Clark*, 145 Miss. 207, 110 So. 447 (1926).

RESEARCH REFERENCES

Am Jur. 45 *Am. Jur.* 2d, *Intoxicating Liquors* §§ 1 et seq.

§ 97-31-35. Sale, possession, or use of alcoholic beverages within facilities; employee knowledge; punishment for violations.

(1) It is unlawful for any person to sell within, bring to, or be in possession of, in any correctional facility or convict camp within the state or any county, municipal or other jail within the state, except as authorized by this chapter, any alcoholic beverage including any vinous, spirituous, malt or intoxicating liquor, or intoxicating drinks which if drunk to excess will produce intoxication.

(2) It is unlawful for any person who is the keeper or officer in charge of the facility, camp or jail, or who is employed in or about the facility, camp or jail to knowingly permit any alcoholic beverage to be sold, possessed or used therein contrary to law.

(3) Any person who violates the provisions of this section and is convicted shall be fined up to Ten Thousand Dollars (\$10,000.00) and be punished by imprisonment for not less than two (2) years, nor more than five (5) years; and that person will not be eligible for probation, parole, suspension of sentence, earned time allowance or other reduction of sentence.

SOURCES: Codes, 1857, ch. 20, art. 22; 1871, § 2695; 1880, § 1118; 1892, § 1599; Laws, 1906, § 1765; Hemingway's 1917, § 2101; Laws, 1930, § 1988; Laws, 1942, § 2627; Laws, 1998, ch. 391, § 4, eff from and after July 1, 1998.

Cross References — Offense of furnishing offenders alcoholic beverages, controlled substances, narcotic drugs, or weapons or deadly weapons, see §§ 47-5-191 through 47-5-195.

Unlawful possession of alcoholic beverages and related personal property, see § 67-1-17.

RESEARCH REFERENCES

ALR. Validity, construction, and application of state statute criminalizing possession of contraband by individual in penal or correctional institution. 45 A.L.R.5th 767.

§ 97-31-37. Sale of alcohol by druggists; certain sales by retail and wholesale druggists permitted.

Any licensed retail druggist in this state may sell in the manner herein set out pure alcohol for medicinal purposes only; grain alcohol to chemists and bacteriologists actually engaged in scientific work and for the purpose of being used only in such work; and wine to be used for sacramental purposes only; provided that the wholesale druggists domiciled and doing business in this state may sell pure alcohol in quantities not less than one gallon to licensed retail druggists, and to licensed and practicing physicians, and to public or charity hospitals, and to medical or pharmaceutical colleges, but all wholesale druggists shall make and preserve for two years after such sales a complete record of sales of alcohol which shall at all times be open for inspection to any conservator of the peace of the county; and provided further, that nothing in this chapter shall be construed to prohibit the manufacture or sale of wood and denatured alcohol for art, scientific and mechanical purposes. A person shall not be deemed a licensed retail druggist within the meaning of this section by reason of being a licensed physician or pharmacist.

SOURCES: Codes, Hemingway's 1917, § 2114; Laws, 1930, § 1995; Laws, 1942, § 2634; Laws, 1908, ch. 113.

Cross References — Local option alcoholic beverage control law, see §§ 67-1-1 et seq.

Prohibition of alcoholic beverages except as authorized by law, see § 67-1-9.

Regulation of sale of alcoholic beverages, generally, see §§ 67-3-1 et seq.

Sale, etc., of denatured alcohol, see § 97-31-17.

Exceptions to unlawful sale, possession, etc., generally, see § 97-31-33.

JUDICIAL DECISIONS

1. In general.

One accused of unlawful possession of intoxicating liquor did not come within the protection of Code 1942, §§ 2634 to 2638 inclusive, on the theory that she was ill and that her attending physician had prescribed whisky as a stimulant, where physician issued no written prescription and it did not appear where or from whom accused obtained the whisky. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

A defendant's drugstore would not be abated as a common nuisance on the ground that alcohol was sold in violation of the statute prohibiting any licensed retail drugstore from selling "pure" alcohol for medicinal purposes except on written prescription of a physician, where the suit was brought by the district attorney for the recovery of the tax imposed for selling or giving away liquors unlawfully, and to obtain an injunction suppressing

the business as a nuisance. State ex rel. v. Carr, 191 Miss. 659, 4 So. 2d 237 (1941).

In an action involving the alleged illegal sale of intoxicating liquors, the state chemist testified that the preparations

sold by the defendant contained 82 per cent alcohol, whereas, "pure" alcohol would run from 98 per cent to 100 per cent. State ex rel. v. Carr, 191 Miss. 659, 4 So. 2d 237 (1941).

RESEARCH REFERENCES

CJS. 48 C.J.S., Intoxicating Liquors
§ 140.

§ 97-31-39. Sale of alcohol by druggists; medicinal purposes; physician's certificate.

No sale of pure alcohol for medicinal purposes shall be made except upon the written prescription of a licensed and practicing physician of this state, who, before writing such prescription shall have made an actual examination of the patient for whom the prescription is issued, which prescription shall be dated and signed by the physician and shall be in substantially the following form:

"State of Mississippi, _____ County, I _____ a regularly licensed and practicing physician under the laws of this state, do hereby certify that I have examined _____ a patient in my charge, and hereby prescribe for the use of said patient _____ of pure alcohol, and I certify that the use thereof is necessary to alleviate or cure the illness or disease from which such patient is suffering. Dated _____"

_____, M. D.

No prescription shall be filled hereunder except upon the day upon which it is issued or the following day, and no more than half a pint of alcohol shall be furnished on any one prescription, and when such prescription is filled it shall not be refilled, but shall be delivered to the druggist filling the same, and at the end of the month in which the same is filed shall be filed by such druggist in the office of the circuit clerk of the county. In towns having a population of 1,000 or more the physician's prescription shall not be filled at any drug store of which he is the proprietor, or in which he has a financial interest, either as partner, stockholder, or otherwise.

Any person purchasing alcohol for any purpose set out in this section, for which a prescription is not required herein, shall first sign a written or printed statement properly dated and deliver the same to the druggist, stating his name, residence and occupation, and the purpose for which he intends to use said alcohol.

SOURCES: Codes, Hemingway's 1917, § 2115; Laws, 1930, § 1996; Laws, 1942, § 2635; Laws, 1908, ch. 113.

JUDICIAL DECISIONS

1. In general.

One accused of unlawful possession of intoxicating liquor did not come within the protection of Code 1942, §§ 2634 to 2638 inclusive, on the theory that she was ill and that her attending physician had

prescribed whisky as a stimulant, where physician issued no written prescription and it did not appear where or from whom accused obtained the whisky. *Conner v. State*, 196 Miss. 335, 17 So. 2d 527 (1944).

RESEARCH REFERENCES

CJS. 48 C.J.S., Intoxicating Liquors § 99.

§ 97-31-41. Sale of alcohol by druggists; wine for sacramental purposes.

It shall be unlawful to sell wine for sacramental purposes except to a minister, pastor, priest, or officer of a regularly organized church or religious congregation, and before such a sale is made, the person desiring to make such purchase shall sign and deliver to the druggist a written or printed statement giving his name, residence, and the name and location of the church for which the wine is purchased, and shall certify that it is purchased in good faith to be used only for sacramental purposes.

SOURCES: Codes, Hemingway's 1917, § 2116; Laws, 1930, § 1997; Laws, 1942, § 2636; Laws, 1908, ch. 113.

Cross References — Regulation of sale of light wines, etc., generally, see §§ 67-3-1 et seq.

Exceptions to unlawful sale, possession, etc., generally, see § 97-31-33.

RESEARCH REFERENCES

Am Jur. 45 Am. Jur. 2d, Intoxicating Liquors § 72.

§ 97-31-43. Sale of alcohol by druggists; statement of sales or prescriptions to be filed with circuit clerk; filing fee.

All statements or prescriptions required by this chapter shall be delivered at the end of the month in which they were given or within five days thereafter to the circuit clerk of the county in which the sale was made and shall be filed and preserved by the circuit clerk in his office for a period of not less than two years, and shall moreover be promptly listed and indexed in a book kept for that purpose, which shall show the name of the druggist making the sale, the name of the purchaser, the date of the statement or prescription and the quantity of alcohol purchased. The original statement or prescription with the certificate of the circuit clerk endorsed thereon, showing that it has been registered, or a certified copy of such record, shall be prima facie evidence in

any prosecution, suit or proceeding of the facts recited therein. The circuit clerk for filing and registering each statement or prescription, shall be entitled to a fee of ten cents, which shall be paid by the druggist filing the same.

SOURCES: Codes, Hemingway's 1917, § 2117; Laws, 1930, § 1998; Laws, 1942, § 2637; Laws, 1908, ch. 113.

JUDICIAL DECISIONS

1. In general.

Statute requiring statement of sales of alcohol to be kept on file for two years had

no bearing on revoking suspension of sentence after two years. *Bolton v. State*, 166 Miss. 290, 146 So. 453 (1933).

§ 97-31-45. Sale of alcohol by druggists; penalties for certain violations.

Any physician who signs or issues any prescription containing any false statement; any druggist who shall sell any alcohol or shall fill any prescription for alcohol in anywise other than herein allowed, or shall refill any prescription for alcohol or who shall fail to file a prescription filled by him in the office of the circuit clerk within the time prescribed; any person who shall obtain alcohol or wine for any purpose authorized herein and who shall convert the same to any other use; shall be guilty of a misdemeanor and shall, on conviction, be fined not less than fifty dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than one week, or more than three months, or both. But in no case of a conviction of any person for an offense under this section committed after a conviction and punishment for a former offense hereunder, shall the punishment be less than a fine of one hundred dollars nor more than provided in this section, or imprisonment in the county jail for not less than sixty days nor more than six months, or both, in the discretion of the court.

SOURCES: Codes, Hemingway's 1917, § 2118; Laws, 1930, § 1999; Laws, 1942, § 2638; Laws, 1908, ch. 113.

Cross References — Suspension or revocation of physician's license, see § 73-25-27. Physician's certificate, see § 97-31-39.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

CJS. 48 C.J.S., Intoxicating Liquors
§ 140.

§ 97-31-47. Transportation of intoxicating liquors into or within state unlawful.

It shall be unlawful for any transportation company, or any agent, employee, or officer of such company, or any other person, or corporation to transport into or deliver in this state in any manner or by any means any

spirituous, vinous, malt, or other intoxicating liquors or drinks, or for any such person, company, or corporation to transport any spirituous, malt, vinous, or intoxicating liquors or drinks from one place within this state to another place within the state, or from one (1) point within this state to any point without the state, except in cases where this chapter or Section 67-9-1 authorizes the transportation.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163a; Laws, 1930, § 2003; Laws, 1942, § 2642; Laws, 1918, ch. 189; Laws, 1996, ch. 417, § 13, eff from and after July 1, 1996.

Cross References — Unlawful possession of alcoholic beverages and related personal property, and forfeiture thereof, see §§ 67-1-17, 67-1-18.

Regulation of distribution of alcoholic beverages under local option alcoholic beverage control law, see §§ 67-1-41 et seq.

Regulation of transportation of light wines and beer, see § 67-3-61.

JUDICIAL DECISIONS

1. In general.

Under Webb-Kenyon act, states may prohibit such shipments. *James Clark Distilling Co. v. Western Md. R. Co.*, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326, Am. Ann. Cas. 1917B,845 (1917).

Where undisputed facts showed that neither taxicab owner nor chauffeur knew that passenger was using car to transport intoxicating liquors, and that the owner had not been negligent in employing the chauffeur, and had directed him not to use the car for such illegal purposes, the circuit court could not order the car forfeited

and destroyed. *Aldinger v. State*, 115 Miss. 314, 75 So. 441 (1917).

Delivery of liquor to boat in Louisiana for continuous passage into Mississippi was an interstate shipment and did not violate Code 1906, § 1771. *American Express Co. v. Miller*, 104 Miss. 247, 61 So. 306 (1913).

Nonintoxicating beverage containing 5.73% malt is within prohibition act 1908 ch. 115 § 1. *Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 So. 316 (1911), aff'd, 226 U.S. 192, 33 S. Ct. 44, 57 L. Ed. 184 (1912).

RESEARCH REFERENCES

Am Jur. 45 Am. Jur. 2d, Intoxicating Liquors §§ 35 et seq., 317, 340, 358, 370, 402.

CJS. 48 C.J.S., Intoxicating Liquors §§ 369-374.

§ 97-31-49. Solicitation of orders for liquors, etc. unlawful.

It shall be unlawful for any person, firm or corporation in this state, in person, by letter, circular, or other printed or written matter, or in any other manner, to solicit or take order in this state for any liquors, bitters or drinks prohibited by the laws of this state to be sold, bartered, or otherwise disposed of. The inhibition of this section shall apply to such liquors, bitters and drinks, whether the parties intend that the same shall be shipped into this state from outside of the state, or from one point in this state to another point in this state. If such order be in writing, parol evidence thereof is admissible without producing or accounting for the absence of the original; and the taking or

soliciting of such orders is within the inhibition of this section, although the orders are subject to approval by some other person, and no part of the price is paid, nor any part of the goods is delivered when the order is taken.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163g; Laws, 1930, § 2006; Laws, 1942, § 2645; Laws, 1918, ch. 189.

Cross References — One acting as agent in sale of liquor, see § 97-31-29.

RESEARCH REFERENCES

Am Jur. 45 Am. Jur. 2d, Intoxicating Liquors § 279. **CJS.** 48 C.J.S., Intoxicating Liquors § 339.

§ 97-31-51. Witnesses; immunity from prosecution granted; penalty for refusing to testify.

No person shall be excused from attending and testifying before a grand jury, or before any court, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or any amendment thereof, on the ground and for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before the grand jury, or any court; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than ninety days, or by both such fines and imprisonment.

SOURCES: Codes, 1906, § 1792; Hemingway's 1917, § 2106; Laws, 1930, § 1991; Laws, 1942, § 2630.

Cross References — Subpoena and swearing of witnesses before grand jury, see § 13-5-63.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Immunity of witnesses in intoxicating liquor proceedings, generally, see § 99-27-45.

JUDICIAL DECISIONS

1. In general.
2. Proceedings before grand jury.
3. Applicability to civil actions.

1. In general.

In view of this section [Code 1942, § 2630], a defendant, who by his own

testimony admitted the sale of intoxicating liquors in connection with his mercantile business could not be prosecuted for such offense, since by his confession of guilt he subjected himself to penalty and forfeiture of both his liquor business and his mercantile business. *Malouf v. Gully*, 187 Miss. 331, 192 So. 2 (1939).

The immunity granted by this section [Code 1942, § 2630] is to a witness introduced by, and compelled to testify at the instance of, the state. *Ivey v. State*, 153 Miss. 41, 120 So. 449 (1929).

Defendant testifying on trial of another on behalf of the latter was not entitled to immunity from prosecution. *Ivey v. State*, 153 Miss. 41, 120 So. 449 (1929).

Law granting immunity held inapplicable to information secured by county attorney while interrogating state witness preparatory to trial. *Cook v. State*, 150 Miss. 304, 116 So. 598 (1928).

Person testifying as to violation of prohibition laws is immune from prosecution for crime revealed by his testimony. *State v. White*, 140 Miss. 245, 105 So. 500 (1925).

Burden on defendant to establish facts constituting immunity. *Hosey v. State*, 136 Miss. 5, 100 So. 577 (1924).

Defendant testifying for jointly indicted defendant not entitled by reason thereof to immunity. *Turnage v. State*, 134 Miss. 431, 99 So. 9 (1924).

When accused entitled to immunity in prosecution for unlawful sale of intoxicating liquors stated. *Maxie v. State*, 133 Miss. 243, 97 So. 560 (1923).

Party compelled to incriminate himself in preliminary trial of another held immune in prosecution. *Griffin v. State*, 127 Miss. 315, 90 So. 81 (1921).

2. Proceedings before grand jury.

Where the defendant appeared before a grand jury which indicted him for the crime of unlawfully selling intoxicating liquor, defendant was not entitled to a claim of immunity inasmuch as he did not testify to anything pertaining to the sale of intoxicating liquor and he gave no testimony that would tend to incriminate him. *Odom v. State*, 213 Miss. 363, 56 So. 2d 887 (1952).

Defendant who, while charged with possessing liquor, was called before grand

jury, and testified concerning subject of prosecution, held entitled to immunity. *Evans v. State*, 157 Miss. 645, 128 So. 737 (1930).

Defendant, having been questioned relative to liquor conditions by grand jury when testifying voluntarily before it for another purpose, held immune from prosecution for manufacturing liquor. *Thorn-ton v. State*, 143 Miss. 262, 108 So. 709 (1926).

Defendant who testified before grand jury as to sale of liquor could not thereafter be convicted of sale. *Ryan v. State*, 136 Miss. 587, 101 So. 381 (1924); *Hosey v. State*, 136 Miss. 5, 100 So. 577 (1924).

Motion on admitted facts entitling defendant to discharge for testifying before grand jury should be sustained. *Sudduth v. State*, 136 Miss. 742, 101 So. 711 (1924).

Although prosecution begun by affidavit, defendant, testifying before grand jury concerning subject of accusation, entitled to immunity. *Triplett v. State*, 136 Miss. 320, 101 So. 501 (1924).

One voluntarily testifying before the grand jury, subsequent to indictment, relative to participation in manufacturing liquor, is immune from prosecution. *Lucas v. State*, 130 Miss. 8, 93 So. 437 (1922).

An officer who is compelled by virtue of this section [Code 1942, § 2630] to disclose before the grand jury his failure to prosecute violations of the liquor law, is immune from prosecution therefor. *Wall v. State*, 105 Miss. 543, 62 So. 417 (1913).

Indictment founded on the testimony of accused before the grand jury in pursuance to a subpoena will be quashed. *Rist v. State*, 93 Miss. 841, 47 So. 433 (1908).

3. Applicability to civil actions.

Where immunity from prosecution is granted by statute, a motion or plea based upon the constitutional right or privilege against self-incrimination is not well taken. *Dabdoub v. Venus*, 192 So. 2d 418 (Miss. 1966).

The privilege against self-incrimination applies to civil as well as criminal actions. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

The provisions of this section [Code 1942, § 2630] apply to proceedings under Code 1942, § 2639, which provides for civil action to collect penalty for unlaw-

fully selling or giving away intoxicating liquors, so that defendant who incriminates himself is immune from fines and penalties. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

Where defendants in a suit by state tax collector to collect from defendants statutory fines and penalties for unlawful sale of intoxicating liquors, were required to answer allegations in a bill of complaint in chancery as to their unlawful sales of liquor, defendants were immune from assessment of fines and penalties, notwithstanding the bill of complaint waived answer under oath. *Bailey v. Muse*, 227 Miss. 51, 85 So. 2d 918 (1956).

In a criminal prosecution for unlawful sale of intoxicating liquor, the testimony of the court's reporter concerning the previous voluntary testimony of the defendant in a civil suit for the unlawful sale of the same intoxicating liquor, was properly admitted and this evidence was not hear-

say. *Yawn v. State*, 220 Miss. 767, 71 So. 2d 779 (1954).

Where a defendant voluntarily testified as a witness in his own behalf in the civil action against him by the state tax collector for unlawful sale of intoxicating liquor, the defendant was not granted immunity from prosecution for unlawful sale of the same intoxicating liquor. *Yawn v. State*, 220 Miss. 767, 71 So. 2d 779 (1954).

In a suit in chancery on relation of district attorney to enjoin defendants from selling intoxicating liquor, where defendants were called in as adverse witnesses for cross-examination and compelled to testify that they have unlawfully sold liquor, the bill of complaint will be dismissed on the ground that the defendants were compelled to testify against themselves, and they were granted immunity from further prosecution. *Zambroni v. State ex rel. Hawkins*, 217 Miss. 418, 64 So. 2d 335 (1953).

RESEARCH REFERENCES

Lawyers' Edition. Adequacy, under Federal Constitution, of immunity

granted in lieu of privilege against self-incrimination. 32 L. Ed. 2d 869.

§ 97-31-53. Penalty for violations where punishment not specifically prescribed.

Any person, firm or corporation convicted of violating any part of this chapter for which there is not prescribed specifically the punishment for such violation, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not longer than six months, or both.

SOURCES: Codes, Hemingway's 1921 Supp. § 2163s; Laws, 1930, § 2019; Laws, 1942, § 2658; Laws, 1918, ch. 189.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Assessment and recovery of penalty on liquor dealers for unlawful sale or gift of malt, vinous or spirituous liquors, see § 99-27-39.

JUDICIAL DECISIONS

1. In general.

Sentence of two hundred dollar fine and sixty days in jail for possessing liquor held excessive. *Buck v. State*, 153 Miss. 710, 121 So. 147 (1929).

On excessive sentence, supreme court will affirm in other respects and remand cause for new sentence. *Myers v. State*, 149 Miss. 749, 115 So. 893 (1928).

Sentence of three months in jail and fine

of \$500 for possession of more than one quart of liquor held excessive. Roney v. State, 147 Miss. 29, 112 So. 601 (1927). 30 days is limit of punishment for possession of liquor. Cox v. State, 146 Miss. 685, 112 So. 479 (1927).

Fine and imprisonment not exceeding

RESEARCH REFERENCES

ALR. When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eight Amendment. 164 A.L.R. Fed. 591.

CHAPTER 32

Tobacco Offenses

Article 1.	Mississippi Juvenile Tobacco Access Prevention Act	97-32-1
Article 3.	Mississippi Adult Tobacco Use on Educational Property Act	97-32-25

ARTICLE 1.

MISSISSIPPI JUVENILE TOBACCO ACCESS PREVENTION ACT.

SEC.

97-32-1.	Short title.
97-32-2.	Legislative intent; supersedes local laws, ordinances and regulations.
97-32-3.	Definitions.
97-32-5.	Prohibition of the sale or transfer of tobacco products to persons under 18 years of age.
97-32-7.	Retail sales clerks; notification and agreement; penalties for violations.
97-32-9.	Juvenile purchase, possession and consumption of tobacco.
97-32-11.	Point of sale warning signs.
97-32-13.	Juvenile misrepresentation of age.
97-32-15.	Vending machine tobacco sales; location.
97-32-17.	Prohibition on the distribution of tobacco products other than in sealed packages.
97-32-19.	Transfers of tobacco products from distributors or wholesalers to retailers.
97-32-21.	Unannounced inspections.
97-32-23.	Confidentiality.

§ 97-32-1. Short title.

This article shall be known and cited as "The Mississippi Juvenile Tobacco Access Prevention Act of 1997."

SOURCES: Laws, 1997, ch. 578, § 1, eff from and after February 1, 1998.

§ 97-32-2. Legislative intent; supersedes local laws, ordinances and regulations.

It is the intent of the Legislature that enforcement of this chapter be implemented in an equitable manner throughout the state. The provisions of Sections 97-32-5, 97-32-7, 97-32-11, 97-32-15, 97-32-17, 97-32-19 and 97-32-21 shall supersede any existing or subsequently enacted local law, ordinance or regulation which relates to the sale, promotion and distribution of tobacco and tobacco products.

SOURCES: Laws, 1998, ch. 312, § 1, eff from and after passage (approved March 12, 1998).

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation cor-

rected a typographical error in the second sentence. The words “provisions of 97-32-5, 97-32-7” were changed to “provisions of Sections 97-32-5, 97-32-7”. The Joint Committee ratified the correction at its May 20, 1998 meeting.

§ 97-32-3. Definitions.

For the purposes of this article:

(a) “Dealer” means every person, firm, corporation or association of persons, except retailers as defined herein, who receives the product from the manufacturer of tobacco for distribution, for sale, for use, or for consumption in the State of Mississippi.

(b) “Person” means any natural person.

(c) “Photographic identification” means any government-issued card that includes a photograph of the person seeking to purchase tobacco products and that is accepted as proof of age under Mississippi law.

(d) “Point of sale” means a store, stand, or any other place of business or point of distribution maintained by a seller from which tobacco products are made available for sale or distribution to consumers.

(e) “Retailer” includes every company, corporation, partnership, business association, joint venture, estate, trust, or any other combination acting as a unit or legal entity other than a wholesale dealer as defined below, whose business is that of selling merchandise at retail, who shall sell or offer for sale tobacco to the consumer.

(f) “Seller” means any natural person, company, corporation, firm, partnership, organization or other legal entity who sells, dispenses, distributes or issues tobacco products for commercial purposes.

(g) “Tobacco product” means any substance that contains tobacco, including, but not limited to, cigarettes, cigars, pipes, snuff, smoking tobacco or smokeless tobacco; “tobacco product” also means cigarette rolling papers.

(h) “Wholesaler” includes dealers whose principal business is that of wholesale dealer or jobber, who is known to the retail trade as such, and whose place of business is located in Mississippi or in a state which affords reciprocity to wholesalers domiciled in Mississippi, who shall sell any taxable tobacco to retail dealers only for the purpose of resale.

(i) “Retailer Tobacco Prevention Education Program” includes any program authorized by the Attorney General that teaches and informs retailers and wholesalers about the laws regarding youth access to tobacco products.

SOURCES: Laws, 1997, ch. 578, § 2; Laws, 2002, ch. 307, § 1, eff from and after July 1, 2002.

§ 97-32-5. Prohibition of the sale or transfer of tobacco products to persons under 18 years of age.

It shall be unlawful for any person, or retailer, to sell, barter, deliver or give tobacco products to any individual under eighteen (18) years of age unless the individual under eighteen (18) years of age holds a retailer’s license to sell tobacco under Section 27-69-1 et seq., Mississippi Code of 1972.

It shall be an absolute affirmative defense that the person selling, bartering, delivering or giving tobacco products over the counter in a retail establishment to an individual under eighteen (18) years of age in violation of this article had requested and examined a government-issued photographic identification from such person establishing his age as at least eighteen (18) years prior to selling such person a tobacco product. The failure of a seller, barterer, deliverer or giver of tobacco products over the counter in a retail establishment to request and examine photographic identification from a person under eighteen (18) years of age prior to the sale of a tobacco product to such person if the individual is not known to the seller, barterer, deliverer or giver of the tobacco product to be over the age of eighteen (18) years, shall be construed against the seller, barterer, deliverer or giver and form a conclusive basis for the seller's violation of this section.

It shall be an absolute affirmative defense that the person or entity giving tobacco products through the mail to an individual under eighteen (18) years of age in violation of this article had requested and received documentary or written evidence from such person purportedly establishing his age to be at least eighteen (18) years of age.

Any person who violates this section shall be liable as follows: For a first conviction, a fine of Fifty Dollars (\$50.00); for a second conviction, a fine of Seventy-five Dollars (\$75.00); and for all subsequent convictions, a fine of One Hundred Fifty Dollars (\$150.00) shall be imposed.

Any person found in violation of this section shall be issued a citation and the holder of the retailer permit shall be sent notification of this citation by registered mail by the law enforcement agency issuing the citation. Notification shall include the opportunity for hearing before the appropriate court. For a first conviction, the retailer shall be sent a warning letter informing him of the retailer's responsibility in the selling of tobacco products. For a second conviction, the retailer, or retailer's designee, shall be required to enroll in and complete a "Retailer Tobacco Education Program."

For a third or subsequent violation of this section by any retailer, within one (1) year of the two (2) prior violations, any retailer's permit issued pursuant to Section 27-69-1 et seq., Mississippi Code of 1972, may be revoked or suspended for a period of at least one (1) year after notice and opportunity for hearing. If said permit is revoked by the Tax Commission, the retailer may not reapply for a permit to sell tobacco for a period of six (6) months. For the purposes of this section, "subsequent violations" are those committed at the same place of business.

It is the responsibility of all law enforcement officers and law enforcement agencies of this state to ensure that the provisions of this article are enforced.

It shall not be considered a violation of this section on the part of any law enforcement officer or person under eighteen (18) years of age for any law enforcement officer of this state to use persons under eighteen (18) years of age to purchase or attempt to purchase tobacco products for the purpose of monitoring compliance with this section, as long as those persons are supervised by duly authorized law enforcement agency officials.

Any law enforcement agency conducting enforcement efforts undertaken pursuant to this article shall prepare a report as prescribed by the Attorney General which includes the number of unannounced inspections conducted by the agency, a summary of enforcement actions taken pursuant to this article, the name and permit number of the retailer pursuant to Section 27-69-1 et seq., Mississippi Code of 1972, and final judicial disposition on all enforcement actions. Reports shall be forwarded to the Office of the Attorney General within twenty (20) working days of the final judicial disposition.

On notification from local law enforcement that a retailer has violated this article so as to warrant a revocation of the retailer's permit, the Attorney General shall notify in writing the State Tax Commission within twenty (20) working days.

In accordance with the procedures of Section 27-69-9, Mississippi Code of 1972, the State Tax Commission shall initiate revocation procedures of the retailer's permit. The Office of the Attorney General shall provide legal assistance in revocation procedures when requested by the Tax Commission.

SOURCES: Laws, 1997, ch. 578, § 3, eff from and after February 1, 1998.

§ 97-32-7. Retail sales clerks; notification and agreement; penalties for violations.

(1) Every person engaged in the business of selling tobacco products at retail shall notify each individual employed by that person as a retail sales clerk that state law:

(a) Prohibits the sale or distribution of tobacco products, including samples, to any person under eighteen (18) years of age and the purchase or receipt of tobacco products by any person under eighteen (18) years of age, and (b) requires that proof of age be demanded from a prospective purchaser or recipient if the prospective purchaser or recipient is under the age of eighteen (18) years. Every person employed by a person engaged in the business of selling tobacco products at retail shall sign an agreement with his employer in substantially the following or similar form:

"I understand that state and federal law prohibit the sale or distribution of tobacco products to persons under the age of eighteen (18) years and out-of-package sales, and requires that proof of age be demanded from a prospective purchaser or recipient under eighteen (18) years of age if the individual is not known to the seller, barterer, deliverer or giver of the tobacco product to be over the age of eighteen (18) years. I promise, as a condition of my employment, to observe this law."

(2) Any person violating the provisions of this section shall be penalized not less than Fifty Dollars (\$50.00) nor more than One Hundred Dollars (\$100.00).

(3) No retailer who instructs his employee as provided in this section shall be liable for any violations committed by such employees.

SOURCES: Laws, 1997, ch. 578, § 4, eff from and after February 1, 1998.

§ 97-32-9. Juvenile purchase, possession and consumption of tobacco.

No person under eighteen (18) years of age shall purchase any tobacco product. No student of any high school, junior high school or elementary school shall possess tobacco on any educational property as defined in Section 97-37-17, Mississippi Code of 1972.

SOURCES: Laws, 1997, ch. 578, § 5, eff from and after February 1, 1998.

ATTORNEY GENERAL OPINIONS

The statute is a policy statement by the legislature; it does not provide for a criminal penalty, and a violation of it does not constitute a crime nor amount to a delinquent act. Zebert, October 9, 1998, A.G. Op. #98-0587.

A city or county is not prohibited from

enacting a local law or ordinance that prohibits the possession of tobacco products by minors and provides penalties therefor, within the limits authorized by the general law. Zebert, October 9, 1998, A.G. Op. #98-0587.

§ 97-32-11. Point of sale warning signs.

Point of sale warning signs are required, and each seller shall place and maintain in legible condition, at each point of sale of tobacco products to consumers, a sign no smaller than eight and one-half (8-½) by eleven (11) inches or ninety-three (93) square inches stating: "STATE LAW PROHIBITS THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER THE AGE OF 18 YEARS. PROOF OF AGE REQUIRED."

Any person who violates this section shall be punished by a penalty of not more than One Hundred Dollars (\$100.00).

SOURCES: Laws, 1997, ch. 578, § 6, eff from and after February 1, 1998.

§ 97-32-13. Juvenile misrepresentation of age.

Any person under the age of eighteen (18) years who falsely states he is eighteen (18) years of age or older, or presents any document that indicates he is eighteen (18) years of age or older, for the purpose of purchasing or possessing any tobacco or tobacco product shall be penalized not less than Twenty-five Dollars (\$25.00) nor more than Two Hundred Dollars (\$200.00) or required to complete at least thirty (30) days community service, or both.

SOURCES: Laws, 1997, ch. 578, § 7, eff from and after February 1, 1998.

ATTORNEY GENERAL OPINIONS

A city or county is not prohibited from enacting a local law or ordinance that prohibits the possession of tobacco products by minors and provides penalties

therefor, within the limits authorized by the general law. Zebert, October 9, 1998, A.G. Op. #98-0587.

§ 97-32-15. Vending machine tobacco sales; location.

It shall be unlawful for any person to sell tobacco products through a vending machine, unless the vending machine is located in an establishment to which individuals under the age of eighteen (18) years are denied access or are required to be accompanied by an adult. A person who violates this section shall be punished by a penalty of not more than Two Hundred Fifty Dollars (\$250.00).

SOURCES: Laws, 1997, ch. 578, § 8, eff from and after February 1, 1998.

§ 97-32-17. Prohibition on the distribution of tobacco products other than in sealed packages.

No retailer shall distribute tobacco products other than cigars and pipe tobacco for commercial purposes other than in a sealed package provided by the manufacturer with the required health warning. A retailer who is in violation of this section shall be liable for a penalty of not more than One Hundred Dollars (\$100.00) for the first violation or enrollment in a Retailer Tobacco Education Prevention Program, or both; not more than Two Hundred Dollars (\$200.00) for a second violation within one (1) year of a prior violation; and a penalty of Three Hundred Dollars (\$300.00) for all subsequent violations.

In addition, for a third and all subsequent violations within one (1) year of two (2) prior violations, the permit to sell tobacco products of any person violating this section may be suspended or revoked under the provisions of Section 27-69-1 et seq., Mississippi Code of 1972, for a period of one (1) year after notice and opportunity for a hearing. For the purposes of this section, "subsequent violations" are those committed at the same place of business.

SOURCES: Laws, 1997, ch. 578, § 9, eff from and after February 1, 1998.

§ 97-32-19. Transfers of tobacco products from distributors or wholesalers to retailers.

No distributor or wholesaler of tobacco products shall sell, distribute, deliver, or in any other manner transfer any tobacco products for sale at retail to any person not possessing a valid tobacco permit under Section 27-69-1 et seq., Mississippi Code of 1972.

Any distributor or wholesaler who violates this section shall be liable for a penalty of up to Two Hundred Fifty Dollars (\$250.00) for a first offense. For a second offense within one (1) year of the prior offense, any distributor or wholesaler shall be liable for a penalty of up to Five Hundred Dollars (\$500.00).

For all subsequent offenses within one (1) year of two (2) prior offenses, the distributor or wholesaler may become ineligible to hold a tobacco distributor's permit for a period of at least one (1) year under Section 27-69-1 et seq.,

Mississippi Code of 1972, and shall be liable for a penalty of One Thousand Dollars (\$1,000.00).

SOURCES: Laws, 1997, ch. 578, § 10, eff from and after February 1, 1998.

§ 97-32-21. Unannounced inspections.

The Office of the Attorney General or local law enforcement agencies shall at least annually conduct random, unannounced inspections at locations where tobacco products are sold or distributed to ensure compliance with the Mississippi Tobacco Youth Access Prevention Act of 1997. Persons under the age of eighteen (18) years may be enlisted by the Office of the Attorney General or local law enforcement to test compliance with the Mississippi Juvenile Tobacco Access Prevention Act of 1997, provided that the parent or legal guardian of the person under eighteen (18) years of age so utilized has given prior written consent for the minor's participation in unannounced inspections. The Office of the Attorney General must prepare a report of the findings, and report these findings to the Department of Health and Department of Mental Health. The Department of Mental Health shall prepare the annual report required by Section 1926, subpart 1 of Part B, Title XIX of the Federal Public Health Service Act (42 USCS 300X-26). The report shall be approved by the Governor and then promptly transmitted to the Secretary of the United States Department of Health and Human Services.

SOURCES: Laws, 1997, ch. 578, § 11, eff from and after February 1, 1998.

§ 97-32-23. Confidentiality.

It shall be unlawful to publish the name or identity of any person under the age of eighteen (18) years who is convicted or adjudicated of any violation of this article.

SOURCES: Laws, 1997, ch. 578, § 14, eff from and after February 1, 1998.

ARTICLE 3.

MISSISSIPPI ADULT TOBACCO USE ON EDUCATIONAL PROPERTY ACT.

SEC.

97-32-25. Short title.

97-32-27. Definitions.

97-32-29. Use of tobacco by adults on certain educational property prohibited; penalties for violation.

§ 97-32-25. Short title.

This article shall be known and cited as "Mississippi Adult Tobacco Use on Educational Property Act of 2000."

SOURCES: Laws, 2000, ch. 626, § 1, eff from and after July 1, 2000.

§ 97-32-27. Definitions.

(1) "Adult" means any natural person at least eighteen (18) years old.

(2) "Minor" means any natural person under the age of eighteen (18) years.

(3) "Person" means any natural person.

(4) "Tobacco product" means any substance that contains tobacco including, but not limited to, cigarettes, cigars, pipes, snuff, smoking tobacco or smokeless tobacco.

(5) "Educational property" means any public school building or bus, public school campus, grounds, recreational area, athletic field, or other property owned, used or operated by any local school board, school, or directors for the administration of any public educational institution or during a school-related activity; provided, however, that the term "educational property" shall not include any sixteenth section school land or lieu land on which is not located a public school building, public school campus, public school recreational area or public school athletic field. Educational property shall not include property owned or operated by the state institutions of higher learning, the public community and junior colleges, or vocational-technical complexes where only adult students are in attendance.

SOURCES: Laws, 2000, ch. 626, § 2, eff from and after July 1, 2000.

§ 97-32-29. Use of tobacco by adults on certain educational property prohibited; penalties for violation.

No person shall use any tobacco product on any educational property as defined in Section 97-32-27. Any adult who violates this section shall be subject to a fine and shall be liable as follows: (a) for a first conviction, a warning; (b) for a second conviction, a fine of Seventy-five Dollars (\$75.00); and (c) for all subsequent convictions, a fine not to exceed One Hundred Fifty Dollars (\$150.00) shall be imposed.

Any adult found in violation of this section shall be issued a citation by a law enforcement officer, which citation shall include notice of the date, time and location for hearing before the justice court having jurisdiction where the violation is alleged to have occurred. For the purposes of this section, "subsequent convictions" are for violations committed on any educational property within the State of Mississippi.

Anyone convicted under this article shall be recorded as being fined for a civil violation of this article and not for violating a criminal statute.

It is the responsibility of all law enforcement officers and law enforcement agencies of this state to ensure that the provisions of this article are enforced.

SOURCES: Laws, 2000, ch. 626, § 3, eff from and after July 1, 2000.

CHAPTER 33

Gambling and Lotteries

In General	97-33-1
Charitable Bingo Law	97-33-50

IN GENERAL

SEC.

97-33-1.	Betting, gaming or wagering; exception from prohibition; penalty.
97-33-3.	Gambling; penalties on certain officers; penalty for use of public money.
97-33-5.	Gambling; additional fine against winning gambler for amount won.
97-33-7.	Gambling devices defined; prohibition; pin ball machines; penalties; exceptions.
97-33-9.	Gambling; keeping, exhibiting, etc. games or gaming tables; exceptions.
97-33-11.	Gambling; clubs not to have interest in gaming; each member fined; grand jury investigation.
97-33-13.	Gambling; building owners, lessees, etc. not to permit gambling.
97-33-15.	Gambling; hotel, tavern and boarding-house keepers to inform on gamblers.
97-33-17.	Gambling; money and appliances forfeited; exceptions.
97-33-19.	Gambling; money and appliances forfeited; penalty for resisting seizure.
97-33-21.	Gambling; gambling with minor.
97-33-23.	Gambling; gambling with minor knowing him to be under-age.
97-33-25.	Gambling; pool-selling; exceptions.
97-33-27.	Gambling; betting on horse or yacht race or shooting match; exceptions.
97-33-29.	Gambling; laws remedial, not penal.
97-33-31.	Lotteries; penalty for putting on.
97-33-33.	Lotteries; advertising prohibited.
97-33-35.	Lotteries; advertising prohibited; publication or circulation of newspapers.
97-33-37.	Lotteries; advertising prohibited; sale of newspapers.
97-33-39.	Lotteries; sale of tickets.
97-33-41.	Lotteries; buying tickets in state prohibited.
97-33-43.	Lotteries; railroads.
97-33-45.	Lotteries; steamboats.
97-33-47.	Lotteries; acting as agent for.
97-33-49.	Raffles.

§ 97-33-1. Betting, gaming or wagering; exception from prohibition; penalty.

If any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play or duel, other than a fight or fighting match between dogs, or upon the result of any election, event or contingency whatever, upon conviction thereof, he shall be fined in a sum not more than Five Hundred Dollars (\$500.00); and, unless such fine and costs be immedi-

ately paid, shall be imprisoned for any period not more than ninety (90) days. However, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this section;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(d) That is legal under the laws of the State of Mississippi.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 11(1); 1857, ch. 64, art. 134; 1871, § 2598; 1880, § 2844; 1892, § 1122; Laws, 1906, § 1203; Hemingway's 1917, § 933; Laws, 1930, § 960; Laws, 1942, § 2190; Laws, 1898, ch. 69; Laws, 1987, ch. 489, § 2; Laws, 1989, ch. 481, § 2; Laws, 1990, ch. 449, § 5; Laws,

1990, ch. 573, § 9; Laws, 1990 Ex Sess, ch. 45 § 148; Laws, 2005, 5th Ex Sess, ch. 16, § 3, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, inserted “including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay” following “southern counties in the State of Mississippi” in (a); added (b) and redesignated former (b) and (c) as present (c) and (d).

Cross References — Municipal regulation of amusement and other devices, see § 21-19-33.

Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Taxation of vending and amusement machines, see §§ 27-27-1 et seq.

Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

State athletic commission, see §§ 75-75-101 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Illegality of gambling contracts, generally, see § 87-1-1.

Operation of gaming devices in clubs, on boats, etc., as abatable nuisance, see § 95-3-25.

Minors being prohibited from entering pool room or billiard hall, see § 97-5-11.

Pin ball machines, etc., see § 97-33-7.

Prohibition of dog fights and the penalties with respect thereto, see § 97-41-19.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Special duty of officers to arrest gamblers, see § 99-3-25.

Requisites of indictment in gambling cases, see § 99-7-27.

Proceedings in gambling cases, see §§ 99-17-25 et seq.

JUDICIAL DECISIONS

1. In general.
2. What constitutes gambling within statute.
3. Indictment.
4. —Proof as supporting allegations.
5. Sentence and punishment.

1. In general.

Mississippi Gaming Commission did not act in excess of its statutory authority in determining that Bernard Bayou was not legal gaming site and denying preliminary site approval; Commission regulation providing that Bernard Bayou is not within area authorized for gaming casino sites was reasonable interpretation of statute authorizing gaming. *Mississippi Gaming Comm'n v. Board of Educ.*, 691 So. 2d 452 (Miss. 1997), reh'g denied, 695 So. 2d 601 (Miss. 1997).

Mississippi Gaming Commission's decision to deny request for preliminary site approval for gaming operations on Bernard Bayou was not arbitrary and capricious; finding that Bernard Bayou was a bayou, and pursuant to Commission reg-

ulation, was not suitable place for gaming operations. *Mississippi Gaming Comm'n v. Board of Educ.*, 691 So. 2d 452 (Miss. 1997), reh'g denied, 695 So. 2d 601 (Miss. 1997).

A proposed site for a casino gambling operation was unlawful, and therefore the Mississippi Gaming Commission's order approving the site would be vacated, where the site was not on water but was on land which the applicants proposed to dredge, and it was not within waters “south of the three most southern counties.” *Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n*, 654 So. 2d 892 (Miss. 1995).

Code of 1906, § 2303 not impliedly repealed by Laws 1908, ch. 118. *Ascher & Baxter v. Edward Moyse & Co.*, 101 Miss. 36, 57 So. 299 (1910).

2. What constitutes gambling within statute.

A mere spectator at a game of chance is not, by his presence alone, guilty of encouraging the game within the purview of

this section [Code 1942, § 2190]. *Stubbs v. State*, 206 Miss. 485, 40 So. 2d 256 (1949).

Person paying 25¢ for privilege of rolling dice with chance of winning \$1.00 or nothing, and owner of place to whom he paid money, held gambling. *Eckles v. State*, 108 Miss. 534, 66 So. 987 (1915).

Playing poker with a three, five and ten-cent limit is gambling to the same extent as if the stakes were larger. *Ford v. State*, 86 Miss. 123, 38 So. 229 (1905).

It is not within the statute for the loser at a game of billiards to pay, by agreement of the parties, the fee due for the use of the table. *Blewett v. State*, 34 Miss. 606 (1857).

To bet on the result of an election in another state is indictable under the statute. *Sharkey v. State*, 33 Miss. 353 (1857).

3. Indictment.

4. —Proof as supporting allegations.

Testimony that accused was “rolling the bones”, had money in front of him and that others were present with money on display, was sufficient to justify jury finding that accused was violating this section [Code 1942, § 2190], it being unnecessary for the prosecution to show that the game had proceeded to the point where accused had made his point or that he had lost by turning up a seven. *Stubbs v. State*, 206 Miss. 485, 40 So. 2d 256 (1949).

Evidence must show defendants’ joint game, under indictment charging they played a game together. *Reno v. State*, 88 Miss. 583, 41 So. 7 (1906).

Under an indictment charging that several persons “unlawfully did play...for

money,” etc., either may be convicted for playing with any person. Such indictment charges a separate offense against each. *Lea v. State*, 64 Miss. 294, 1 So. 244 (1887).

If the indictment charge that accused played “for money,” it must be shown that he was either directly or indirectly interested in the money wagered, or he cannot be convicted. *Strawhern v. State*, 37 Miss. 422 (1859).

An indictment charging a bet on the result of an election in a particular state for presidential electors is not sustained by proof of a bet on the result of an election, in the state for president. The election of electors is distinct from the election of president. *Gamble v. State*, 35 Miss. 222 (1858).

A bet upon the unknown result of an election, made after the election is held, is indictable; and proof thereof under an indictment which charges that the bet was made before the election, is proper and will maintain it. The time laid is immaterial. *Terrall v. Adams*, 23 Miss. 570 (1852); *Miller v. State*, 33 Miss. 356 (1857).

5. Sentence and punishment.

This section [Code 1942, § 2190] does not prescribe two punishments in the alternative but a defendant convicted of gaming under this section may be sentenced to pay a fine and costs and stand committed until they are paid, as provided in Laws 1894, ch. 76 § 3, and may be worked on the county farm until such fine and costs are paid. *Fuller v. State*, 83 Miss. 30, 35 So. 214 (1903).

RESEARCH REFERENCES

ALR. Entrapment to commit offense with respect to gambling or lotteries. 31 A.L.R.2d 1212.

Admissibility, in prosecution for gambling or gaming offense, or evidence of other acts of gambling. 64 A.L.R.2d 823.

Criminal conspiracies as to gambling. 91 A.L.R.2d 1148.

Bridge as within gambling laws. 97 A.L.R.2d 1420.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima

facie evidence of other incriminating facts. 17 A.L.R.3d 491.

Promotion schemes of retail stores as criminal offense under anti-gambling laws. 29 A.L.R.3d 888.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other non-profit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Construction and application of state or municipal enactments relating to policy or numbers games. 70 A.L.R.3d 897.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 A.L.R.4th 801.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place

wagers in pari-mutuel pool. 78 A.L.R.4th 483.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 31 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games §§ 1 et seq.

CJS. 38 C.J.S., Gaming §§ 84 et seq.

§ 97-33-3. Gambling; penalties on certain officers; penalty for use of public money.

If a judge of any court, or a justice court judge, or attorney-general or district attorney, or a constable, sheriff, or any person charged by law with the custody of public money, shall violate the provisions of the foregoing section, such person so offending, on conviction thereof, shall be fined Five Hundred Dollars (\$500.00), and be imprisoned in the county jail twenty (20) days. In case any public officer shall in any manner use or loan public money in his hands by virtue of his office, in any game, wager, or bet, on conviction thereof, his commission shall thereby be deemed vacated, and the vacancy supplied as in case of death, resignation, or removal from office.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 11(2); 1857, ch. 64, art. 135; 1871, § 2599; 1880, § 2845; 1892, § 1123; Laws, 1906, § 1204; Hemingway's 1917, § 934; Laws, 1930, § 961; Laws, 1942, § 2191; Laws, 1986, ch. 459, § 43, eff from and after July 1, 1986.

Cross References — Attorney general, see §§ 7-5-1 et seq.

State treasurer, see §§ 7-9-1 et seq.

Suit on official bond for embezzlement, see § 7-9-51.

Chancery court judges, see § 9-5-1.

Circuit court judges, see § 9-7-1.

County court judges, see §§ 9-9-1 et seq.

Penalty for constable's neglect of duty, see § 19-19-15.

Sheriffs, see §§ 19-25-1 et seq.

Removal of public officers from office, see § 25-5-1.

District attorneys, see §§ 25-31-1 et seq.

Tax collectors, see §§ 27-1-1 et seq.

Embezzlement by public officers and employees, see §§ 97-11-25 et seq.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 265, 345 et seq.

CJS. 38 C.J.S., Gaming §§ 84 et seq.

§ 97-33-5. Gambling; additional fine against winning gambler for amount won.

In a prosecution for gambling or gaming, in addition to penalties elsewhere provided, the jury shall find the amount won, and it shall be the duty of the court to enter judgment against the winning party for the amount so won, to be collected and paid over as fines.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(21); 1857, ch. 64, art. 144; 1871, § 2608; 1880, § 2854; 1892, § 1361; Laws, 1906, § 1433; Hemingway's 1917, § 1189; Laws, 1930, § 1213; Laws, 1942, § 2456.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Another section derived from same 1942 code section, see § 99-7-27.

RESEARCH REFERENCES

Am Jur. 12A Am. Jur. Pl & Pr Forms
(Rev), Gambling, Forms 1 et seq.

§ 97-33-7. Gambling devices defined; prohibition; pin ball machines; penalties; exceptions.

(1) It shall be unlawful for any person or persons, firm, copartnership or corporation to have in possession, own, control, display, or operate any cane rack, knife rack, artful dodger, punch board, roll down, merchandise wheel, slot machine, pinball machine, or similar device or devices. Provided, however, that this section shall not be so construed as to make unlawful the ownership, possession, control, display or operation of any antique coin machine as defined in Section 27-27-12, or any music machine or bona fide automatic vending machine where the purchaser receives exactly the same quantity of merchandise on each operation of said machine. Any slot machine other than an antique coin machine as defined in Section 27-27-12 which delivers, or is so constructed as that by operation thereof it will deliver to the operator thereof anything of value in varying quantities, in addition to the merchandise received, and any slot machine other than an antique coin machine as defined in Section 27-27-12 that is constructed in such manner as that slugs, tokens, coins or similar devices are, or may be, used and delivered to the operator thereof in addition to merchandise of any sort contained in such machine, is hereby declared to be a gambling device, and shall be deemed unlawful under the provisions of this section. Provided, however, that pinball machines which do not return to the operator or player thereof anything but free additional games or plays shall not be deemed to be gambling devices, and neither this section nor any other law shall be construed to prohibit same.

(2) No property right shall exist in any person, natural or artificial, or be vested in such person, in any or all of the devices described herein that are not exempted from the provisions of this section; and all such devices are hereby declared to be at all times subject to confiscation and destruction, and their possession shall be unlawful, except when in the possession of officers carrying out the provisions of this section. It shall be the duty of all law-enforcing officers to seize and immediately destroy all such machines and devices.

(3) A first violation of the provisions of this section shall be deemed a misdemeanor, and the party offending shall, upon conviction, be fined in any sum not exceeding Five Hundred Dollars (\$500.00), or imprisoned not exceeding three (3) months, or both, in the discretion of the court. In the event of a

second conviction for a violation of any of the provisions of this section, the party offending shall be subject to a sentence of not less than six (6) months in the county jail, nor more than two (2) years in the State Penitentiary, in the discretion of the trial court.

(4) Notwithstanding any provision of this section to the contrary, it shall not be unlawful to operate any equipment or device described in subsection (1) of this section or any gaming, gambling or similar device or devices by whatever name called while:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this subsection;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(d) That is legal under the laws of the State of Mississippi.

(5) Notwithstanding any provision of this section to the contrary, it shall not be unlawful (a) to own, possess, repair or control any gambling device, machine or equipment in a licensed gaming establishment or on the business premises appurtenant to any such licensed gaming establishment during any period of time in which such licensed gaming establishment is being constructed, repaired, maintained or operated in this state; (b) to install any gambling device, machine or equipment in any licensed gaming establishment; (c) to possess or control any gambling device, machine or equipment during the process of procuring or transporting such device, machine or equipment for installation on any such licensed gaming establishment; or (d) to store in a warehouse or other storage facility any gambling device, machine, equipment, or part thereof, regardless of whether the county or municipality in which the warehouse or storage facility is located has approved gaming aboard cruise vessels or vessels, provided that such device, machine or equipment is operated only in a county or municipality that has approved gaming aboard cruise vessels or vessels. Any gambling device, machine or equipment that is owned, possessed, controlled, installed, procured, repaired, transported or stored in accordance with this subsection shall not be subject to confiscation, seizure or destruction, and any person, firm, partnership or corporation which owns, possesses, controls, installs, procures, repairs, transports or stores any gambling device, machine or equipment in accordance with this subsection shall not be subject to any prosecution or penalty under this section. Any person constructing or repairing such cruise vessels or vessels within a municipality shall comply with all municipal ordinances protecting the general health or safety of the residents of the municipality.

SOURCES: Codes, 1930, § 821; Laws, 1942, § 2047; Laws, 1924, ch. 339; Laws, 1938, ch. 353; Laws, 1950, ch. 357; Laws, 1990, ch. 573, § 10; Laws, 1990 Ex Sess, ch. 45 § 149; Laws, 1992, ch. 371, § 5; 1994, ch. 530, § 1 eff from and after July 1, 1994; Laws, 2005, 5th Ex Sess, ch. 16, § 4, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, inserted “including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay” following “southern counties in the State of Mississippi” in (4)(a); added (4)(b) and redesignated former (4)(b) and (c) as present (4)(c) and (d); and in (5), inserted “in a/any licensed gaming establishment” following “machine or equipment” and “licensed gaming establishment” following “any/which such” throughout.

Cross References — Municipal regulation of amusement and other devices, see § 21-19-33.

Governing authorities not authorized to regulate gambling equipment that is within corporate limits in accordance with this section, see § 21-19-33.

Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Unlawful business not legalized by issuance of privilege license or payment of tax, see § 27-15-221.

Vending and amusement machines, see §§ 27-27-1 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Illegality of gambling contracts, generally, see § 87-1-1.

Operation of gaming devices in clubs, on boats, etc., as abatable nuisance, see § 95-3-25.

Gambling equipment possessed in accordance with this section not deemed common nuisance, see § 95-3-25.

Prohibition of minors from entering pool room or billiard hall, see § 97-5-11.

Use of slugs, etc., in automatic coin machines, see § 97-21-11.

Betting on any game, play or amusement, see § 97-33-1.

Exceptions provided for in this section applicable to keeping or exhibiting of games or gaming tables, see § 97-33-9.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Slot machines generally.
2. Character of slot machine as gambling device.
3. Search, seizure and confiscation.
4. —Replevin after seizure.
5. Issuance of privilege license or payment of tax.
6. Miscellaneous.

1. Slot machines generally.

The definition of a "slot machine" contained in Miss. Code Ann. § 75-76-5(ff) is applicable to Miss. Code Ann. § 97-33-7, which prohibits the possession or use of slot machines. *State Gaming Comm'n v. Six Elec. Video Gambling Devices*, 792 So. 2d 321 (Miss. Ct. App. 2001).

A machine was a slot machine where (1) it dispensed a two-minute emergency long distance calling card, good only for one call no matter the time actually used, (2) with each card, the purchaser also received a game piece, which had a bar code on the back that was read by the machine as the card was being dispensed, (3) the display on the machine then simulated a slot machine by spinning nine squares, (4) after a few moments, the display showed the same combination of squares as on the game piece, (5) again simulating a slot machine, the machine lit up and played music if the patron was a winner, and (6) a cashier at the store verified the winning card and then paid the prize money, which could be in the amount of one dollar up to \$500. *State Gaming Comm'n v. Six Elec. Video Gambling Devices*, 792 So. 2d 321 (Miss. Ct. App. 2001).

But where an injunction has been issued against the defendant for violation of gaming laws, his mere possession of slot

machines was a violation of the injunction despite the fact that the machines were not operated. *Stevens v. State*, 225 Miss. 48, 82 So. 2d 645 (1955).

It was not the purpose of this statute [Code 1942, § 2047], or similar statutes, to condemn a machine as being a slot machine simply because its initial operation is by way of the insertion of a coin in a slot; but the maxim *noscitur a sociis* should be applied, and in looking to the associated devices or machines or games mentioned in such statutes, the condemnation is against those which, in their nature, are gambling devices. *Rouse v. Sisson*, 190 Miss. 276, 199 So. 777, 132 A.L.R. 998 (1941).

The mere possession of a slot machine or even its operation for amusement and not for profit does not constitute a crime. *King v. McCrory*, 179 Miss. 162, 175 So. 193 (1937).

2. Character of slot machine as gambling device.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7 and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. *Trainer v. State*, 930 So. 2d 373 (Miss. 2006).

Where the elements of consideration and chance are present, Miss. Code Ann. § 75-76-5(ff) requires only that machines possess the "potential for reward" to be considered a slot machine subject to seizure and destruction under Miss. Code Ann. § 97-33-7(1). *Mississippi Gaming Comm'n. v. Henson*, 800 So. 2d 110 (Miss. 2001).

State gaming commission properly seized amusement devices based on their illegality, as the machines possessed "potential for reward" by providing credits for free additional games even though they did not necessarily provide an instant payoff. *Mississippi Gaming Comm'n. v. Henson*, 800 So. 2d 110 (Miss. 2001).

A machine operated at a truck stop was an illegal slot machine where the machine operated as follows: (1) for one dollar, the machine dispensed a two minute emergency long distance calling card, good only for one call no matter the time actually used, (2) with each card, the purchaser also received a game piece which had a bar code on the back that was read by the machine as it was dispensed, (3) the display on the machine then simulated a slot machine by spinning nine squares, (4) after a few moments, the display showed the same combination of squares as on the game piece, (5) again simulating a slot machine, the machine lit up and played music if the patron was a winner, and (6) a cashier at the store verified the winning card and then paid the prize money, which could be in the amount of one dollar up to five hundred dollars. *Mississippi Gaming Comm'n v. Six Elec. Video Gambling Devices & Gene Gullick*, — So. 2d —, 2001 Miss. App. LEXIS 13 (Miss. Ct. App. Jan. 9, 2001).

Despite the fact that § 2047, Code 1942, specifically provides that pinball machines which do not return to the operator or player anything but free additional games or plays shall not be deemed gambling devices, such machines are still subject to the forfeiture and seizure under federal statutes. *United States v. Various Gambling Devices*, 368 F. Supp. 661 (N.D. Miss. 1973).

The fact that so-called "free-game" pinball machines are legal under Mississippi law does not render them exempt from the

registration and record keeping requirements of 15 USCS 1173. *United States v. Various Gambling Devices*, 368 F. Supp. 661 (N.D. Miss. 1973).

Although it appeared that upon the trial a slot machine did not operate when tested, the evidence was sufficient to support the verdict of the jury that it was a gaming or gambling device. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

A machine which, upon the deposit of a coin, presents a question with a number of alternate answers only one of which is correct, whereupon the player has twenty seconds in which to depress a key indicating the number of the answer selected by him, and which, if his answer is correct, automatically awards him a cash prize in an amount of which he is advised before commencement of the play, and which in any event delivers the card containing the question, on the reverse side of which is printed the correct answer, is not a gambling device within the purview of this statute [Code 1942, § 2047], since the element of uncertainty is not in the operation of the machine but in the scope of the player's knowledge. *Rouse v. Sisson*, 190 Miss. 276, 199 So. 777, 132 A.L.R. 998 (1941).

Slot machine, played for a "jackpot," operating by placing 5-cent coin in slot and pulling a lever for which purchaser could get a piece of gum, or sometimes 10 or 15 cents, was a "gambling device." *Atkins v. State*, 178 Miss. 804, 174 So. 52 (1937).

Vending machine held a gambling device; a "slot machine or similar device." *Crippen v. Mint Sales Co.*, 139 Miss. 87, 103 So. 503 (1925).

3. Search, seizure and confiscation.

National guardsmen, acting under an executive order of the governor, and a search warrant issued by the county judge, directed to any officer of the county, had authority to make a search of the accused's premises wherein a slot machine was found. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

Where the recitals in the executive order, empowering the adjutant general to order out national guardsmen for the purpose of seeing that laws were faithfully executed in Jones County, made out a

prima facie case justifying the governor's actions, the duty of showing that there was not such breakdown of law enforcement conditions as to justify this action was upon the accused, who was complaining of the search of the premises wherein a slot machine was found. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

In a prosecution for the unlawful possession of a slot machine found upon the accused's premises during a search by national guardsmen under authority of an executive order, and a search warrant issued by the county judge, it was not error to introduce in evidence a copy of the executive order, certified by the secretary of state, since whatever right, if any, accused had to subpoena witnesses and contradict the facts set forth in the original executive order applied as well to the copy as to the original. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

The legislature has the power to render the possession or ownership of slot machines and pay-off tables unlawful, and to provide for their seizure and destruction, without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Clark v. Holden*, 191 Miss. 7, 2 So. 2d 570 (1941).

The fact that slot machines and other gambling devices, when seized, were contained in their original crates and were designed for operation in another jurisdiction where their operation was lawful would not make their seizure and destruction under the provision of this section [Code 1942, § 2047] wrongful, since the statute makes the possession or ownership thereof unlawful. *Clark v. Holden*, 191 Miss. 7, 2 So. 2d 570 (1941).

Where a slot machine was not a gambling device within the purview of this statute [Code 1942, § 2047], the owner thereof was entitled to an injunction against seizure and confiscation of such machine as a gambling device. *Rouse v. Sisson*, 190 Miss. 276, 199 So. 777, 132 A.L.R. 998 (1941).

A city marshal had no authority, without affidavit or search warrant, to seize slot machine which was not operated by person keeping it, since statute does not contemplate that officers may seize property not contraband without a warrant,

unless such property is being used by persons in such manner as to make out a crime. *King v. McCrory*, 179 Miss. 162, 175 So. 193 (1937).

4. —Replevin after seizure.

Since this section [Code 1942, § 2047] makes the possession or ownership of slot machines and other similar gambling devices and apparatus unlawful it necessarily follows that replevin will not lie for the recovery in which no property right can exist in the plaintiff and the possession of which by him is made unlawful. *Clark v. Holden*, 191 Miss. 7, 2 So. 2d 570 (1941).

An owner of a slot machine which was kept on premises of another not for purpose of operating it could replevy such machine from city marshal who, while searching premises for intoxicating liquors, found machine and without taking any legal papers or making any affidavit took the machine into his possession, where marshal could not show that machine was being used for purpose of gambling. *King v. McCrory*, 179 Miss. 162, 175 So. 193 (1937).

5. Issuance of privilege license or payment of tax.

A copy of a record in the office of the United States District Director of Internal Revenue showing the issuance by the director of a license for the accused's premises to operate a coin-operated gaming device, which was duly certified by the Director, was properly authenticated and admissible in a prosecution for the unlawful possession of a slot machine notwithstanding accused's objection that the admission of the certified copy, without the witness being on the stand, deprived the accused of the right of cross-examination, since it would appear there was no rule prohibiting accused from subpoenaing and using that official as a witness. *Brady v. State*, 229 Miss. 677, 91 So. 2d 751 (1957).

In prosecution for unlawfully operating a slot machine, admission of testimony of payment of privilege tax was not error, notwithstanding evidence as to privilege tax being paid is not ordinarily admissible, where payment was a stipulated fact and court instructed jury that payment did not justify operation of slot machine as

a gambling device. *State v. Stigler*, 179 Miss. 276, 175 So. 194 (1937).

Issuance of license held not to create an estoppel against prosecution for crime under statute making it unlawful to operate slot machines which do not indicate in advance what purchaser is to receive. *Atkins v. State*, 178 Miss. 804, 174 So. 52 (1937).

In view of legislative history, suit to collect privilege tax on slot machine for year 1924 cannot be maintained (Code 1906, § 3786; Laws 1914, ch. 110; Laws 1920, ch. 104 §§ 7, 64; Laws 1922, ch. 239 §§ 1-3; Laws 1924, ch. 120, § 339.). *Scott v. Hossley*, 142 Miss. 611, 107 So. 760 (1926).

6. Miscellaneous.

A justice of the peace has no jurisdiction, other than to require bail for appearance in circuit court to await action of grand jury, on an affidavit charging a

second offense, such second offense being the commission of a felony. *Ellis v. State*, 203 Miss. 330, 33 So. 2d 837 (1948).

In a prosecution for burglary, which involved the stealing of a slot machine containing a large number of nickels, it was immaterial whether or not the slot machine was "property," since the money in the machine was property, and was not withdrawn from that category by a statute under which the money could have been seized by any police officer. *Hawkins v. State*, 193 Miss. 586, 10 So. 2d 678 (1942).

In prosecution for unlawfully operating a slot machine, instructing that to convict, jury must believe beyond reasonable doubt that some person other than accused played or operated machine was not error, since it was not unlawful, per se, for owner of slot machine to keep it and operate it for amusement and not as a gambling device. *State v. Stigler*, 179 Miss. 276, 175 So. 194 (1937).

ATTORNEY GENERAL OPINIONS

If gambling devices are stored in warehouse located in county or municipality that has not approved gaming and devices are intended for ultimate delivery to vessel on which gambling is legal, then such storage does constitute part of "the pro-

cess of procuring or transporting such device" and such possession is legal under subsection (5) of this section provided that license from Gaming Commission is obtained pursuant to Section 75-76-79. Guice, August 6, 1993, A.G. Op. #93-0403.

RESEARCH REFERENCES

ALR. Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 A.L.R.2d 815.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 A.L.R.3d 726.

Constitutionality of statutes providing for destruction of gambling devices. 14 A.L.R.3d 366.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts. 17 A.L.R.3d 491.

Right to recover money lent for gambling purposes. 74 A.L.R.5th 369.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 1 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games §§ 1 et seq.

CJS. 38 C.J.S., Gaming §§ 1 et seq.

§ 97-33-9. Gambling; keeping, exhibiting, etc. games or gaming tables; exceptions.

If any person shall be guilty of keeping or exhibiting any game or gaming table commonly called A.B.C. or E.O. roulette or rowley-powley, or rouge et

noir, roredo, keno, monte, or any faro-bank, or other game, gaming table, or bank of the same or like kind or any other kind or description under any other name whatever, or shall be in any manner either directly or indirectly interested or concerned in any gaming tables, banks, or games, either by furnishing money or articles for the purpose of carrying on the same, being interested in the loss or gain of said table, bank or games, or employed in any manner in conducting, carrying on, or exhibiting said gaming tables, games, or banks, every person so offending and being thereof convicted, shall be fined not less than Twenty-five Dollars (\$25.00) nor more than Two Thousand Dollars (\$2,000.00), or be imprisoned in the county jail not longer than two (2) months, or by both such fine and imprisonment, in the discretion of the court. Nothing in this section shall apply to any person who owns, possesses, controls, installs, procures, repairs or transports any gambling device, machine or equipment in accordance with subsection (4) of Section 97-33-7 or Section 75-76-34.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(11); 1857, ch. 64, art. 136; 1871, § 2600; 1880, § 2846; 1892, § 1124; Laws, 1906, § 1205; Hemingway's 1917, § 935; Laws, 1930, § 962; Laws, 1942, § 2192; Laws, 1896, ch. 105; Laws, 1990, ch. 573, § 11; Laws, 1991, ch. 543, § 4, eff from and after July 1, 1991.

Cross References — Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Operation of gaming devices in clubs, on boats, etc., as abatable nuisance, see § 95-3-25.

Slot machines and other gambling devices, see § 97-33-7.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.

1. In general.

An agent of the alcoholic beverage control division of the state tax commission does not have the authority to serve a search warrant issued for the purpose of making a search for illegal gambling equipment. *Wright v. State*, 231 So. 2d 777 (Miss. 1970).

Supreme court would not interfere with trial court's discretion in overruling motion for severance made by seven defendants charged with being interested in gambling table. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

Under this section [Code 1942, § 2192] the mere act of keeping and exhibiting a gaming table is not a crime; the unlawful

purpose of keeping the table must be shown; there must be facts which make the keeping or exhibiting unlawful. *Rawls v. State*, 70 Miss. 739, 12 So. 584 (1893).

2. Indictment.

Indictment charging that defendants were interested in loss or gain of gambling table held not demurrable as charging more than one offense in one count by referring to "games of chance," since offense charged did not end by playing of one game, but was continuous. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

Indictment held not bad for duplicity. *Ross v. State*, 135 Miss. 862, 101 So. 289 (1924).

An indictment under this section [Code 1942, § 2192] held not demurrable because it improperly charged the offense as having been "feloniously" committed.

Brister v. State, 86 Miss. 461, 38 So. 678 (1905).

An indictment under this section [Code 1942, § 2192] which merely charges that defendant "was interested in a gaming table" is fatally defective in that it fails to charge that he was interested in the loss or gain of the table as required by the statute. *Brazele v. State*, 86 Miss. 286, 38 So. 314 (1905).

3. Evidence.

In a prosecution for illegal possession of gambling devices, where the evidence was objected to on the ground of an illegal search, but the defense did not specifically object to the admission of illegal gambling equipment on the ground that the alcoholic beverage control agent lacked authority to serve a search warrant issued for the search for illegal gambling devices, under the plain error rule and in the interest of the equal administration of justice, a prior holding that such agent did not have such authority would be applied.

Wright v. State, 231 So. 2d 777 (Miss. 1970).

In prosecution of seven defendants for being interested in gambling table, evidence as to gaming on occasions subsequent to first occasion admitted when all defendants but one participated in furtherance of game held not admissible, where evidence as to subsequent occasions disclosed separate offenses in commission of which some of the defendants did not participate. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

Evidence held insufficient to sustain conviction as to defendant who played on table, but as to whom evidence contained nothing to indicate that he was at any time interested in loss or gain of table. *Boyd v. State*, 177 Miss. 34, 170 So. 671 (1936).

Evidence examined and held to show that defendant was the lessee and occupant of the room in which the gambling was conducted. *Ford v. State*, 86 Miss. 123, 38 So. 229 (1905).

RESEARCH REFERENCES

ALR. Requirement of 18 USCS § 1955, prohibiting illegal gambling businesses, that such businesses involve five or more persons. 55 A.L.R. Fed. 778.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 96 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games §§ 1 et seq.

CJS. 38 C.J.S., Gaming §§ 88 et seq.

§ 97-33-11. Gambling; clubs not to have interest in gaming; each member fined; grand jury investigation.

It shall not be lawful for any association of persons of the character commonly known as a "club," whether such association be incorporated or not, in any manner, either directly or indirectly, to have any interest or concern in any gambling tables, banks, or games, by means of what is sometimes called a "rake-off" or "take-out," or by means of an assessment upon certain combinations, or hands at cards, or by means of a percentage extracted from players, or an assessment made upon, or a contribution from them, or by any other means, device or contrivance whatsoever. It shall not be lawful for such an association to lend or advance money or any other valuable thing to any person engaged or about to engage in playing any game of chance prohibited by law, or to become responsible directly or indirectly for any money or other valuable thing lost, or which may be lost, by any player in any such game. If any such association shall violate any of the provisions of this section each and every member thereof shall be guilty of a misdemeanor, and, upon conviction thereof

shall be fined in a sum not more than five hundred dollars; and unless such fine and costs be immediately paid, shall be imprisoned in the county jail for not less than five nor more than twenty days. Each grand jury shall cause such of the members of such an association as it may choose to appear before them and submit to examination touching the observance or nonobservance by such association of the provisions hereof.

SOURCES: Codes, 1906, § 1206; Hemingway's 1917, § 936; Laws, 1930, § 963; Laws, 1942, § 2193.

Cross References — Operation of gaming devices in clubs, on boats, etc., as abatable nuisance, see § 95-3-25.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Club, boat or place where liquor is found as abatable nuisance, see § 99-27-23.

RESEARCH REFERENCES

ALR. Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon. 98 A.L.R.3d 694.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 96 et seq.

CJS. 38 C.J.S., Gaming §§ 93 et seq.

§ 97-33-13. Gambling; building owners, lessees, etc. not to permit gambling.

Any owner, lessee, or occupant of any outhouse or other building, who shall knowingly permit or suffer any of the before mentioned tables, banks, or games, or any other game prohibited by law, to be carried on, kept, or exhibited in his said house or other building, or on his lot or premises, being thereof convicted, shall be fined not less than one hundred dollars nor more than two thousand dollars.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(12); 1857, ch. 64, art. 138; 1871, § 2602; 1880, § 2848; 1892, § 1126; Laws, 1906, § 1208; Hemingway's 1917, § 938; Laws, 1930, § 965; Laws, 1942, § 2195.

Cross References — Slot machines and other gambling devices, see § 97-33-7.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Evidence.

1. In general.

City had power to pass an ordinance making it an offense against the municipi-

pality to violate Code 1906, § 1208. *Rosetto v. City of Bay St. Louis*, 97 Miss. 409, 52 So. 785 (1910).

Playing poker with a three, five and ten-cent limit is gaming within the meaning of Code 1892, § 1126. *Ford v. State*, 86 Miss. 123, 38 So. 229 (1905).

The lessee of a building who has assigned his term as to a portion thereof, and retains no control over such portion, cannot be held guilty under this section [Code 1942, § 2195], if his assignee, even with his knowledge, permit games to be carried on in such portion in violation of the section. *Diebel v. State*, 68 Miss. 725, 9 So. 354 (1891).

2. Indictment.

Indictment charging that accused feloniously suffered games of chance to be played with dice for money in a house occupied by her as a dwelling, contrary to the statute, sufficiently charges the statutory offense and is not violated by the use

of the word "feloniously." *Brister v. State*, 86 Miss. 461, 38 So. 678 (1905).

3. Evidence.

Evidence obtained by coroner under illegal warrant for search and seizure of intoxicating liquor was inadmissible in prosecution for permitting games of chance to be played for money on defendant's premises. *Millwood v. State*, 198 Miss. 485, 23 So. 2d 496 (1945).

Evidence that defendant's house had the reputation of being a gambling house was inadmissible, being hearsay. *Rosetto v. City of Bay St. Louis*, 97 Miss. 409, 52 So. 785 (1910).

Evidence that a door opened from the store into the room, of which defendant alone had the key, that he would open it at request, that it was necessary to ask permission of him to enter, and that he kept goods stored therein, was sufficient to show that he was the lessee and occupant of the room. *Ford v. State*, 86 Miss. 123, 38 So. 229 (1905).

RESEARCH REFERENCES

ALR. Gambling in private residence as prohibited or permitted by anti-gambling laws. 27 A.L.R.3d 1074.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 132 et seq.

CJS. 38 C.J.S., Gaming §§ 93 et seq.

§ 97-33-15. Gambling; hotel, tavern and boarding-house keepers to inform on gamblers.

If any guest or other person shall play at any game, bank, or table contrary to law, in a tavern, hotel, or boarding-house, or any outhouse, or under any booth, arbor, or other place upon the premises in possession of any tavern, hotel, or boarding-house keeper, and the keeper of the tavern, hotel, or boarding-house shall not forthwith give information of the offense, together with the names of the offenders, to some justice of the peace of his county, and prosecute the same, he shall, upon conviction thereof, be fined not less than twenty dollars nor more than one hundred dollars.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 3(18); 1857, ch. 64, art. 137; 1871, § 2601; 1880, § 2847; 1892, § 1126; Laws, 1906, § 1207; *Hemingway's* 1917, § 937; Laws, 1930, § 964; Laws, 1942, § 2194.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Slot machines and other gambling devices, see § 97-33-7.

Applicability of the Racketeer Influenced and Corrupt Organization Act of this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 38 *Am. Jur.* 2d, *Gambling* **CJS.** 38 *C.J.S.*, *Gaming* §§ 93 et seq.
§ 136.

§ 97-33-17. Gambling; money and appliances forfeited; exceptions.

(1) All monies exhibited for the purpose of betting or alluring persons to bet at any game, and all monies staked or betted, shall be liable to seizure by any sheriff, constable, or police officer, together with all the appliances used or kept for use in gambling, or by any other person; and all the monies so seized shall be accounted for by the person making the seizure, and all appliances seized shall be destroyed; provided, however, this section shall not apply to betting, gaming or wagering on:

(a) A cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this subsection;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) A vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(d) That is legal under the laws of the State of Mississippi.

(2) Nothing in this section shall apply to any gambling device, machine or equipment that is owned, possessed, controlled, installed, procured, repaired or transported in accordance with subsection (4) of Section 97-33-7.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(9); 1857, ch. 64, art. 139; 1871, § 2603; 1880, § 2849; 1892, § 1127; Laws, 1906, § 1209; Hemingway's 1917, § 939; Laws, 1930, § 966; Laws, 1942, § 2196; Laws, 1989, ch. 481, § 3; Laws, 1990, ch. 449, § 6; Laws, 1990, ch. 573, § 12; Laws, 1990 Ex Sess, ch. 45, § 150; Laws, 2005, 5th Ex Sess, ch. 16, § 5, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, inserted "including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay" in (a); added (b); and redesignated former (b) and (c) as present (c) and (d).

Cross References — Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Recovery of money lost in void gambling contracts, see §§ 87-1-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7 and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. *Trainer v. State*, 930 So. 2d 373 (Miss. 2006).

In a prosecution for burglary, which involved the stealing of a slot machine containing a large number of nickels, it was immaterial whether or not the slot machine was "property," since the money

in the machine was property, and was not withdrawn from that category by a statute under which the money could have been seized by any police officer. *Hawkins v. State*, 193 Miss. 586, 10 So. 2d 678 (1942).

A city marshal had no authority, without affidavit or search warrant, to seize slot machine which was not operated by person keeping it, since statute does not contemplate that officers may seize property not contraband without a warrant, unless such property is being used by persons in such manner as to make out a crime. *King v. McCrory*, 179 Miss. 162, 175 So. 193 (1937).

An owner of a slot machine which was kept on premises of another not for purpose of operating it could replevy such machine from city marshal who, while searching premises for intoxicating liquors, found machine and without taking any legal papers or making any affidavit took the machine into his possession,

where marshal could not show that machine was being used for purpose of gam-

ing. *King v. McCrory*, 179 Miss. 162, 175 So. 193 (1937).

RESEARCH REFERENCES

ALR. Forfeiture of property for unlawful use before trial of individual offender. 3 A.L.R.2d 738.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place. 19 A.L.R.2d 1228.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 A.L.R.3d 726.

Constitutionality of statutes providing for destruction of gambling devices. 14 A.L.R.3d 366.

Validity, construction, and application of statutes or ordinances involved in pros-

ecutions for possession of bookmaking paraphernalia. 51 A.L.R.4th 796.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 190 et seq.

12A Am. Jur. Pl & Pr Forms (Rev), Gambling, Forms 11 et seq. (actions to recover gambling losses).

CJS. 38 C.J.S., Gaming §§ 75 et seq., 78 et seq.

Law Reviews. Payne, An introduction to civil forfeiture in Mississippi: An effective law enforcement tool or cash register justice? 59 Miss. L. J. 453, Fall 1989.

§ 97-33-19. Gambling; money and appliances forfeited; penalty for resisting seizure.

Any person or persons who shall oppose the seizure of any such moneys or appliances by any officer or person so authorized to make it, shall, on conviction thereof, be liable to a penalty of fifteen hundred dollars; and any person who shall take any part of said money, after the said seizure shall be declared, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined and imprisoned, at the discretion of the court.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 3(10); 1857, ch. 64, art. 140; 1871, § 2604; 1880, § 2850; 1892, § 1128; Laws, 1906, § 1210; *Hemingway's* 1917, § 940; Laws, 1930, § 967; Laws, 1942, § 2197.

Cross References — Recovery of money lost in void gambling contracts, see §§ 87-1-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

This provision is capable of construction that respects First Amendment. *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992), reh'g denied, 971 F.2d 750 (5th Cir. 1992).

Genuine issues of material facts existed, precluding summary judgment, as to whether law enforcement officer was arresting owner of building where gambling raid occurred because officer feared riot when building owner questioned offic-

ers as to whether they had search warrant and arrest warrant, or whether officer was arresting him because owner had exercised First Amendment rights in connec-

tion with owner's protesting of raid. *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992), reh'g denied, 971 F.2d 750 (5th Cir. 1992).

RESEARCH REFERENCES

ALR. Forfeiture of money used in connection with gambling or lottery or seized by officers in connection with an arrest or search on premises where such activities took place. 19 A.L.R.2d 1228.

Constitutionality of statutes providing for destruction of gambling devices. 14 A.L.R.3d 366.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia. 51 A.L.R.4th 796.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 186 et seq.

§ 97-33-21. Gambling; gambling with minor.

Any person of full age who shall bet any money or thing of any value with a minor, or allow a minor to bet at any game or gaming-table exhibited by him, or in which he is interested or in any manner concerned, on conviction thereof, shall be fined not less than three hundred dollars and imprisoned not less than three months.

SOURCES: Codes, 1857, ch. 64, art. 142; 1871, § 2606; 1880, § 2852; 1892, § 1129; Laws, 1906, § 1211; Hemingway's 1917, § 941; Laws, 1930, § 968; Laws, 1942, § 2198.

Cross References — Statutory definition of the term "infant," see § 1-3-21.

Statutory definition of the term "minor," see § 1-3-27.

Recovery of money lost in void gambling contracts, see §§ 87-1-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-33-23. Gambling; gambling with minor knowing him to be under-age.

Any person of full age who shall bet any money or thing of value with a minor, knowing such minor to be under the age of twenty-one years, or allowing any such minor to bet at any game or games, or at any gaming-table exhibited by him, or in which he is interested or in any manner concerned, on conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding two years.

SOURCES: Codes, 1857, ch. 64, art. 143; 1871, § 2607; 1880, § 2853; 1892, § 1130; Laws, 1906, § 1212; Hemingway's 1917, § 942; Laws, 1930, § 969; Laws, 1942, § 2199.

Cross References — Statutory definition of the term "infant," see § 1-3-21.

Statutory definition of the term "minor," see § 1-3-27.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

§ 97-33-25. Gambling; pool-selling; exceptions.

If any person shall sell or buy, either directly or indirectly, any chance in what is commonly called pool, upon any event whatever, or shall in any manner engage in such business or pastime, he shall be fined not more than Five Hundred Dollars (\$500.00) or shall be imprisoned in the county jail not more than ninety (90) days; provided, however, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this section;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(d) That is legal under the laws of the State of Mississippi.

SOURCES: Codes, 1892, § 1131; Laws, 1906, § 1213; Hemingway's 1917, § 943; Laws, 1930, § 970; Laws, 1942, § 2200; Laws, 1989, ch. 481, § 4; Laws, 1990, ch. 449, § 7; Laws, 1990, ch. 573, § 13; Laws, 1990 Ex Sess, ch. 45 § 151; Laws, 2005, 5th Ex Sess, ch. 16, § 6, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, inserted “including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay” following “southern counties in the State of Mississippi” in (1)(a); added (1)(b); and redesignated former (1)(b) and (c) as present (1)(c) and (d).

Cross References — Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Construction and application of state or municipal enactments relating to policy or numbers games. 70 A.L.R.3d 897.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool. 78 A.L.R.4th 483.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling. 80 A.L.R.4th 1079.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling. 84 A.L.R.4th 740.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 44 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games §§ 10, 11.

CJS. 38 C.J.S., Gaming § 89.

§ 97-33-27. Gambling; betting on horse or yacht race or shooting match; exceptions.

If any person shall bet on a horse race or a yacht race or on a shooting match, he shall be fined not more than Five Hundred Dollars (\$500.00), and, unless the fine and costs be immediately paid, he shall be imprisoned in the county jail not more than ninety (90) days; provided, however, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this section;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River, and in which the registered voters of the county in which the port is located have not voted to prohibit such betting, gaming or wagering on vessels as provided in Section 19-3-79; or

(d) That is legal under the laws of the State of Mississippi.

SOURCES: Codes, 1892, § 1132; Laws, 1906, § 1214; Hemingway's 1917, § 944; Laws, 1930, § 971; Laws, 1942, § 2201; Laws, 1989, ch. 481, § 5; Laws, 1990, ch. 449, § 8; Laws, 1990, ch. 573, § 14; Laws, 1990 Ex Sess, ch. 45 § 152; Laws, 2005, 5th Ex Sess, ch. 16, § 7, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, inserted “including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay” in (a); added (b); and redesignated former (b) and (c) as present (c) and (d).

Cross References — Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers

or wagering information related to book-making. 53 A.L.R.4th 801.

Validity, construction, and application

of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool. 78 A.L.R.4th 483.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling. 80 A.L.R.4th 1079.

Construction and application of statute or ordinance prohibiting or regulating

bookmaking or pool selling. 84 A.L.R.4th 740.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 56 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games § 28 (proof of use of premises for bookmaking).

CJS. 38 C.J.S., Gaming §§ 91, 92.

§ 97-33-29. Gambling; laws remedial, not penal.

All laws made or to be made for the suppression of gambling or gaming, are remedial and not penal statutes, and shall be so construed by the courts.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 11(7); 1857, ch. 64, art. 146; 1871, § 2610; 1880, § 2856; 1892, § 1133; Laws, 1906, § 1215; Hemingway's 1917, § 945; Laws, 1930, § 972; Laws, 1942, § 2202.

Cross References — Illegality of gambling contracts, generally, see §§ 87-1-1 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Word "remedial" called for gaming laws to be construed liberally against the criminal; the Mississippi Supreme Court has never held that the provision removed all prohibitory gambling laws from the criminal code; the constitutional analysis of a statute is the same whether the statute under scrutiny is criminal or civil, and the Constitution applies to every statute. The proper construction of the statute, or whether it shall be strictly or liberally construed, is not the question, but whether the Constitution applies to all statutes alike, whether civil or criminal.

And the supreme court holds that it does. *Trainer v. State*, 930 So. 2d 373 (Miss. 2006).

Indorsement and transfer of check in payment of gambling debt is void and ineffective to pass title to any subsequent holder. *Skinner Mfg. Co. v. Deposit Guar. Bank*, 160 Miss. 815, 133 So. 660 (1931).

Bank paying check indorsed in payment of gambling debt, resulting in loss to bank when maker stopped payment, held without remedy against maker. *Skinner Mfg. Co. v. Deposit Guar. Bank*, 160 Miss. 815, 133 So. 660 (1931).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling §§ 201 et seq.

CJS. 38 C.J.S., Gaming §§ 9 et seq.

§ 97-33-31. Lotteries; penalty for putting on.

If any person, in order to raise money for himself or another, or for any purpose whatever, shall publicly or privately put up a lottery to be drawn or adventured for, he shall, on conviction, be imprisoned in the penitentiary not exceeding five years.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(23); 1857, ch. 64, art. 141; 1871, § 2605; 1880, § 2851; 1892, § 1199; Laws, 1906, § 1277; Hemingway's 1917, § 1009; Laws, 1930, § 1038; Laws, 1942, § 2270.

Cross References — Provision in constitution prohibiting lotteries, see former Miss Const § 98.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Requisites of indictment for crimes involving lotteries, see § 99-7-35.

Sufficiency of lottery indictment, see § 99-17-29.

Compelling purchaser of lottery ticket to testify, see § 99-17-29.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Proof.

1. In general.

Cash drawing sponsored by political candidate does not constitute violation of bribery statutes, candidate gift statute, or lottery statute where scheme sponsored by candidate requires only that voters who wish to participate in cash drawing participate in election and where scheme expressly disclaims attempt to influence direction of vote. *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985).

The offense under this section [Code 1942, § 2270] is made a felony, whereas under each of the subsequent nine sections pertaining to lotteries (Code 1942, §§ 2271-2279), the offense merely constitutes a misdemeanor. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

The words, "put up a lottery," as used in this section [Code 1942, § 2270] are to be construed in their usual and most common sense, as they would ordinarily be understood by the public in general. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

To "put up a lottery" within the meaning of this section [Code 1942, § 2270] is not to operate a lottery but to put up or provide whatever is necessary for its operation, that is, (1) the capital, (2) the necessary paraphernalia and (3) the plan or set-up for the operation. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

Policy game whereby "writers" issue tickets upon which purchaser selects a number from 1 to 78, and, to determine the winners, balls numbering from 1 to 78

are put in a bag and shaken and 12 withdrawn therefrom, the numbers upon which designating the winners who are paid in money, constitutes a lottery. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

Scheme whereby merchant gave customers tickets purchased from chamber of commerce entitling customers to chance on prize, held not "lottery" or "gambling device." *R.J. Williams Furn. Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579, 57 A.L.R. 421 (1927).

2. Indictment.

Charge in indictment that defendant wilfully, unlawfully and feloniously, in order to raise money for himself, publicly put up, owned, maintained and operated a lottery to be drawn or adventured for, commonly called policy or a gambling game for money, is not confined to that of having put up a lottery in violation of this section [Code 1942, § 2270], but also includes further offenses under subsequent sections of this chapter pertaining to lotteries (Code 1942, §§ 2271-2279). *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

3. Proof.

State has burden of proof that defendant "put up a lottery" within the meaning of this section [Code 1942, § 2270], and mere proof that defendant was operating the lottery does not cast upon him the burden of showing that he did not put up the lottery. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

Where indictment charged defendant not only with a felony of having put up a

lottery in violation of this section [Code 1942, § 2270] but other offenses which under subsequent sections of this chapter (Code 1942, §§ 2271-2279) are misdemeanors, and, although there was no proof that defendant put up the lottery within the purview of this section [Code 1942, § 2270], the proof showed that he

did receive money for the lottery and delivered prizes therefor within the prohibition of Code 1942, § 2278, general verdict of guilty will be sustained, but case will be remanded for proper resentencing under Code 1942, § 2278. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

ATTORNEY GENERAL OPINIONS

It is illegal for a person to raffle off a jeep on which he owes, even if any proceeds over the amount he owes would be

donated to a D.A.R.E. program. See Sections 97-33-31, 97-33-49, and 97-33-51. *Stuart*, April 27, 1995, A.G. Op. #95-0202.

RESEARCH REFERENCES

ALR. Entrapment to commit offense with respect to gambling or lotteries. 31 A.L.R.2d 1212.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

State lotteries: actions by ticket holders

against state or contractor for state. 40 A.L.R.4th 662.

Private contests and lotteries: entrants' rights and remedies. 64 A.L.R.4th 1021.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 5 et seq., 61 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games § 10.

CJS. 54 C.J.S., Lotteries § 2.

§ 97-33-33. Lotteries; advertising prohibited.

If any person shall in any way advertise any lottery whatever, no matter where located, or shall knowingly have in his possession any posters or other lottery advertisements of any kind-save a regularly issued newspaper containing such an advertisement without intent to circulate the same as an advertisement-he shall, on conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned in the county jail not exceeding three months, or both.

SOURCES: Codes, 1892, § 1202; Laws, 1906, § 1280; Hemingway's 1917, § 1012; Laws, 1930, § 1041; Laws, 1942, § 2273.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling § 147.

CJS. 54 C.J.S., Lotteries § 30.

§ 97-33-35. Lotteries; advertising prohibited; publication or circulation of newspapers.

If any newspaper published or circulated in this state shall contain an

advertisement of any lottery whatever, or any matter intended to advertise a lottery, no matter where located, the editor or editors, publisher or publishers, and the owner or owners thereof permitting the same, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned in the county jail not less than ten days nor more than three months, for each offense. The issuance of each separate daily or weekly edition of the newspaper that shall contain such an advertisement shall be considered a separate offense.

SOURCES: Codes, 1892, § 1203; Laws, 1906, § 1281; Hemingway's 1917, § 1013; Laws, 1930, § 1042; Laws, 1942, § 2274.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 38 **Am. Jur.** 2d, Gambling **CJS.** 54 C.J.S., Lotteries §§ 8, 9.
§ 147.

§ 97-33-37. Lotteries; advertising prohibited; sale of newspapers.

If any newsdealer or other person shall, directly or indirectly, sell or offer for sale any newspaper or other publication containing a lottery advertisement, he shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than ten dollars or imprisoned not less than ten days or both.

SOURCES: Codes, 1892, § 1204; Laws, 1906, § 1282; Hemingway's 1917, § 1014; Laws, 1930, § 1043; Laws, 1942, § 2275.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 38 **Am. Jur.** 2d, Gambling **CJS.** 54 C.J.S., Lotteries § 30.
§§ 68, 75, 147.

§ 97-33-39. Lotteries; sale of tickets.

If any person shall sell, or offer or expose for sale, any lottery ticket, whether the lottery be in or out of this state, or for or in any other state, territory, district, or country, he shall, on conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned in the county jail not less than ten days nor more than sixty days, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(23); 1857, ch. 64, art. 141; 1871, § 2605; 1880, § 2851; 1892, § 1200; Laws, 1906, § 1278; Hemingway's 1917, § 1010; Laws, 1930, § 1039; Laws, 1942, § 2271.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling **CJS.** 54 C.J.S., Lotteries § 29.
 §§ 62, 63.
 19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games § 10.

§ 97-33-41. Lotteries; buying tickets in state prohibited.

If any person shall buy in this state any lottery ticket, whether the lottery be in or out of this state, or of or in any other state, territory, district, or country, he shall, on conviction, be fined not less than Five Dollars (\$5.00) nor more than Twenty-five Dollars (\$25.00), or be imprisoned in the county jail not exceeding ten (10) days, or both.

SOURCES: Codes, 1892, § 1201; Laws, 1906, § 1279; Hemingway's 1917, § 1011; Laws, 1930, § 1040; Laws, 1942, § 2272; Laws, 1992, ch. 388, § 1, eff from and after passage (approved April 27, 1992).

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Compelling purchaser of lottery ticket to testify, see § 99-17-29.

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling **CJS.** 54 C.J.S., Lotteries § 27, 28.
 §§ 62, 63.

§ 97-33-43. Lotteries; railroads.

If any railroad company shall suffer or permit the sale of a lottery ticket of any kind on its cars, or at its depots or depot grounds, or by its employees, no matter where the lottery is located, it shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than one hundred dollars for every such ticket so sold.

SOURCES: Codes, 1892, § 1205; Laws, 1906, § 2183; Hemingway's 1917, § 1015; Laws, 1930, § 1044; Laws, 1942, § 2276.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 38 *Am. Jur.* 2d, Gambling **CJS.** 54 *C.J.S.*, Lotteries § 30.
§ 140.

§ 97-33-45. Lotteries; steamboats.

If the owner or owners of any steamboat shall suffer or permit the sale of a lottery ticket of any kind on his or their boat, or by his or their employees, no matter where the lottery is located, he or they shall be guilty of a misdemeanor, and shall, on conviction, be punished as prescribed in section 97-33-43.

SOURCES: Codes, 1892, § 1206; Laws, 1906, § 1284; Hemingway's 1917, § 1016; Laws, 1930, § 1045; Laws, 1942, § 2277.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

Am Jur. 38 *Am. Jur.* 2d, Gambling **CJS.** 54 *C.J.S.*, Lotteries § 30.
§ 140.

§ 97-33-47. Lotteries; acting as agent for.

If any person shall act as agent for any lottery or lottery company, no matter where domiciled or located, or if he shall assume to so act as agent, or if he receive any money or other thing for any such lottery or lottery company, or deliver to any person any ticket or tickets, prize or prizes, or other thing from such lottery or lottery company, he shall, on conviction, be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than three months nor more than six months.

SOURCES: Codes, 1892, § 1207; Laws, 1906, § 1285; Hemingway's 1917, § 1017; Laws, 1930, § 1046; Laws, 1942, § 2278.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where indictment charged defendant not only with a felony of having put up a lottery in violation of Code 1942, § 2270, but other offenses which under subsequent sections of this chapter (Code 1942, §§ 2271-2279) are misdemeanors, and, al-

though there was no proof that defendant put up the lottery within the purview of Code 1942, § 2270, the proof showed that he did receive money for the lottery and delivered prizes therefor within the prohibition of this section [Code 1942, § 2278], general verdict of guilty will be sustained,

but case will be remanded for proper re-sentencing hereunder. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

RESEARCH REFERENCES

Am Jur. 38 *Am. Jur.* 2d, Gambling §§ 68, 75. **CJS.** 54 *C.J.S.*, Lotteries § 30.

§ 97-33-49. Raffles.

Except as otherwise provided in Section 97-33-51, if any person, in order to raise money for himself or another, shall publicly or privately put up or in any way offer any prize or thing to be raffled or played for, he shall, on conviction, be fined not more than Twenty Dollars (\$20.00), or be imprisoned not more than one (1) month in the county jail.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3(23); 1857, ch. 64, art. 141; 1871, § 2605; 1880, § 2851; 1892, § 1208; Laws, 1906, § 1286; Hemingway's 1917, § 1018; Laws, 1930, § 1047; Laws, 1942, § 2279; Laws, 1992, ch. 581, § 26, eff from and after October 1, 1992.

Cross References — Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2279] deals with cases wherein the putting up a lottery is for a single occasion. *Clark v. State*, 198 Miss. 88, 21 So. 2d 296 (1945).

Property raffled must be put up or offered within the state. *Jenkins v. State*, 96 Miss. 461, 50 So. 495 (1909).

The statute does not make punishable the selling of a chance in a raffle. The unlawful act is the putting up of the property. *Kirk v. State*, 69 Miss. 215, 10 So. 577 (1892).

ATTORNEY GENERAL OPINIONS

It is illegal for a person to raffle off a jeep on which he owes money, even if any proceeds over the amount owed would be donated to a D.A.R.E. program. See Sections 97-33-31, 97-33-51, and this section. *Stuart*, April 27, 1995, A.G. Op. #95-0202.

In order to be legal, a raffle must be

sponsored by a nonprofit civic, educational, wildlife conservation or religious organization and all proceeds must go to that organization, to be dispersed in accordance with the organization's rules and regulations. *Dedeaux*, July 25, 1997, A.G. Op. #97-0443.

RESEARCH REFERENCES

ALR. Entrapment to commit offense with respect to gambling or lotteries. 31 *A.L.R.*2d 1212.

State lotteries: actions by ticket holders

against state or contractor for state. 40 *A.L.R.*4th 662.

Am Jur. 38 *Am. Jur.* 2d, Gambling §§ 5 et seq.

19 Am. Jur. Proof of Facts 647, Unlawful Gambling Games § 10.

CHARITABLE BINGO LAW

SEC.

- 97-33-50. Short title.
- 97-33-51. Exemptions for certain bingo games and raffles.
- 97-33-52. Organizations authorized to conduct bingo games; disposition of proceeds; records and reports.
- 97-33-53. Definitions.
- 97-33-55. License to conduct games; application; person or persons responsible; fee.
- 97-33-57. Investigation of qualifications of applicants for licenses; criteria; term of license; denial, refusal, suspension or revocation of license.
- 97-33-59. Special licenses for emergency financial relief; special charitable limited license requirement.
- 97-33-61. Notice and hearing prerequisites to denial of license; judicial review.
- 97-33-63. [Reserved].
- 97-33-65. Commission to control games; entry and inspection by agents; suspension or revocation of license for violations.
- 97-33-67. Length and frequency of sessions; prize limits; designated supervisor responsible for session; purchase of supplies only from licensees; persons under 18 years of age.
- 97-33-69. Active member to conduct games; compensation, rentals and fees regulated; contract to be in writing; furnisher of services or equipment not to conduct games; allowable expenses.
- 97-33-71. Records and reports to Commission.
- 97-33-73. Gaming and Tax Commissions may examine books and records.
- 97-33-75. Violations; sanctions.
- 97-33-77. Regulation of pull-tabs.
- 97-33-79. Regulation of manufacturers of supplies and equipment; license required; sale of supplies only to licensees; gifts, etc.; records and reports.
- 97-33-81. Overlap of financial interest between organizations conducting games and manufacturers, distributors, or lessors.
- 97-33-101. Disposition of fees and fines; Charitable Bingo Fund.
- 97-33-103. Annual report by Commission.
- 97-33-105. Commission personnel not to have interest in organization conducting bingo or manufacturing or distributing supplies or equipment.
- 97-33-107. Functions, duties, and responsibilities of Commission.
- 97-33-109. Monitoring of licensees; enforcement powers and actions; prosecutions; penalties.
- 97-33-111 through 97-33-199. [Reserved].
- 97-33-201. Licensure as manufacturer, distributor, or operator of supplies or equipment or as commercial lessor; application; fee; requirements; denial, refusal to renew, suspension or revocation; grounds.
- 97-33-203. Commercial lessor's license; rental rates and other charges allowable; length and frequency of rentals; agreements with distributors.

§ 97-33-50. Short title.

The provisions of Sections 97-33-51 through 97-33-81, 97-33-101 through 97-33-109, 97-33-201 and 97-33-203, Mississippi Code of 1972, may be cited as the "Charitable Bingo Law."

SOURCES: Laws, 1992, ch. 581, § 1, eff from and after October 1, 1992.

ATTORNEY GENERAL OPINIONS

Bingo regulation has been delegated by Mississippi legislature to Mississippi Gaming Commission by Charitable Bingo Law, Miss. Code Sections 97-33-50 et seq.; however, this law has not preempted local

governing authority power to regulate hours of bingo operation or power to enact reasonable zoning restrictions relating to bingo operations and facilities. Scott, Jan. 20, 1993, A.G. Op. #93-0014.

RESEARCH REFERENCES

ALR. Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 30, 53.

CJS. 38 C.J.S., Gaming §§ 89, 98.
66 C.J.S., Nuisance § 46.

§ 97-33-51. Exemptions for certain bingo games and raffles.

(1) The provisions of Sections 97-33-1 through 97-33-49 shall not apply to any raffle wherein a ticket is sold and a prize is offered when such raffle is being held by and for the benefit of any nonprofit civic, educational, wildlife conservation or religious organization with all proceeds going to said organization.

(2) The provisions of Sections 97-33-1 through 97-33-49 shall not apply to any bingo game wherein a prize is offered when such bingo game is being held in accordance with the provisions of the Charitable Bingo Law.

(3) A bingo game or a raffle held pursuant to the provisions of the Charitable Bingo Law shall not be considered a game or gambling game for the purposes of Section 75-76-1 et seq.

SOURCES: Laws, 1979, ch. 390; Laws, 1987, ch. 445; Laws, 1991, ch. 588, § 2; Laws, 1992, ch. 581, § 2, eff from and after October 1, 1992.

Editor's Note — Sections 97-33-51 through 97-33-81, 97-33-101 through 97-33-109, 97-33-201 and 97-33-203 may be cited as the "Charitable Bingo Law" by provision of § 97-33-50.

Cross References — Provisions of this section constituting exception from prohibition of raffles, see § 97-33-49.

Except as otherwise provided in this section through § 97-33-81, all net proceeds from bingo to be expended for purposes for which organization conducting bingo game is created, see § 97-33-52.

JUDICIAL DECISIONS

1. In general.

Section 87-1-1, which declares "utterly void" all contracts executed and made in connection with illegal gaming activities,

does not bar collection of debts arising out of legal gaming activities; thus, § 87-1-1 does not apply to bingo, since charitable bingo games were exempted from any and

all "illegal" definitions by § 97-33-51. *Frank v. Dore*, 635 So. 2d 1369 (Miss. 1994).

Bingo is not a "lottery" prohibited by

[former] Mississippi Constitution Art 4, § 98, and therefore this section is constitutional. *Knight v. State ex rel. Moore*, 574 So. 2d 662 (Miss. 1990).

ATTORNEY GENERAL OPINIONS

Governmental entity, without express authority, cannot claim exemption provided to certain entities under subsection (1) of this section, and may not conduct raffles to raise money. *Cockrell* Nov. 3, 1993, A.G. Op. #93-0746.

It is illegal for a person to raffle off a jeep on which he owes money, even if any proceeds over the amount owed would be donated to a D.A.R.E. program. See Sections 97-33-31, 97-33-49, and this section. *Stuart*, April 27, 1995, A.G. Op. #95-0202.

In order to be legal, a raffle must be sponsored by a nonprofit civic, educational, wildlife conservation or religious organization and all proceeds must go to that organization, to be dispersed in accor-

dance with the organization's rules and regulations. *Dedeaux*, July 25, 1997, A.G. Op. #97-0443.

Any arrest made by a Mississippi Gaming Commission agent for assault, larceny, etc., is as a private citizen as it was the intent of the legislature to only give gaming enforcement agents the authority to enforce violations of the Gaming Control Act and the Charitable Bingo Law. *Patton*, Jan. 14, 2000, A.G. Op. #99-0708.

A governmental entity, without express statutory authority, may not claim the exemption provided to certain entities under Section 97-33-51(1) and may not conduct raffles to raise money. *Hilliard*, Feb. 14, 2003, A.G. Op. #03-0041.

RESEARCH REFERENCES

ALR. Validity and construction of statute exempting gambling operations carried on by religious, charitable or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 15 et seq.

CJS. 54 C.J.S., Lotteries §§ 8, 9.

§ 97-33-52. Organizations authorized to conduct bingo games; disposition of proceeds; records and reports.

(1) A bingo game may be conducted only:

(a) When held for the benefit of a charitable organization that (i) is licensed pursuant to Section 97-33-55 or Section 97-33-59; (ii) is domiciled in the State of Mississippi; and

(b) When the game is held by active members of such organization.

(2) Except as may be otherwise provided in Sections 97-33-51 through 97-33-203, all net proceeds derived from a bingo game authorized by this section shall be expended only for the purposes for which the organization is created, and no net proceeds derived from a bingo game authorized by this section shall be distributed to a charity outside of the State of Mississippi without the approval of the Mississippi Gaming Commission. Nothing in the Charitable Bingo Law shall prohibit a charitable organization from using gross receipts derived from a bingo game conducted under the Charitable Bingo Law to pay administrative penalties imposed by any state agency against the charitable organization.

(3) None of the proceeds of a bingo game authorized to be held under this section shall be used to purchase, construct or improve a building, hall or other facility solely for the purpose of conducting or operating a bingo game.

(4) Every organization which conducts bingo games shall report to the Mississippi Gaming Commission at such time, in such manner and on such forms as the commission prescribes. All records and reports so filed shall be public records and shall be available for inspection in accordance with the Mississippi Public Records Act of 1983.

SOURCES: Laws, 1991, ch. 588, § 1; Laws, 1992, ch. 581, § 3; Laws, 1994, ch. 635, § 1; Laws, 2002, ch. 366, § 1, eff from and after passage (approved Mar. 18, 2002.)

Cross References — Mississippi Public Records Act of 1983, see §§ 25-61-1 et seq. Exemption of certain bingo games and raffles from provisions of this section, see § 97-33-51.

Federal Aspects — Section 501 of the Internal Revenue Code is codified at 26 USCS § 501.

§ 97-33-53. Definitions.

As used in Sections 97-33-51 through 97-33-203, the following words and phrases shall have the meanings ascribed herein unless the context clearly indicates otherwise:

(a) “Bingo” means a game of chance in which a right to participate is sold to a player and prizes are awarded, that is:

(i) Played with a card, sheet, or an electronic representation thereof, bearing numbers or symbols;

(ii) Played with the participant covering, marking or revealing the numbers or symbols, as objects similarly numbered or designated are drawn from a receptacle and orally called; in the case of electronic representations, the requisite covering, marking or revealing may be accomplished electronically to match objects similarly numbered or designated and stored in memory in advance as winners, or which are generated randomly by an electronic process;

(iii) Won by the player who first covers, marks or reveals a previously designated arrangement of numbers or symbols; and

(iv) Played on the premises of a licensed organization and during the organization’s regular hours of conducting bingo games.

The term “bingo” includes pull-tabs made available as a companion game to bingo and played on the premises. The term “bingo” does not include any game which is played via television, telephone, satellite dish or any other telecommunications transmission or receiving device.

Any electronic device used to produce an electronic representation must maintain an inventory recorded in computed memory, not on cartridge memory, of the number of winners and losers. It must also be equipped with tamper-proof electric meters as a backup to the computer memory. It may not dispense cash or coins. Paybacks will be dispensed by printed ticket only.

The printer shall maintain duplicate records of all transactions. All such electronic devices shall be approved by the Mississippi Gaming Commission.

(b) "Charitable organization" means:

(i) Any nonprofit organization domiciled in this state that is tax exempt under Section 501(c) or (d) of the United States Internal Revenue Code and which has on file with the Mississippi Gaming Commission either a tax exemption letter issued by the United States Internal Revenue Service, or a certified copy of its application for such tax exempt status if the commission determines that the organization is likely to be granted the tax exempt status, and is:

1. Any chapter or post domiciled in this state of a nationally chartered organization whose membership is composed of former members of the military forces of the United States of America or whose membership is composed of members of the Merchant Marine Veterans Association; or

2. Any nonprofit civic, educational, wildlife conservation organization or religious organization domiciled in this state.

If an organization which has on file with the commission a certified copy of its application for a tax exemption under Section 501(c) or (d) of the U.S. Internal Revenue Code is not granted the exemption within twelve (12) months from the date of such application, the organization's license shall be subject to revocation pursuant to Section 97-33-61.

(ii) Any senior citizen recreation club, which is defined as an organization sanctioned by the local council on aging and composed of members aged sixty (60) years or older, the sole function of which is to provide amusement and diversion for its members.

(c) "Commission" means the Mississippi Gaming Commission.

(d) "Distributor" means any person or other entity who sells, offers for sale or otherwise furnishes to any person, gaming supplies or equipment for use in the conducting of a bingo game authorized by Sections 97-33-51 through 97-33-203.

(e) "Manufacturer" means any person or other entity who manufactures for sale, offers for sale, or otherwise furnishes, any gaming supplies or equipment for use in the conducting of a bingo game authorized by Sections 97-33-51 through 97-33-203.

(f) "Commercial lessor" means any person or other entity, other than a bona fide nonprofit organization licensed to conduct charitable bingo games, who leases any building, structure or premises to organizations licensed under the provisions of Sections 97-33-51 through 97-33-203.

(g) "Operator" means a person or other entity who supplies the charity an electronic facsimile pull-tab device or labor saving device as described in Section 97-33-53. This person or entity may not be engaged in any other form of bingo operations such as a distributor, manufacturer, charity or commercial lessor.

(h) "Pull-tabs" means single or banded tickets or cards each with its face covered to conceal one or more numbers or symbols, where one or more cards

or tickets in each set have been designed in advance as winners. "Pull-tabs" shall also mean any device for dispensing pull-tabs.

(i) "Session" means any five-hour time period within one (1) day or six-hour time period within one (1) week.

(j) "Day" means the whole or any part of the time period of twenty-four (24) hours from midnight to midnight.

(k) "Week" means the seven-day period from 12:01 a.m. on Monday until midnight the following Sunday.

(l) "Net proceeds" means the gross amount collected from participants less the actual prizes or winnings paid, the actual cost or expenses of conducting the bingo game, any administrative penalties imposed by any state agency against the charitable organization, and any other expense authorized under the Charitable Bingo Law or any regulation promulgated thereunder.

(m) "Gross receipts" means all revenue received from bingo operations.

SOURCES: Laws, 1992, ch. 581, § 4; Laws, 1994, ch. 635, § 2; Laws, 2002, ch. 366, § 2, eff from and after passage (approved Mar. 18, 2002.)

Cross References — Mississippi Gaming Commission, see § 75-76-7.

RESEARCH REFERENCES

ALR. Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 30, 53.

CJS. 38 C.J.S., Gaming §§ 89, 98.
66 C.J.S., Nuisance § 46.

§ 97-33-55. License to conduct games; application; person or persons responsible; fee.

(1) Any charitable organization desiring to conduct bingo games must obtain a license to do so from the Mississippi Gaming Commission.

(2) Each applicant for such a license shall file with the commission a written application therefor in a form prescribed by the commission on which shall be stated:

(a) The name and address of the applicant, together with sufficient facts relating to its incorporation and organization to enable the commission to determine whether or not the applicant is a bona fide organization;

(b) The names and addresses of its officers;

(c) The place or places where, and the date or dates and the time or times when, bingo games are intended to be conducted by the applicant, under the license applied for;

(d) The items of expense intended to be incurred or paid in connection with the holding, operating and conducting of bingo games and the names and addresses of the persons to whom, and the purposes for which, they are to be paid;

(e) The specific purposes to which the entire net proceeds of the bingo games are to be devoted and in what manner;

(f) That, except as otherwise provided in Section 97-33-69, no commission, salary, compensation, reward or recompense will be paid to any person for holding, operating or conducting bingo games;

(g) A description of all prizes to be offered and given in all bingo games to be held, operated and conducted under such license; and

(h) Such other information as shall be prescribed by the commission by its rules and regulations.

(3) In each application there shall be designated an active member or members of the organization under whom the bingo games are to be held, operated and conducted. The application shall include a statement executed by the applicant and by the member or members so designated, that he or they will be responsible for the holding, operation and conduct of the bingo games in accordance with the terms of the license and the provisions of the commission's rules and regulations governing bingo games and of Sections 97-33-51 through 97-33-203, if such license is granted.

(4) An original application shall be accompanied by a fee of Fifty Dollars (\$50.00). Such application fee shall be refunded by the commission to an organization deemed to be an exempt organization pursuant to Section 97-33-107.

SOURCES: Laws, 1992, ch. 581, § 5; Laws, 1994, ch. 635, § 3, eff from and after October 1, 1994.

Cross References — Mississippi Gaming Commission, see § 75-76-7.

Charitable organization licensed under this section authorized to conduct bingo games, see § 97-33-52.

Deposit of all fees and fines collected pursuant to this section into Charitable Bingo Fund, see § 97-33-101.

JUDICIAL DECISIONS

1. Bingo games by charitable organization.

Contrary to appellants' claims that there was proof that there were members of a charitable corporation, which had the authority to elect and replace the board of directors, the fact that the charitable corporation held bingo games was not proof that there were members of the corporation, although Mississippi's Charitable

Bingo Law, Miss. Code Ann. § 97-33-55, permits a nonprofit entity to conduct bingo games if the game is held by active members. The corporation may very well have been operating in violation of the law for a decade, and just managed to escape the notice of regulatory authorities. *His Way, Inc. v. McMillin*, 909 So. 2d 738 (Miss. Ct. App. 2005).

§ 97-33-57. Investigation of qualifications of applicants for licenses; criteria; term of license; denial, refusal, suspension or revocation of license.

(1) The commission shall investigate the qualifications of each applicant

and the merits of the application, with due expedition after the filing of the application, and shall make the following determinations:

(a) That the applicant is duly qualified to hold, operate and conduct bingo games under the provisions of Sections 97-33-51 through 97-33-203 and the rules and regulations of the commission governing same.

(b) That the member or members of the organization designated in the application to hold, operate, conduct, or assist in holding, operating, or conducting, the bingo games are bona fide active members of the organization and of good moral character, who have never been convicted of certain offenses as designated by the commission.

(c) That bingo games are to be held, operated and conducted in accordance with the provisions of Sections 97-33-51 through 97-33-203 and in accordance with the rules and regulations of the commission governing same, and that the proceeds thereof are to be disposed of as provided by Sections 97-33-51 through 97-33-203.

(2) If the commission is satisfied that no commission, salary, compensation, reward or recompense whatever, except as otherwise provided in Section 97-33-69, will be paid or given to any person holding, operating or conducting any bingo game, it may issue a license to the applicant for the holding, operating and conducting of bingo games.

(3) No license for holding, operating or conducting bingo games that is issued under Sections 97-33-51 through 97-33-203 shall be effective for more than one (1) calendar year.

(4) The commission shall not issue a license to:

(a) Any person who has been convicted of certain related offenses as established by the commission or who presently has such a charge pending in any state or federal court;

(b) Any person who has ever been convicted of a gambling-related offense in any state or federal court;

(c) Any person who is or has ever been a professional gambler;

(d) Any firm, organization or corporation in which any person as described in paragraphs (a) through (c) is an officer or director, whether compensated or not, or in which such person has a direct or indirect financial interest;

(e) The commission may deny an application for licensure, refuse to renew a license, or suspend or revoke a license for any reason consistent with the purposes of Sections 97-33-51 through 97-33-203 which it deems to be in the interest of the public. However, policies regarding such denial, suspension, revocation or refusal to renew shall be established by rule and regulation. If the commission fails to act upon the license application within sixty (60) days of the date of filing of the application by the charitable organization, such application shall be deemed accepted.

(5) Any significant change in the information submitted on its application for licensure shall be filed by a licensee with the commission within ten (10) days of the change. A significant change shall include but not be limited to any change in the officers, directors, managers, proprietors or persons having a direct or indirect financial interest in any licensed organization or entity.

SOURCES: Laws, 1992, ch. 581, § 6; Laws, 1994, ch. 635, § 4, eff from and after October 1, 1994.

§ 97-33-59. Special licenses for emergency financial relief; special charitable limited license requirement.

(1) The commission may issue a special license for the conducting of limited fund-raising bingo games for the benefit of a person, family or group of persons who, because of circumstances which cause a financial crisis of an emergency nature, are in need of immediate fund-raising relief. Bingo games conducted under this section shall consist of no more than two (2) bingo sessions annually by the same person, family or group of persons, at which the total amount of prizes which may be awarded on any calendar day under such a license shall not exceed Fifteen Thousand Dollars (\$15,000.00) in cash or other thing or things of value. Except as otherwise provided in this section or as may be otherwise provided by Section 97-33-69(10) or 97-33-107(k), all other provisions of Sections 97-33-51 through 97-33-203 shall apply to the issuance of such special licenses.

(2) The commission shall not authorize any organization to conduct limited bingo games as described in subsection (1) as provided herein unless that organization has first obtained a special charitable limited license from the commission.

(3) All proceeds derived from bingo games conducted under a special charitable limited license shall go to the specific need for which the games are conducted, as outlined in the application for such license.

(4) The fee for a special charitable limited license shall be limited to the actual administrative costs of issuing it.

SOURCES: Laws, 1992, ch. 581, § 7; Laws, 1994, ch. 635, § 5, eff from and after October 1, 1994.

Cross References — Charitable organization licensed under this section authorized to conduct bingo games, see § 97-33-52.

Prize limit in this section an exception to general rule limiting amount of prize money, see § 97-33-67.

§ 97-33-61. Notice and hearing prerequisites to denial of license; judicial review.

No license shall be revoked by the commission until after a hearing is held on due notice. The commission may designate a hearing examiner to hear the case and render a decision. A licensee aggrieved by the decision of the hearing examiner may apply within fifteen (15) days after announcement of the decision in writing to the commission for review of the decision. Review is limited to the record of proceedings before the hearing examiner. The commission may sustain or reverse the hearing examiner's decision.

Any person aggrieved by the final decision of the commission may obtain a judicial review thereof in the circuit court of the county in which the bingo

games are conducted. The judicial review must be instituted by filing a petition within ten (10) days after the decision is rendered.

SOURCES: Laws, 1992, ch. 581, § 8; Laws, 1994, ch. 635, § 6, eff from and after October 1, 1994.

JUDICIAL DECISIONS

1. Temporary restraining order.

A county circuit court had authority to enter a temporary restraining order or a temporary injunction allowing an American Legion Post to continue operations while the revocation of its charitable bingo license was on appeal. *American Legion Post 134 v. Mississippi Gaming Comm'n*, 798 So. 2d 445 (Miss. 2001).

The circuit court had jurisdiction to

enter a temporary restraining order or a temporary injunction allowing an American Legion Post to continue bingo operations while the revocation of its charitable bingo license was on appeal as this section did not grant an automatic supersedeas. *American Legion Post 134 v. Mississippi Gaming Comm'n*, — So. 2d —, 2000 Miss. LEXIS 188 (Miss. Aug. 17, 2000).

§ 97-33-63. [Reserved].

§ 97-33-65. Commission to control games; entry and inspection by agents; suspension or revocation of license for violations.

The commission shall control all bingo games held, operated or conducted by a licensee to assure that they are fairly held, operated and conducted in accordance with the provisions of the license, the commission's rules and regulations, and the provisions of Sections 97-33-51 through 97-33-203. The commission may suspend or revoke any license for violation of any such rule and regulation or provision. Its officers and agents may enter and inspect any premises where any bingo game is being held, operated and conducted or is intended to be held, operated and conducted, or where any equipment is being used or intended to be used in the conduct thereof.

SOURCES: Laws, 1992, ch. 581, § 9; Laws, 1994, ch. 635, § 7, eff from and after October 1, 1994.

Cross References — Mississippi Gaming Commission, see § 75-76-7.

§ 97-33-67. Length and frequency of sessions; prize limits; designated supervisor responsible for session; purchase of supplies only from licensees; persons under 18 years of age.

(1)(a) No licensee shall hold, operate or conduct any bingo game more often than for two (2) sessions within one (1) day and more often than eight (8) sessions in any one (1) week. Any licensee who holds no more than one (1) session per week shall be entitled to conduct one (1) six-hour session per week. Notwithstanding the provisions of this paragraph, pull-tabs, video

pull-tabs or video bingo games may be played for up to eighty (80) hours per week.

(b) No licensee shall hold, operate or conduct any bingo game in more than one (1) physical location. Any bingo operation for which a license has been issued by the Gaming Commission on or after April 1, 1995, and which is located within one thousand five hundred (1,500) feet of a school, church or public library building, shall not conduct bingo sessions during the hours of the school day or during church or library hours.

(2) The total amount of prizes which may be awarded in any one (1) session by a licensee shall not exceed Seven Thousand Five Hundred Dollars (\$7,500.00) in cash or other thing or things of value, except as otherwise provided in Section 97-33-59 and except that the total amount of prizes which may be awarded in any one (1) session shall not exceed Eight Thousand Dollars (\$8,000.00) if only one (1) session is held in any one (1) week. The Seven Thousand Five Hundred Dollars (\$7,500.00) and the Eight Thousand Dollars (\$8,000.00) limits do not include payback of pull-tabs or electronic representations. The commission shall establish by rule the method of calculating the value of anything offered as a prize.

(3) Each licensee shall designate a supervisor and a sufficient number of alternate supervisors to be in charge of and primarily responsible for each session of a bingo game. Such individual shall be familiar with the provisions of Sections 97-33-51 through 97-33-203 and the rules and regulations of the commission. Such individual, or alternate who shall be designated as the bingo supervisor, shall supervise all activities of such session and be responsible for the conduct of all games of such session. The supervisor shall be present at all times on the premises during the session.

(4) No licensee shall purchase or otherwise obtain any gaming supplies or equipment from any distributor, operator or manufacturer until it has first determined that the individual selling or otherwise offering such supplies or equipment has a valid license issued by the commission.

(5) No licensee shall allow any person under eighteen (18) years of age to assist in the holding, operation or conduct of any bingo game. No licensee shall allow any person under eighteen (18) years of age to play a bingo game unless accompanied by his or her parent or legal guardian, except that a licensee may prohibit all persons under eighteen (18) years from entering the licensed premises by posting a written notice to that effect on the premises.

SOURCES: Laws, 1992, ch. 581, § 10; Laws, 1994, ch. 635, § 8; Laws, 1995, ch. 618, § 1; Laws, 2002, ch. 508, § 1, eff from and after passage (approved Apr. 1, 2002.)

JUDICIAL DECISIONS

1. In general.

This section does not exist to criminalize the actions of one designated by the statutory signatory to act on his behalf when necessary, but to prevent the opera-

tion of any aspect of the games by those not authorized to do so or those with an interest in the outcome of the games. *Mississippi Gaming Comm'n v. Baker*, 755 So. 2d 1129 (Miss. Ct. App. 1999).

ATTORNEY GENERAL OPINIONS

Any bingo operation that received its original license prior to April 1, 1995, would be exempt from the provisions of subsection (1)(b) of this section. However, the statute does not prohibit a bingo operation located within one thousand five hundred (1,500) feet of a school or library from receiving a license after April 1, 1995. Johnson, June 16, 1995, A.G. Op. #95-0281.

This section prohibits any bingo operation that receives its license after April 1, 1995, and that is located within one thou-

sand five hundred (1,500) feet of a school or library from conducting bingo sessions during the hours of the school day or during library hours. Johnson, June 16, 1995, A.G. Op. #95-0281.

Pursuant to § 97-33-203 and this section, since a session is defined as a five-hour period of time, there is no need for the Gaming Commission to set a regulation which prorates the amount of prizes allowed or the rent to be paid based on the length of the session. Harvey, October 30, 1996, A.G. Op. #96-0719.

RESEARCH REFERENCES

ALR. Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 30, 53.

CJS. 38 C.J.S., Gaming §§ 89, 98.
66 C.J.S., Nuisance § 46.

§ 97-33-69. Active member to conduct games; compensation, rentals and fees regulated; contract to be in writing; furnisher of services or equipment not to conduct games; allowable expenses.

(1) Except as otherwise provided in subsection (3) of this section, no person shall hold, operate, conduct or assist in holding, operating or conducting, any bingo game under any license issued pursuant to Sections 97-33-51 through 97-33-81, except designated supervisors or alternate supervisors designated as provided for in Section 97-33-67(3).

(2) Except as otherwise provided in subsection (3) of this section and as may be otherwise provided pursuant to subsection (10) of this section, no commission, salary, compensation, reward or recompense, including but not limited to granting or use of bingo cards without charge or at a reduced charge, shall be paid or given directly or indirectly to the bingo supervisor or alternate supervisor or any person related to such supervisor or alternate supervisor by blood, marriage or business relationship, for the holding, operating or conducting any licensed game or games of chance.

(3) Except as may be otherwise provided pursuant to subsection (10) of this section, any licensee may pay as compensation for all persons involved in the holding, operating or conducting of any licensed game or games of chance, an amount not to exceed Four Hundred Dollars (\$400.00) per session. Persons who may be compensated from the Four Hundred Dollars (\$400.00) per session amount may include the bingo supervisor or alternate supervisor, callers, runners and cashiers. Neither the bingo supervisor nor any alternate super-

visor, or any person related to such supervisor by blood, marriage or business relationship, while being compensated as the bingo supervisor, shall receive any other compensation, directly or indirectly, from the licensee. No employee receiving compensation for the holding, operating or conducting or assisting in the holding, operating or conducting of a bingo game shall receive compensation for more than one (1) job function.

(4)(a) Any corporation, person or entity operating bingo games, under contract, for the benefit of organizations as prescribed in subsection (3) of this section shall be restricted to operating such games for a limit of one (1) such organization authorized to pay employees up to a maximum of Four Hundred Dollars (\$400.00) per session. Such corporation, person or entity shall only be authorized to conduct such sessions at one (1) physical location or building.

(b) Any corporation, person or entity operating bingo games, under contract, for the benefit of organizations as prescribed in subsection (3) of this section shall have a written contract with the organization and shall be subject to any rules and regulations promulgated by the commission for the purpose of investigating or regulating contracting agents.

(5) Except as may be otherwise provided pursuant to subsection (10) of this section, no manufacturer, operator, distributor, commercial lessor, or his agents or employees, who directly or indirectly leases premises, sells, leases, otherwise distributes gaming supplies or equipment, or furnishes any commodities or services, in relation to the conducting of any bingo game pursuant to Sections 97-33-51 through 97-33-203 shall take part in the holding, operation or conducting of a bingo game. However, nothing in this section shall prohibit the owner of a premises from having a representative present to protect his interests in the premises.

(6) Except as may be otherwise provided pursuant to subsection (10) of this section, no bingo game shall be conducted with any supplies or equipment except such as shall be owned by the licensee, provided without payment of any compensation by the licensee or purchased from a licensed manufacturer or distributor of such supplies or equipment.

(7) Except as may be otherwise provided pursuant to subsection (10) of this section, no item of expense shall be incurred or paid in connection with the holding, operating or conducting of any bingo game by a licensee, except:

(a) The actual and reasonable costs of purchasing or leasing necessary supplies, equipment and materials to be used exclusively in the holding, operating or conducting of the bingo game; and

(b) The actual and reasonable costs incurred in obtaining and performing necessary bookkeeping, security and janitorial services for the holding, operating or conducting of the bingo game. The reasonableness of the amounts of, and the necessity for, an expense authorized by this subsection shall be determined by the commission.

(8) Except as may be otherwise provided pursuant to subsection (10) of this section, no licensee shall pay any consulting fees to any person for any service performed in relation to the conducting of any charitable game of

chance or concession fees to any person who provides refreshments to the participants in any such games.

(9) Except as may be otherwise provided pursuant to subsection (10) of this section, no lease providing for a rental arrangement for premises or equipment shall provide for payment in excess of the reasonable market rental rate for such premises or equipment, and in no case shall any payment be based on a percentage of gross receipts or profits derived from a bingo game. Whether a market rental rate is reasonable shall be determined by the commission.

(10) Administrative exceptions to the provisions of this section with regard to organizations which have demonstrated to the Mississippi Gaming Commission a practice of legitimate operation of such games, may be made by the Mississippi Gaming Commission pursuant to its rules and regulations, as duly adopted and promulgated by the commission; provided that such an administrative exception shall be no more restrictive than the provision of law to which it is an exception.

SOURCES: Laws, 1992, ch. 581, § 11; Laws, 1994, ch. 635; Laws, 1995, ch. 618, § 2, eff from and after July 1, 1995.

Cross References — Except as otherwise provided in §§ 97-33-51 through 97-33-81, all net proceeds from bingo to be expended for purposes for which organization conducting bingo game is created, see § 97-33-52.

Compensation not to be paid to any person for holding, operating or conducting bingo games, except as provided in this section, see § 97-33-55.

Commission, salary, compensation, reward, or recompense paid under this section not impediment to granting of bingo license, see § 97-33-57.

JUDICIAL DECISIONS

1. In general.
2. Compensation.

1. In general.

This section does not exist to criminalize the actions of one designated by the statutory signatory to act on his behalf when necessary, but to prevent the operation of any aspect of the games by those not authorized to do so or those with an interest in the outcome of the games. *Mississippi Gaming Comm'n v. Baker*, 755 So. 2d 1129 (Miss. Ct. App. 1999).

2. Compensation.

While § 97-33-67(1)(a) allows a charity to operate video bingo and pull-tabs out-of-session, the compensation paid to its employees for working during that time must be included in the session pay limitation; thus, pursuant to subsection (3) of this section, the maximum allowable compensation for any two-week period is \$400 times 16, or \$6,400.00. *His Way Homes, Inc. v. Mississippi Gaming Comm'n*, 733 So. 2d 764 (Miss. 1999).

ATTORNEY GENERAL OPINIONS

Subsection (4)(a) of this section, does not create an exception to the mandate that "members-in-charge" not be compen-

sated in any way. *Harvey*, March 2, 1995, A.G. Op. #95-0081.

§ 97-33-71. Records and reports to Commission.

(1) Except as may be otherwise provided pursuant to Section 97-33-107(k), the organization which held, operated or conducted the bingo game, and its bingo supervisor or supervisors who were in charge thereof, shall furnish to the commission the following information not less than quarterly:

(a) A verified statement showing the amount of the gross receipts derived from each bingo game, which shall include receipts from the sale of shares, tickets or rights in any manner connected with participation in said game;

(b) Each item of expense incurred or paid, and each item of expenditure made or to be made;

(c) The name and address of each person to whom each such item has been paid or is to be paid, with a detailed description of the merchandise purchased or the service rendered therefor;

(d) The net profit derived from each such bingo game and the uses to which such net profit has been or is to be applied;

(e) A list of prizes offered or given, with the respective values thereof;

(f) The number of participants in each game.

(2) Each licensee shall maintain and keep such books and records as may be necessary to substantiate the particulars of each such report.

(3) All licensees shall maintain records and submit reports as provided by rules of the commission. Such rules may require that all income of a licensee derived from charitable bingo games be recorded to the extent necessary to disclose gross and net income.

SOURCES: Laws, 1992, ch. 581, § 12; Laws, 1994, ch. 635, § 10; Laws, 1995, ch. 618, § 3, eff from and after July 1, 1995.

Cross References — Except as otherwise provided in §§ 97-33-51 through 97-33-81, all net proceeds from bingo to be expended for purposes for which organization conducting bingo game is created, see § 97-33-52.

Reporting provisions of this section applicable to certain expenditures relating to conduct of games, see § 97-33-69.

§ 97-33-73. Gaming and Tax Commissions may examine books and records.

(1) The Mississippi Gaming Commission shall have power to examine or to cause to be examined the books and records of any organization to which such license is issued so far as they may relate to any transactions connected with the holding and conducting of bingo and to examine any manager, officer, director, agent, member or employee thereof under oath in relation to the conduct of any such game, but any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of Sections 97-33-51 through 97-33-203.

(2) The State Tax Commission shall have the power to examine or to cause to be examined the books and records of any organization to which a license is

issued for the purpose of determining compliance with the Charitable Bingo Law and any other laws and regulations and to conduct in-depth audits and investigation of the licensee.

SOURCES: Laws, 1992, ch. 581, § 13; Laws, 1994, ch. 635, § 11, eff from and after October 1, 1994.

Cross References — Mississippi Gaming Commission, see § 75-76-7.

§ 97-33-75. Violations; sanctions.

(1) Any person, association or corporation violating any provision of Sections 97-33-51 through 97-33-203 or any rule or regulation of the commission shall be subject to a fine imposed by the commission and to suspension or revocation of its license.

(2) Any person who commits any of the following acts, upon conviction, shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for one (1) year, or both:

(a) Making any false statement in any application for a license under Sections 97-33-51 through 97-33-203, or in any official report to the commission;

(b) Holding, operating or conducting any bingo game without a license;

(c) Knowingly falsifying or making any false entry in any books or records, with respect to any transaction connected with the holding, operating or conducting of any bingo game;

(d) Refusing to allow the commission access to any premises where a game of chance is being conducted or to any book, record or document relating to such conduct;

(e) Intentionally causing, aiding, abetting or conspiring with another to cause any person to violate any provision of Sections 97-33-51 through 97-33-203;

(f) Possessing, displaying, selling or otherwise furnishing to any person any pull-tabs, except as provided for in Section 97-33-77.

(3) Any person who violates any other provision of Sections 97-33-51 through 97-33-203 that is not listed in this section may be imprisoned for not more than six (6) months or fined not more than Five Hundred Dollars (\$500.00), or both.

(4) Any conviction of any person pursuant to subsections (2) and (3) of this section shall constitute cause for revocation of the license of such person or the organization with which such person is affiliated.

SOURCES: Laws, 1992, ch. 581, § 14; Laws, 1994, ch. 635, § 12, eff from and after October 1, 1994.

Cross References — Deposit of all fees and fines collected pursuant to this section into Charitable Bingo Fund, see § 97-33-101.

§ 97-33-77. Regulation of pull-tabs.

(1) No organization, distributor, manufacturer, or any representative thereof, either with knowledge or in circumstances whereunder he reasonably should have known, shall possess, display, put out for play, sell or otherwise furnish to any person any pull-tabs:

(a) In which the winning pull-tabs have not been completely and randomly distributed and mixed among all other pull-tabs in the deal;

(b) In which the location or approximate location of any of the winning pull-tabs can be determined in advance of opening the pull-tabs in any manner or by any device, including but not limited to any pattern in the manufacture, assembly, or packaging of pull-tabs by the manufacturer, by any markings on the pull-tabs or container, or by the hue of a light; or

(c) Which does not conform in any respect to these requirements as to manufacturer, assembly or packaging.

(2) A distributor shall not purchase or be furnished any pull-tabs from a manufacturer of pull-tabs unless all of the following conditions are met:

(a) The manufacturer's label or trademark has been registered with the Mississippi Gaming Commission.

(b) Each individual pull-tab manufactured has conspicuously set forth on it the name of the manufacturer or a label or trademark which identifies its manufacturer.

(c) The pull-tab is of a type approved by the commission for use in Mississippi.

SOURCES: Laws, 1992, ch. 581, § 15, eff from and after October 1, 1992.

Cross References — Mississippi Gaming Commission, see § 75-76-7.

Provisions of this section an exception to general prohibition against possessing, displaying, selling or furnishing pull-tabs, see § 97-33-75.

§ 97-33-79. Regulation of manufacturers of supplies and equipment; license required; sale of supplies only to licensees; gifts, etc.; records and reports.

(1) No person or other entity shall fabricate, concoct or manufacture any supplies or equipment for use in the conducting of any bingo game authorized under Sections 97-33-51 through 97-33-203, including but not limited to bingo equipment, pull-tabs, or electronic representations, within this state or for use within this state without having obtained a manufacturer's license from the commission.

(2) No person or other entity shall sell, offer for sale, or otherwise furnish any other person any supplies or equipment of use in the conduct of any bingo game authorized under Sections 97-33-51 through 97-33-203, including but not limited to bingo equipment and pull-tabs without having obtained a distributor's or operator's license from the commission.

(3) No person licensed as a manufacturer, distributor or operator shall sell or otherwise make available any such gaming supplies or equipment to any

individual unless he has first determined that the individual is a licensed distributor or is acting as an agent of an organization which has a valid license issued by the commission.

(4) No manufacturer, distributor or operator of gaming supplies or equipment shall directly or indirectly give gifts, trips, prizes, premiums or other such gratuities to any charitable gaming organization, its employees, or commercial lessors.

(5) Each manufacturer, distributor or operator of gaming supplies or equipment shall maintain records and submit reports as required by rules of the commission. The rules may require maintenance of purchase and sale invoices of all gaming supplies and equipment manufactured or distributed, whether by sale, lease, rental, loan or donation, to any charitable gaming organization.

SOURCES: Laws, 1992, ch. 581, § 16; Laws, 1994, ch. 635, § 13, eff from and after October 1, 1994.

§ 97-33-81. Overlap of financial interest between organizations conducting games and manufacturers, distributors, or lessors.

(1) No organization which conducts charitable bingo games shall be a manufacturer, distributor or operator of supplies or equipment for such games.

(2) No officer, director or manager of an organization which conducts charitable bingo games shall:

(a) Have a direct or indirect financial interest in any entity which manufactures or distributes supplies or equipment for charitable bingo games;

(b) Serve as an officer, director, shareholder, proprietor or employee of an entity which manufactures or distributes supplies or equipment for charitable bingo games; or

(c) Serve as an officer, director, shareholder, proprietor or employee of a commercial lessor who leases buildings, structures or premises to organizations licensed under the provisions of Sections 97-33-51 through 97-33-203.

(3) No entity which manufactures or distributes supplies or equipment for charitable bingo games of chance; no officer, director, shareholder, proprietor or employee of such entity; and no person having a direct or indirect financial interest in such an entity shall lease premises, directly or indirectly, to an organization for purposes of conducting charitable bingo games of chance.

(4) No entity or person described in subsections (1), (2) or (3) of this section shall serve as a commercial lessor.

SOURCES: Laws, 1992, ch. 581, § 17; Laws, 1994, ch. 635, § 14, eff from and after October 1, 1994.

§ 97-33-101. Disposition of fees and fines; Charitable Bingo Fund.

All fees and fines collected by the commission pursuant to Sections 97-33-51 through 97-33-203 shall be deposited into a special fund to be known as the "Charitable Bingo Fund," which is hereby created in the State Treasury. The monies in such fund shall be used exclusively to support the activities of the commission related to the regulation of the Charitable Bingo Law, upon appropriation by the Legislature. Unexpended amounts remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund, and any interest earned on amounts in such special fund shall be deposited to the credit of the special fund.

SOURCES: Laws, 1992, ch. 581, § 18; Laws, 1994, ch. 635, § 15, eff from and after October 1, 1994.

Editor's Note — Sections 97-33-51 through 97-33-81, 97-33-101 through 97-33-109, 97-33-201 and 97-33-203 may be cited as the "Charitable Bingo Law" by provision of § 97-33-50.

§ 97-33-103. Annual report by Commission.

(1) The commission shall annually prepare and submit a comprehensive report on the scope and nature of charitable bingo game activities in this state and impact of the commission on such activities. The report shall be submitted to the Lieutenant Governor, the Speaker of the House of Representatives, the Chairmen of the House and Senate Judiciary Committees, the Chairman of the House Ways and Means Committee and the Chairman of the Senate Finance Committee.

(2) The commission shall furnish a copy of its rules and regulations, including any amendments thereto as they are adopted, pursuant to the Charitable Bingo Law, to the Chairman and Counsel of the House Ways and Means Committee and the Chairman and Counsel of the Senate Finance Committee. Further, upon a written request from any member of the Legislature, the commission shall furnish such rules and regulations to the member, by return United States Mail.

SOURCES: Laws, 1992, ch. 581, § 19; Laws, 1994, ch. 635, § 16, eff from and after October 1, 1994.

§ 97-33-105. Commission personnel not to have interest in organization conducting bingo or manufacturing or distributing supplies or equipment.

Neither the director nor any employee of the commission shall be an officer, director or manager of any organization licensed by the state to conduct charitable bingo games or have a direct or indirect financial interest in any entity manufacturing or distributing supplies or equipment used in such games.

SOURCES: Laws, 1992, ch. 581, § 20, eff from and after October 1, 1992.

§ 97-33-107. Functions, duties, and responsibilities of Commission.

In connection with its regulation of charitable bingo games, the commission shall have the following functions, duties and responsibilities:

(a) To issue and renew annual state licenses required by law for organizations conducting bingo games and for manufacturers, distributors or operators of supplies or equipment for such games;

(b) To assess and collect fees not to exceed two and one-half percent (2-½%) of the net proceeds of pull-tabs, electronic bingo machines and electronic pull-tab machines, which fees shall be limited to the amounts necessary to administer the Charitable Bingo Law;

(c) To assess and collect fees equal to one percent (1%) of the gross proceeds of each bingo session conducted by a Class "A" charitable organization and equal to one-half (½) of one percent (1%) of the gross proceeds of each bingo session conducted by a Class "B" or a Class "C" charitable organization; provided, however, that the fees assessed and collected under this subsection (c) shall not apply to pull-tabs, electronic bingo machines or electronic pull-tab machines as described in subsection (b) above; and provided, that the fees shall not be collected in any bingo session held by a religious organization which has been in existence for ten (10) years or longer, held on the premises owned by the religious organization, and held without any person being compensated for operating the game, and until the gross proceeds of bingo games conducted by such organization exceed Fifty Thousand Dollars (\$50,000.00) during the calendar year;

(d) To deny applications for licensure or license renewal and to issue orders for suspension or revocation of licenses issued pursuant to Sections 97-33-51 through 97-33-203;

(e) To monitor licensees to ensure compliance with all provisions of law and regulations relative to charitable bingo games through routine scheduled and unscheduled inspections, investigations and audits;

(f) To enforce all provisions of law and regulations relative to charitable bingo games and to assist local law enforcement agencies in these enforcement responsibilities and bingo enforcement agents shall have the powers of a peace officer;

(g) To establish and assess penalties for violations of regulations relative to charitable bingo games;

(h) To familiarize the members of organizations which conduct charitable bingo games of chance, with provisions of the Charitable Bingo Law and other applicable laws and regulations;

(i) To adopt rules and regulations to provide for the sale or transfer of surplus supplies or equipment from one licensed organization to another and such other rules and regulations as are necessary to carry out the purposes and functions of Sections 97-33-51 through 97-33-203, including the adop-

tion of rules and regulations pursuant to Section 97-33-69(10) which may provide for differing requirements, with regard to the number of participants, sessions, amount of prizes offered, proceeds received or other factors which affect the regulatory and administrative burdens on organizations operating charitable bingo games, for a certain class of organizations, provided that such rules and regulations shall be no more restrictive than the provisions of law that govern such factors;

(j) To prescribe rules and regulations creating a class of organizations that are exempt from the purchase of reprinted tickets as provided for in paragraph (c) of this section based on the number of participants or the amount of prizes offered or other factors which affect the regulatory and administrative burdens on the organizations imposed by the commission; and

(k) To establish the classes described in this paragraph of charitable organizations that are licensed to conduct bingo games and to prescribe rules and regulations to provide for differing reporting requirements imposed upon each different class; provided that such rules and regulations shall be no more restrictive than the provisions of law that relate to reporting requirements. Such classes of organizations are as follows:

(i) Class "A" shall be composed of licensed charitable organizations which conduct bingo games in which the prizes awarded total an aggregate amount in excess of Five Thousand Dollars (\$5,000.00) per session;

(ii) Class "B" shall be composed of licensed charitable organizations which conduct bingo games in which the prizes awarded total an aggregate amount of not less than Two Thousand Five Hundred Dollars (\$2,500.00) and not more than Five Thousand Dollars (\$5,000.00);

(iii) Class "C" shall be composed of licensed charitable organizations which conduct bingo games in which the prizes awarded total an aggregate amount of less than Two Thousand Five Hundred Dollars (\$2,500.00).

SOURCES: Laws, 1992, ch. 581, § 21; Laws, 1994, ch. 635, § 17; Laws, 1995, ch. 511, § 1; Laws, 1999, ch. 490, § 1, eff from and after July 1, 1999.

Cross References — Application fees for bingo license refunded to organizations deemed to be exempt organizations pursuant to this section, see § 97-33-55.

§ 97-33-109. Monitoring of licensees; enforcement powers and actions; prosecutions; penalties.

(1) The commission shall monitor the conduct or business of licensees, both on a routine scheduled and an unscheduled basis, to the extent necessary to ensure compliance with the provisions of charitable bingo game laws and regulations of the state.

(2) In carrying out its enforcement responsibilities, the commission may:

(a) Inspect and examine all premises in which charitable bingo games are conducted or supplies or equipment for such games are manufactured and distributed;

(b) Inspect all such supplies and equipment in, upon or about such premises;

(c) Seize and remove from such premises and impound such supplies and equipment for the purpose of examination and inspection pursuant to an appropriate court order;

(d) Demand access to and audit and inspect books and records of licensees for the purpose of determining compliance with laws and regulations relative to charitable bingo games;

(e) Conduct in-depth audits and investigations; and

(f) Mandate that internal controls be executed in accordance with the provisions of the Charitable Bingo Law and other applicable laws and regulations.

(3) The commission shall require licensees to maintain records and submit reports.

(4) In addition to license revocation or suspension or any criminal penalty imposed, the commission may assess a fine against any person who violates any law or regulation relative to charitable bingo games. Such a fine shall only be assessed after notice and an opportunity for a hearing to be held.

(5) All departments, commissions, boards, agencies, officers and institutions of the state, and all subdivisions thereof, shall cooperate with the commission in carrying out its enforcement responsibilities.

(6) The Attorney General shall be the attorney for the commission in regard to its duties to regulate the Charitable Bingo Law and he shall represent it in all legal proceedings and shall prosecute any civil action for a violation of the provisions of Sections 97-33-51 through 97-33-203 or the rules and regulations of the commission.

(7) It is the duty of the sheriffs, deputy sheriffs and police officers of this state to assist the commission in the enforcement of the provisions of Sections 97-33-51 through 97-33-203 and to arrest and complain against any person violating the provisions of Sections 97-33-51 through 97-33-203. It is the duty of the district attorneys of this state to prosecute all violations of the provisions of Sections 97-33-51 through 97-33-203 if requested to do so by the commission.

(8)(a) Whenever any person who is a resident of the State of Mississippi has reason to believe that a person or organization is or has violated the provisions of Sections 97-33-51 through 97-33-203 and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction such violation, upon at least five (5) days' summons before the hearing of the action. The action shall be brought in the chancery or county court of the county in which such violation has occurred or, with consent of the parties, may be brought in the chancery or county court of the county in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of Sections 97-33-51 through 97-33-203, and such injunctions shall be issued without bond.

(b) Any person who violates the terms of an injunction issued under this subsection shall forfeit and pay to the state a civil penalty of not more than

Five Thousand Dollars (\$5,000.00) per violation which shall be payable to the General Fund of the State of Mississippi. For the purposes of this subsection, the chancery or county court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the person bringing the action may petition for recovery of civil penalties.

(c) In any action brought under this subsection, if the court finds that a person is willfully violating the provisions of Sections 97-33-51 through 97-33-203, the person bringing the action, upon petition to the court, may recover on behalf of the state a civil penalty of not exceeding Five Hundred Dollars (\$500.00) per violation which shall be payable to the General Fund of the State of Mississippi.

(d) No penalty authorized by this subsection shall be deemed to limit the court's powers to insure compliance with its orders, decrees and judgments, or punish for the violations thereof.

(e) For purposes of this subsection, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of the provisions of Sections 97-33-51 through 97-33-203.

SOURCES: Laws, 1992, ch. 581, § 22; Laws, 1994, ch. 635, § 18, eff from and after October 1, 1994.

ATTORNEY GENERAL OPINIONS

The Mississippi Gaming Commission has the statutory authority to conduct an audit of a charitable gaming licensee.

Thornton, August 6, 1999, A.G. Op. #99-0167.

RESEARCH REFERENCES

ALR. Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 A.L.R.3d 663.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 30, 53.

CJS. 38 C.J.S., Gaming §§ 89, 98. 66 C.J.S., Nuisance § 46.

§§ 97-33-111 through 97-33-199. [Reserved].

§ 97-33-201. Licensure as manufacturer, distributor, or operator of supplies or equipment or as commercial lessor; application; fee; requirements; denial, refusal to renew, suspension or revocation; grounds.

(1)(a) Any organization or person seeking licensure as a manufacturer, distributor or operator of bingo gaming supplies or equipment, shall submit an application to the commission on forms provided for such purposes. Such application shall contain such information as may be reasonably required by rules of the commission. The application shall be accompanied by a fee as established by the commission.

(b) The commission shall investigate all applications for licensure and, in addition to the information required on the application, may require the applicant to furnish such additional information as it deems necessary.

(2) The commission shall not issue a license under this section to:

(a) Any person who has been convicted of certain related offenses as established by the commission or who presently has such a charge pending in any state or federal court;

(b) Any person who has ever been convicted of a gambling-related offense in any state or federal court;

(c) Any person who is or has ever been a professional gambler;

(d) Any firm, organization or corporation in which any person as described in paragraphs (a) through (c) of this subsection is an officer or director, whether compensated or not, or in which such person has a direct or indirect financial interest;

(e) Any person, firm, organization, entity or corporation which has a direct or indirect financial interest in a licensed charity.

(3) The commission may deny an application for licensure, refuse to renew a license, or suspend or revoke a license for any reason consistent with the purposes of Sections 97-33-201 and 97-33-203 which it deems to be in the interest of the public. However, policies regarding such denial, suspension, revocation or refusal to renew shall be established by rule and regulation.

(4) Any significant change in the information submitted on its application for licensure shall be filed by a licensee with the commission within ten (10) days of the change. A significant change shall include but not be limited to any change in the officers, directors, managers, proprietors or persons having a direct or indirect financial interest in any licensed organization or entity.

SOURCES: Laws, 1992, ch. 581, § 23; Laws, 1994, ch. 635, § 19; Laws, 1999, ch. 490, § 2, eff from and after July 1, 1999.

Editor's Note — Sections 97-33-51 through 97-33-81, 97-33-101 through 97-33-109, 97-33-201 and 97-33-203 may be cited as the "Charitable Bingo Law" by provision of § 97-33-50.

Cross References — Deposit of all fees and fines collected pursuant to this section into Charitable Bingo Fund, see § 97-33-101.

Commission to issue commercial lessor's license to qualified persons upon compliance with provisions for licensure in this section, see § 97-33-203.

§ 97-33-203. Commercial lessor's license; rental rates and other charges allowable; length and frequency of rentals; agreements with distributors.

(1) No lease of any premises by a commercial lessor to any charitable organization for a charitable bingo game shall provide for payment in excess of the reasonable market rental rate for such premises. The commission shall determine whether a market rental rate for such premises is reasonable. No lease shall provide for rental for less than a five-hour session. No more than two (2) sessions shall be conducted within one (1) day and more often than

eight (8) sessions in any one (1) week on the premises of a commercial lessor. Any licensee who holds no more than one (1) session per week shall be entitled to conduct one (1) six-hour session per week.

(2) No commercial lessor shall require the payment of any other cost or fee from an organization licensed to hold, operate or conduct bingo games other than the rental amount provided for by the rental agreement or contract or charge admission fees to persons entering the premises to participate in the games.

(3) No commercial lessor leasing premises for authorized charitable bingo game activities shall enter into any agreement with a distributor of gaming supplies for the use, purchase, promotion or sale of supplies to be used in such bingo games.

SOURCES: Laws, 1992, ch. 581, § 24; Laws, 1994, ch. 635, § 20; Laws, 1999, ch. 490, § 3, eff from and after July 1, 1999.

Editor's Note — Sections 97-33-51 through 97-33-81, 97-33-101 through 97-33-109, 97-33-201 and 97-33-203 may be cited as the "Charitable Bingo Law" by provision of § 97-33-50.

Cross References — Deposit of all fees and fines collected pursuant to this section into Charitable Bingo Fund, see § 97-33-101.

Commission authorized to deny, refuse to renew, suspend, or revoke license to manufacturer, distributor, or operator of equipment or supplies or to lessor, consistent with purposes of this section, see § 97-33-201.

JUDICIAL DECISIONS

1. Appraisals.

The Gaming Commission may reject an appraisal submitted pursuant to subsection (2) of this section and may require another appraisal to aid it in determining the reasonableness of the proposed rental

rate for the premises on the ground that the appraisal was not based on the proper benchmark. *Mississippi Gaming Comm'n v. Tupelo Indus., Inc.*, 747 So. 2d 287 (Miss. Ct. App. 1999).

ATTORNEY GENERAL OPINIONS

Pursuant to this section and § 97-33-67 since a session is defined as a five-hour period of time, there is no need for the Gaming Commission to set a regulation

which prorates the amount of prizes allowed or the rent to be paid based on the length of the session. Harvey, October 30, 1996, A.G. Op. #96-0719.

CHAPTER 35

Crimes Against Public Peace and Safety

SEC.

- 97-35-1. Buses; disorderly conduct; use of profane, etc., language; intoxication or smoking on passenger bus.
- 97-35-3. Disorderly conduct; certain acts performed with intent to provoke breach of peace; penalties; exception.
- 97-35-5. Disorderly conduct; interference with business, customers, invitees, etc.
- 97-35-7. Disorderly conduct; failure to comply with requests or commands of law enforcement officers; penalties; exception.
- 97-35-9. Disturbance by explosions, noises or offensive conduct.
- 97-35-11. Disturbance by abusive language or indecent exposure; exception.
- 97-35-13. Disturbance in public place.
- 97-35-15. Disturbance of the public peace or the peace of others; exception.
- 97-35-17. Disturbance of worship; proceedings and penalty.
- 97-35-18. Disturbance by disruptive protest of funeral, burial service, or memorial service.
- 97-35-19. Hydraulic brake fluid; sale of inferior quality unlawful; standards.
- 97-35-21. Lighthouse property and navigation lights; destroying, extinguishing, etc.
- 97-35-23. Obstructing public streets, etc.; intentional obstruction of, or interference with, vehicle or pedestrian.
- 97-35-25. Obstructing public streets, etc.; wilful obstruction of use by impeding traffic.
- 97-35-27. Registration of convicted felons residing in state.
- 97-35-29. Tramps; definition.
- 97-35-31. Tramps; arrest by any person permitted; proceedings.
- 97-35-33. Tramps; punishment.
- 97-35-35. Tramps; penalty for not leaving house, etc. on request, carrying weapons, or threatening injury.
- 97-35-37. Vagrants; defined.
- 97-35-39. Vagrants; penalty for vagrancy; bond.
- 97-35-41. Vagrants; penalty for second offense; payment of costs in all cases.
- 97-35-43. Vagrants; officers punished for failing in their duty.
- 97-35-45. False alarm of fire.
- 97-35-47. False reporting of crime.
- 97-35-49. Focusing laser beam at law enforcement officer, fire fighter or other emergency personnel; penalties.

§ 97-35-1. Buses; disorderly conduct; use of profane, etc., language; intoxication or smoking on passenger bus.

(1) It shall be unlawful for any person to be guilty of disorderly conduct or a breach of the peace or use any obscene, profane or vulgar language, upon any passenger bus or coach while such passenger bus or coach is in the service of passenger transportation upon any of the highways of this state.

(2) It shall be unlawful for any person, while intoxicated, to be in or upon any passenger bus or coach when such passenger bus or coach is engaged in the service of passenger transportation upon any of the highways of this state.

(3) It shall be unlawful for any person to drink intoxicating liquors of any kind in or upon any passenger bus or coach while the said passenger bus or

coach is in the service of passenger transportation upon any of the highways of this state.

(4) It shall be unlawful for any person to smoke a cigar or pipe in or upon any passenger bus or coach while said passenger bus or coach is in the service of passenger transportation upon any of the highways of this state. Before being guilty of a violation of this subsection, the driver of the bus shall have first requested such violator to refrain from smoking.

(5) The provisions of the foregoing subsections shall apply only to passenger buses or coaches engaged in interstate commerce or intrastate commerce operating over regularly scheduled routes within this state under a certificate of public convenience and necessity granted by the interstate commerce commission or the Mississippi Public Service Commission or both.

(6) If any person shall be guilty of violating any of the five (5) preceding subsections, the driver of the bus or person in charge thereof, may stop it at the place where the offense is committed, or at the next regular or convenient stopping place of the bus and eject such passenger, using only such force as may be necessary to accomplish the removal, and the driver of the bus or person in charge thereof, may command the assistance of passengers thereon to assist in the removal, and the driver of the bus may cause any person so violating any of said subsections to be detained and delivered to the proper authorities.

(7) Any person violating any subsection of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not more than five hundred dollars (\$500.00), or imprisoned in the county jail for not exceeding thirty (30) days, in the discretion of the court, or the offender may be punished by both such fine and imprisonment.

SOURCES: Codes, 1942, § 2087.3; Laws, 1964, ch. 238, §§ 1-7, eff from and after passage (approved June 11, 1964).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Carrier's liability based on serving intoxicants to passenger. 76 A.L.R.3d 1218.

Liability of land carrier to passenger who becomes victim of another passenger's assault. 43 A.L.R.4th 189.

Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation. 78 A.L.R.4th 1127.

Secondary smoke as battery. 46 A.L.R.5th 813.

Validity, construction, and operation of

Federal disorderly conduct regulation (36 C.F.R. § 2.34). 180 A.L.R. Fed. 637.

Am Jur. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 1 et seq.

5A Am. Jur. Pl & Pr Forms (Rev), Carriers, Forms 46.1, 46.2 (complaint for damages arising out of assault by fellow passenger).

CJS. 11 C.J.S., Breach of the Peace §§ 1 et seq.

27 C.J.S., Disorderly Conduct §§ 1 et seq.

§ 97-35-3. Disorderly conduct; certain acts performed with intent to provoke breach of peace; penalties; exception.

(1) Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(a) Crowds or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

(b) Insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(c) While in or on any public bus, taxicab or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in paragraph (b) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(d) Refuses to leave the premises of another when requested so to do by any owner, lessee or any employee thereof, shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than Two Hundred Dollars (\$200.00) or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment.

(2) If any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the penitentiary not longer than ten (10) years.

(3) The act of breast-feeding shall not constitute disorderly conduct.

(4) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2087.5; Laws, 1960, ch. 250, §§ 1, 2; Laws, 2006, ch. 520, § 6, eff from and after passage (approved Apr. 3, 2006.)

Amendment Notes — The 2006 amendment added present (3); and redesignated former (3) as present (4).

Cross References — Right to choose business customers, patrons, or clients, see § 97-23-17.

Interference with business, customers, invitees, etc., see § 97-35-5.

Failure to comply with requests or commands of law enforcement officers, see § 97-35-7.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

Peace bonds, see §§ 99-23-1 et seq.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.

1. Constitutionality.

In *Thomas v. Mississippi*, 380 U.S. 524, 14 L. Ed. 2d 265, 85 S. Ct. 1327, the Supreme Court of the United States, in a per curiam opinion, reversed *Thomas v. State*, 248 M 850, 160 So. 2d 657, upholding the validity of this section [Code 1942, § 2087.5]. In the latter case, the state court had held that this section was not so vague and uncertain as to be void, and that a “freedom rider” failing to obey a police officer’s order, given because of antagonism displayed toward him by other persons present, to leave a bus station terminal’s waiting room for whites justified his arrest, notwithstanding that his presence therein was in the exercise of a constitutional right. *Thomas v. Mississippi*, 380 U.S. 524, 85 S. Ct. 1327, 14 L. Ed. 2d 265 (1965), on remand, 252 Miss. 563, 176 So. 2d 258 (1965).

In *Pierson v. Ray*, 352 F.2d 213, cert gr 384 U.S. 938, 16 L. Ed. 2d 537, 86 S. Ct. 1457, an action alleging a common law tort claim for false imprisonment and a statutory claim for damages for deprivation of civil rights growing out of the arrest and imprisonment of a group of “prayer pilgrims” who had failed to heed police orders to “move along,” the court, citing *Thomas v. Mississippi*, 380 U.S. 524, 14 L. Ed. 2d 206, 85 S. Ct. 1327, said that this section [Code 1942, § 2087.5] had been held invalid as applied to circumstances such as those existing in the

case under consideration. *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965), rev’d on other grounds, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

The constitutionality of this section [Code 1942, § 2087.5] was challenged in *Bailey v. Patterson*, 199 F Supp 595, in which it was held, in view of the involvement of factual issues, that the federal court would withhold action until the state courts should pass upon the issues; but this decision was vacated in 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549, which, affirming that no state may require racial segregation of interstate or intrastate transportation facilities, held that the claim that the statutes so requiring are not unconstitutional was frivolous, and therefore not one in which a three-judge federal district court is required. The appellants, however, were held to lack standing to enjoin criminal prosecutions under the breach of peace statutes, not having been prosecuted, or threatened with prosecution, under them. *Bailey v. Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961), vacated, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962’).

2. Construction and application.

Defendant’s free speech rights were not violated by his warrantless arrest where the confrontation occurred not out in public but at the sheriff’s department, the officer neither initiated nor had an opportunity to walk away from defendant’s words and combative conduct, defendant became agitated and began shouting pro-

fanities when the officer told him about the protocol he would have to follow to retrieve his vehicle from the impound lot, and defendant did not stop with simply expressing his displeasure. He was combative, and he created a stalemate that rose to the level of "fighting words" that were likely to inflict injury or incite an immediate breach of the peace. *Odem v. State*, 881 So. 2d 940 (Miss. Ct. App. 2004).

Where police officers received report of fight on privately-owned field near school, students were seen fleeing into woods and some were arrested either in field or as they came out of woods, defendants city, chief of police, and mayor could argue that probable cause existed to arrest plaintiffs at field and road, for inciting riot; sufficient nexus existed between charge of inciting riot and charge disorderly conduct to allow such argument; inciting riot is part of disorderly conduct statutes. *C-1 ex rel. P-1 v. City of Horn Lake*, 775 F. Supp. 940 (N.D. Miss. 1990).

Prior to the time when this section [Code 1942, § 2087.5] was declared invalid, an instruction, by the United States District Judge in an action for false imprisonment brought against police officers for plaintiffs' arrest, to the effect that if plaintiffs were arrested after refusing to obey orders to "move on" under circumstances where their disobedience might occasion a breach of peace then the jury should return a verdict for the defendants was proper; but following a declaration that the section was invalid such an instruction became improper. *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965), rev'd on other grounds, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

Under the rule followed in Mississippi, a public officer is not charged with the duty of determining at his peril whether a statute is valid when he is acting under it.

Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), rev'd on other grounds, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

A federal district court has authority under the public accommodation sections of the Civil Rights Act of 1964 to issue a temporary restraining order to stay proceedings in a state court wherein Negroes were being prosecuted for violations of this section [Code 1942, § 2087.5] resulting from peaceful and nonviolent efforts to enforce their right of access to places of public accommodation. *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965).

A chief United States marshal, under specific orders from his superiors and the statutory duty to assist in the execution of two federal court orders, finding himself faced with a large crowd of people demonstrating against the orders and apparently bent on obstructing their execution, who ordered the use of tear gas against the crowd, and was indicted by a state grand jury for inciting a breach of the peace and riot in violation of this section [Code 1942, § 2087.5] by ordering the use of the gas was entitled to be released under a federal writ of habeas corpus. In re *McShane*, 235 F. Supp. 262 (N.D. Miss. 1964).

Any error in refusal to permit identification of an accused by race is rendered immaterial by his presence in court. *Knight v. State*, 248 Miss. 850, 161 So. 2d 521 (1964).

Persons arrested for violating ordinances by parading without a permit, in an anti-segregation demonstration, held not entitled to habeas corpus in federal court on ground that mass arrests had so invaded state courts as to deprive them of an adequate remedy under state law. *Brown v. Rayfield*, 320 F.2d 96 (5th Cir. 1963), cert. denied, 375 U.S. 902, 84 S. Ct. 191, 11 L. Ed. 2d 143 (1963).

RESEARCH REFERENCES

ALR. Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace. 58 A.L.R.2d 1056.

Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 A.L.R.2d 1152.

What constitutes offense of unlawful assembly. 71 A.L.R.2d 875.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. 12 A.L.R.3d 1448.

Participation of student in demonstra-

tion on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 A.L.R.3d 551.

Peaceful picketing of private residence. 42 A.L.R.3d 1353.

Larceny as within disorderly conduct statute or ordinance. 71 A.L.R.3d 1156.

Gesture as punishable obscenity. 99 A.L.R.3d 762.

Insulting words addressed directly to police officers as breach of peace or disorderly conduct. 14 A.L.R.4th 1252.

What constitutes sufficiently violent, tumultuous, forceful, aggressive, or terrorizing conduct to establish crime of riot in state courts. 38 A.L.R.4th 648.

Tavern keeper's liability to patron for third person's assault. 43 A.L.R.4th 281.

Validity, construction, and operation of Federal disorderly conduct regulation (36 C.F.R. § 2.34). 180 A.L.R. Fed. 637.

Am Jur. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 1 et seq.

5A Am. Jur. Pl & Pr Forms (Rev), Carriers, Forms 46.1, 46.2 (complaint for damages arising out of assault by fellow passenger).

13 Am. Jur. Trials 465, Defending Minor Felony Cases §§ 1 et seq.

CJS. 11 C.J.S., Breach of the Peace § 1 et seq.

27 C.J.S., Disorderly Conduct §§ 1 et seq.

§ 97-35-5. Disorderly conduct; interference with business, customers, invitees, etc.

(1) It shall be unlawful for any person or persons, while in or on the premises of another, whether that of an individual person, or a corporation, or a partnership, or an association, and on which property any store, restaurant, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty parlor, or any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, to:

(a) prevent or seek to prevent, or interfere with, the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with, customers or prospective customers, or other members of the public who may then be in such building, or

(b) prevent or seek to prevent, or interfere with, or seek to interfere with, other persons, expressly or impliedly invited upon said premises, or prospective customers, coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises.

(2) Any person engaging in the unlawful conduct described in subsection (1) shall be guilty of disorderly conduct, a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

(3) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2087.7; Laws, 1960, ch. 260, §§ 1, 2.

Cross References — Right to choose business customers, patrons, or clients, see § 97-23-17.

When disorderly conduct may constitute a felony, see § 97-35-3.

Failure to comply with request or commands of law enforcement officers, see § 97-35-7.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Persons arrested for violating ordinances by parading without a permit, in an anti-segregation demonstration, held not entitled to habeas corpus in federal court on ground that mass arrests had so invaded state courts as to deprive them of an adequate remedy under state law. *Brown v. Rayfield*, 320 F.2d 96 (5th Cir. 1963), cert. denied, 375 U.S. 902, 84 S. Ct. 191, 11 L. Ed. 2d 143 (1963).

The constitutionality of this section [Code 1942, § 2087.7] was challenged in *Bailey v. Patterson*, 199 F. Supp. 595, in which it was held, in view of the involvement of factual issues, that the federal court would withhold action until the

state courts should pass upon the issues; but this decision was vacated in 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549, which, affirming that no state may require racial segregation of interstate or intrastate transportation facilities, held that the claim that the statutes so requiring are not unconstitutional was frivolous, and therefore not one in which a three-judge federal district court is required. The appellants, however, were held to lack standing to enjoin criminal prosecutions under the breach of peace statutes, not having been prosecuted, or threatened with prosecution, under them. *Bailey v. Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962).

RESEARCH REFERENCES

ALR. Nonlabor picketing or boycott. 93 A.L.R.2d 1284.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 A.L.R.3d 551.

Tavernkeeper's liability to patron for third person's assault. 43 A.L.R.4th 281.

Validity, construction, and operation of statute or regulation forbidding, regulat-

ing, or limiting peaceful residential picketing. 113 A.L.R.5th 1.

Validity, construction, and operation of Federal disorderly conduct regulation (36 C.F.R. § 2.34). 180 A.L.R. Fed. 637.

Am Jur. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 1 et seq.

CJS. 11 C.J.S., Breach of the Peace §§ 1 et seq.

27 C.J.S., Disorderly Conduct §§ 1 et seq.

§ 97-35-7. Disorderly conduct; failure to comply with requests or commands of law enforcement officers; penalties; exception.

(1) Whoever, with intent to provoke a breach of the peace, or under such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace, fails or refuses to promptly comply with or obey

a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law, to:

(a) Move or absent himself and any vehicle or object subject to his control from the immediate vicinity where the request, command or order is given, or

(b) Arise, if lying or sitting down, and move to a point designated by said officer outside the immediate area of, or which is affected by the occurrences at, the place of issuing such order, command or request, or

(c) Refrain from lying down or sitting down at, or in the immediate vicinity of, the place where said order, request or command is given, or

(d) Refrain from obstructing, with his body or any part thereof, or in any manner, the lawful movement or passage of any vehicle, or

(e) Refrain from placing, or permitting, or cooperating with another to place, his body or any part thereof, in front of or behind any vehicle, in such manner as to interfere with, or prevent its movement or block its path in lawful movement, or

(f) Refrain from chaining or tying or binding himself or another to any object or person, or

(g) Unbind, unchain or loosen himself, or remove himself, from any chain or other means whereby he may be prevented from moving away from the place or the immediate vicinity where he may be when such officer issues said order, request or command, or

(h) Walk or move to, enter and remain in, either or both, as may be directed by such officer, any police or other vehicle operated by any law enforcement officer or department, or any other vehicle designated by such an officer, or

(i) Act or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command, shall be guilty of disorderly conduct, which is made a misdemeanor and, upon conviction thereof, such person or persons shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

(2) Any person who causes, or aids, or encourages, or abets another to violate, or in violating, any provision of subsection (1) hereof, shall be guilty of disorderly conduct which is made a misdemeanor and, upon conviction thereof, such person or persons shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

(3) If any person alone or in concert with others violates subsection (1) or (2) hereof, or both, under such circumstances or in such a manner as to evince a willful and wanton disregard for the life or safety of another and if as a result thereof another person or persons be injured, maimed or killed, the person or persons so violating subsection (1) or (2) hereof, or both, shall be guilty of a felony and, upon conviction thereof, such person or persons shall be imprisoned in the State Penitentiary not longer than five (5) years or be fined not more than Two Thousand Dollars (\$2,000.00), or both such fine and imprisonment.

(4) The act of breast-feeding shall not constitute disorderly conduct.

(5) The provisions of this section are supplementary to the provisions of any other statutes of this state.

SOURCES: Codes, 1942, § 2087.9; Laws, 1964, ch. 336, §§ 1-4; Laws, 2006, ch. 520, § 7, eff from and after passage (approved Apr. 3, 2006.)

Amendment Notes — The 2006 amendment added (4); redesignated former (4) as present (5); and made minor stylistic changes.

Cross References — When disorderly conduct may constitute a felony, see § 97-35-3.

Interference with business, customers, invitees, etc., see § 97-35-5.

Intentional or wilful obstruction of public streets, etc., see §§ 97-35-23, 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of evidence.
3. Fighting words.

1. In general.

Probable cause existed to arrest the defendant for a violation of this section where he was found on a driveway behind a county jail, the driveway was owned by the county and was never dedicated as a public thoroughfare, and defendant was on notice that the area was off-limits because he had previously been forbidden from coming into the area. *Bigham v. Huffman*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 16542 (N.D. Miss. Oct. 9, 1999), aff'd, 218 F.3d 744 (5th Cir. 2000), cert. denied, 531 U.S. 958, 121 S. Ct. 381, 148 L. Ed. 2d 294 (2000).

Disorderly conduct demonstrated by failure to obey the commands or requests of a law enforcement officer is a punishable offense. *Merritt v. State*, 497 So. 2d 811 (Miss. 1986).

2. Sufficiency of evidence.

Evidence that defendant, who was a guest in arrestee's mother's home, refused to allow police to search home to find the arrestee, after officer informed defendant of felony warrant and inquired about arrestee's presence in the home, that defendant denied arrestee's presence and insisted that he was alone in the home, and

that arrestee was subsequently found hiding behind insulation in attic was sufficient to support conviction for disorderly conduct. *Bovan v. State*, 706 So. 2d 254 (Miss. 1997).

Issue of whether exigent circumstances supported ultimate search and arrest of arrestee in home where defendant was a guest was irrelevant to issue of defendant's guilt for disorderly conduct, based on his refusal to allow police to search home. *Bovan v. State*, 706 So. 2d 254 (Miss. 1997).

3. Fighting words.

Defendant's free speech rights were not violated by his warrantless arrest where the confrontation occurred not out in public but at the sheriff's department, the officer neither initiated nor had an opportunity to walk away from defendant's words and combative conduct, defendant became agitated and began shouting profanities when the officer told him about the protocol he would have to follow to retrieve his vehicle from the impound lot, and defendant did not stop with simply expressing his displeasure. He was combative, and he created a stalemate that arose to the level of "fighting words" that were likely to inflict injury or incite an immediate breach of the peace. *Odem v. State*, 881 So. 2d 940 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR. Insulting words addressed directly to police officer as breach of peace or disorderly conduct. 14 A.L.R.4th 1252.

Validity, construction, and operation of Federal disorderly conduct regulation (36 C.F.R. § 2.34). 180 A.L.R. Fed. 637.

Am Jur. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 1 et seq.

CJS. 11 C.J.S., Breach of the Peace §§ 1 et seq.

27 C.J.S., Disorderly Conduct §§ 1 et seq.

§ 97-35-9. Disturbance by explosions, noises or offensive conduct.

A person who wilfully disturbs the peace of any family or person by an explosion of gunpowder or other explosive substance, or by loud or unusual noise, or by any tumultuous or offensive conduct, shall be punished by fine or imprisonment, or both; the fine not to exceed one hundred dollars, and the imprisonment not to exceed six months in the county jail.

SOURCES: Codes, 1880, § 2769; 1892, § 1032; Laws, 1906, § 1111; Hemingway's 1917, § 837; Laws, 1930, § 862; Laws, 1942, § 2088.

Cross References — Nuisances, see §§ 95-3-1 et seq.

Obscenity, profanity, and drunkenness, see § 97-29-47.

Arrest of person without warrant for violation of this section, see § 99-3-7.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2088] and Code 1942, § 2089 are intended to protect the peace of families. An affidavit or indictment, averring the disturbance merely of an individual, charges no offense under either section. *Brooks v. State*, 67 Miss. 577, 7 So. 494 (1890).

What constitutes the offensive conduct, or the nature or character of the offensive conduct, should be stated in the affidavit or indictment. *Finch v. State*, 64 Miss. 461, 1 So. 630 (1886).

RESEARCH REFERENCES

ALR. Recovery of damages for emotional distress, fright, and the like, result-

ing from blasting operations. 75 A.L.R.3d 770.

§ 97-35-11. Disturbance by abusive language or indecent exposure; exception.

Any person who enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises, and in the presence or hearing of the family or the possessor or occupant thereof, or of any member thereof, makes use of abusive, profane, vulgar or indecent language, or is guilty of any indecent exposure of his or her person at such place, shall be punished for a misdemeanor. The act of breast-feeding shall not constitute indecent exposure.

SOURCES: Codes, 1880, § 2770; 1892, § 1033; Laws, 1906, § 1112; Hemingway's 1917, § 838; Laws, 1930, § 863; Laws, 1942, § 2089; Laws, 1980, ch. 389; Laws, 2006, ch. 520, § 8, eff from and after passage (approved Apr. 3, 2006.)

Amendment Notes — The 2006 amendment added the last sentence.

Cross References — Obscenity, profanity, and drunkenness, see § 97-29-47.

Arrest of person without warrant for violation of this section, see § 99-3-7.

JUDICIAL DECISIONS

1. In general.
2. Indictment or affidavit charging offense.
3. Proof.

1. In general.

Notwithstanding that a portion of the sentence imposed upon a defendant indicted for violating this section [Code 1942, § 2089] had been suspended, an appeal brought more than six months after judgment was entered on a guilty plea was barred by a statute requiring, with certain exceptions, that an appeal be brought to the supreme court within six months of its rendition. *Dickerson v. State*, 150 Miss. 823, 117 So. 261 (1928).

2. Indictment or affidavit charging offense.

Setting out language used without use of the word "unlawful" does not charge any offense. *Wade v. State*, 100 Miss. 802, 57 So. 222 (1911).

Affidavit charging use of profane language in a public place must allege the particular public place. *State v. Shanks*, 88 Miss. 410, 40 So. 1005 (1906); *Files v. State*, 96 Miss. 257, 50 So. 979 (1910).

An indictment charging the use of abusive language in the public highway near

the premises of another and in the presence of a member of the latter's family, is insufficient. *State v. Reed*, 76 Miss. 211, 24 So. 308, 71 Am. St. R. 528 (1898).

3. Proof.

In a prosecution for disturbing the peace, the trial court erred in failing to give a preemptory instruction of not guilty where the alleged incident took place in the home of the defendant's mother and where the state failed to specifically prove the words used and the things done which constituted the alleged offense. *Taylor v. State*, 396 So. 2d 39 (Miss. 1981).

Indictment for disturbing peace by entering dwelling was supported by proof that defendant came onto front porch of residence. *Moree v. State*, 152 Miss. 278, 119 So. 202 (1928).

Failure of city to prove the use of loud and boisterous language as charged in affidavit is fatal to conviction. *Culpepper v. City of Meridian*, 123 Miss. 527, 86 So. 338 (1920).

Place is material. An indictment charging the use of abusive language in a yard is not sustained by proof of its use near the yard. *Quin v. State*, 65 Miss. 479, 4 So. 548 (1888).

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

Indecent exposure: what is "person". 63 A.L.R.4th 1040.

Am Jur. 12 Am. Jur. 2d, Blasphemy and Profanity §§ 1 et seq.

50 Am. Jur. 2d, Lewdness, Indecency and Obscenity §§ 17 et seq.

CJS. 67 C.J.S., Obscenity § 11.

§ 97-35-13. Disturbance in public place.

Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other

public place whatsoever, in the State of Mississippi, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

SOURCES: Codes, 1942, § 2090.5; Laws, 1956, ch. 256.

Cross References — Arrest of person without warrant for violation of this section, see § 99-3-7.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Fighting words.

1. In general.

A county court's enhancement of a defendant's sentence for breach of the peace from \$50 to \$250 on appeal from the municipal court, was proper since the fine fell within the breach of the peace statute's sentencing guideline and there was no evidence that the enhancement was reflective of judicial vindictiveness. *Jones v. City of Meridian*, 552 So. 2d 820 (Miss. 1989).

The breach of the peace statute, this section, is not unconstitutionally vague. Although the statute may have been construed with broad language and could arguably be construed in a manner which would reach constitutionally protected speech or conduct, a statute may not be construed "so as to infringe upon the state or federally protected constitutional

rights" of any individual. *Jones v. City of Meridian*, 552 So. 2d 820 (Miss. 1989).

2. Fighting words.

Defendant's free speech rights were not violated by his warrantless arrest where the confrontation occurred not out in public but at the sheriff's department, the officer neither initiated nor had an opportunity to walk away from defendant's words and combative conduct, defendant became agitated and began shouting profanities when the officer told him about the protocol he would have to follow to retrieve his vehicle from the impound lot, and defendant did not stop with simply expressing his displeasure. He was combative, and he created a stalemate that rose to the level of "fighting words" that were likely to inflict injury or incite an immediate breach of the peace. *Odem v. State*, 881 So. 2d 940 (Miss. Ct. App. 2004).

RESEARCH REFERENCES

ALR. Location of offense as "public" within requirement of enactments against drunkenness. 8 A.L.R.3d 930.

§ 97-35-15. Disturbance of the public peace or the peace of others; exception.

(1) Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous

conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail not more than six (6) months, or both.

(2) The act of breast-feeding shall not constitute a breach of the peace.

(3) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2089.5; Laws, 1960, ch. 254, §§ 1, 2; Laws, 2006, ch. 520, § 9, eff from and after passage (approved Apr. 3, 2006.)

Amendment Notes — The 2006 amendment added (2); and redesignated former (2) as present (3).

Cross References — Arrest of person without warrant for violation of this section, see § 99-3-7.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Peace bonds, see §§ 99-23-1 et seq.

JUDICIAL DECISIONS

1. Constitutionality.
2. Construction and application.

1. Constitutionality.

As interpreted by the state courts, this section is not unconstitutional. *McLaurin v. Burnley*, 279 F. Supp. 220 (N.D. Miss. 1967), *aff'd*, 401 F.2d 773 (5th Cir. 1968), *cert. denied*, 399 U.S. 928, 90 S. Ct. 2228, 26 L. Ed. 2d 795 (1970).

Although this section [Code 1942, § 2089.5] as drawn is in broad terms, it is not unconstitutional upon its face, and it may not be so construed as to infringe upon the state or federally protected constitutional rights of any person. *McLaurin v. Greenville*, 187 So. 2d 854 (Miss. 1966), *cert. denied*, 385 U.S. 1011, 17 L. Ed. 2d 548, 87 S. Ct. 704 (1967); *McLaurin v. Greenville*, 187 So. 2d 860 (Miss. 1966), *cert. denied*, 385 U.S. 1011, 87 S. Ct. 704, 17 L. Ed. 2d 548 (1967); *Cobb v. Greenville*, 187 So. 2d 861 (Miss. 1966).

The constitutionality of this section [Code 1942, § 2089.5] was challenged in *Bailey v. Patterson*, 199 F Supp 595, in which it was held, in view of the involvement of factual issues, that the federal court would withhold action until the state courts should pass upon the issues;

but this decision was vacated in 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549, which, affirming that no state may require racial segregation of interstate or intrastate transportation facilities, held that the claim that the statutes so requiring are not unconstitutional was frivolous, and therefore not one in which a three-judge Federal district court is required. The appellants, however, were held to lack standing to enjoin criminal prosecutions under the breach of peace statutes, not having been prosecuted, or threatened with prosecution, under them. *Bailey v. Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961), *vacated*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962)'.

2. Construction and application.

Where the victim was shot by her estranged husband after an arrest warrant was issued, but never delivered to the sheriff's department, there was ample probable cause to arrest through Miss. Code Ann. § 99-3-7(3), based upon Miss. Code Ann. § 97-35-15. However, reckless disregard required that the person knowingly or intentionally commit a wrongful act and even viewing the facts in a light most favorable to the victim, the victim

showed no evidence that the sheriff's department knew that it could and/or was required to arrest the victim's estranged husband; the sheriff's department's conduct, even if negligent, could not be said to have risen to the level of reckless disregard, and therefore, Miss. Code Ann. § 11-46-9(c) did provide immunity based upon the sheriff's department's conduct, and summary judgment was proper as to the sheriff's department. *Collins v. Tallahatchie County*, 876 So. 2d 284 (Miss. 2004).

In a prosecution for disturbing the peace, the trial court erred in failing to give a preemptory instruction of not guilty where the alleged incident took place in the home of the defendant's mother and where the state failed to specifically prove the words used and the things done which constituted the alleged offense. *Taylor v. State*, 396 So. 2d 39 (Miss. 1981).

In view of the provisions of Code 1942, § 7185-03, the youth court does not have jurisdiction of a minor charged with disturbing the peace in violation of Code 1942, § 2089.5. *Boatright v. Yalobusha County Youth Court*, 223 So. 2d 303 (Miss. 1969).

Although Mississippi has required by statute that the complaining witness' testimony be corroborated in prosecutions for certain sexual offenses (e.g. Code 1942, §§ 2359, 2374), the state courts have specifically held that the requirement for corroboration is confined to those offenses wherein the statute expressly so provides, and no such corroboration is required in prosecution of defendant for disturbing the peace of the complaining witness, on allegations that the defendant had touched complainant's private parts. *Henry v. Williams*, 299 F. Supp. 36 (N.D. Miss. 1969).

This section [Code 1942, § 2089.5] evinces a legislative judgment that speech which is either calculated to lead to a breach of the peace or which may lead to a breach of the peace should be regulated. *McLaurin v. Burnley*, 279 F. Supp. 220 (N.D. Miss. 1967), *aff'd*, 401 F.2d 773 (5th Cir. 1968), *cert. denied*, 399 U.S. 928, 90 S. Ct. 2228, 26 L. Ed. 2d 795 (1970).

This section [Code 1942, § 2089.5], as interpreted by the Supreme Court of Mis-

issippi, permits a conviction for speech only if that speech was calculated to lead to a breach of the peace or was of such a nature as ultimately led to a breach of the peace, and there can be no conviction under this section for peaceably exercising the right of free speech. *McLaurin v. Burnley*, 279 F. Supp. 220 (N.D. Miss. 1967), *aff'd*, 401 F.2d 773 (5th Cir. 1968), *cert. denied*, 399 U.S. 928, 90 S. Ct. 2228, 26 L. Ed. 2d 795 (1970).

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In view of the provisions of Code 1942, § 7185-03, the youth court does not have jurisdiction of a minor charged with disturbing the peace in violation of Code 1942, § 2089.5. *Boatright v. Yalobusha County Youth Court*, 223 So. 2d 303 (Miss. 1969).

This section [Code 1942, § 2089.5] clearly prohibits any loud, violent, or boisterous conduct which may disturb or lead to disturbances of the public peace, and where the evidence showed that the conduct of the defendants violated the provisions of the section and that disturbances occurred as a consequence, injunctive relief against the prosecution and incarceration of the defendants must be denied. *United States v. Leflore County*, 371 F.2d 368 (5th Cir. 1967).

By instructing the jury that if the defendant was arrested for public protest against racial segregation he could not be found guilty, the instruction constituted recognition that this section [Code 1942, § 2089.5] could not be applied to restrict defendant's constitutional right so to protest, and that it could not be used to infringe upon the constitutional right of any person to speak freely within the framework of the law. *McLaurin v. Greenville*, 187 So. 2d 854 (Miss. 1966), *cert. denied*, 385 U.S. 1011, 17 L. Ed. 2d 548, 87 S. Ct. 704 (1967); *Cobb v. Greenville*, 187 So. 2d 861 (Miss. 1966).

A narrow and specific construction of this section [Code 1942, § 2089.5] limit-

ing it to situations where, as applied to persons exercising a guaranteed constitutional right in a peaceful manner, they refuse to obey a police order to move on if, but only if, there is a clear and present danger of riot, or other threat to public safety, peace, or order, is untenable in view of the decisions of the United States Supreme Court. *Bolton v. City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965).

The constitutional rights of a defendant, legally present in a public place, and neither committing nor threatening a breach of the peace, cannot be denied because of hostility, for some unknown

reason, on the part of a group of white citizens. *Bolton v. City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965).

In a prosecution for disturbing the peace on public school grounds, there was prejudicial error, requiring reversal, where the school principal was permitted to testify, over objection, that the accused had been dishonorably discharged from the Air Force, that the accused had told the principal that the accused had been expelled from another school for stealing, and that accused had had fights with other students. *Willis v. State*, 250 Miss. 334, 165 So. 2d 154 (1964).

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance prohibiting use of "obscene" language in public. 2 A.L.R.4th 1331.

Am Jur. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 1 et seq.

CJS. 11 C.J.S., Breach of the Peace §§ 1 et seq.

27 C.J.S., Disorderly Conduct §§ 1 et seq.

§ 97-35-17. Disturbance of worship; proceedings and penalty.

If any person shall wilfully disturb any congregation of persons lawfully assembled for religious worship, he may be immediately arrested by any officer or private person, without warrant, and taken before any justice court judge of the county, present or convenient, and on conviction thereof by such justice, municipal, county or circuit court, shall be fined not more than Five Hundred Dollars (\$500.00) or imprisoned not more than six (6) months, or both.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 4(3); 1857, ch. 64, art. 71; 1871, § 2713; 1880, § 2767; 1892, § 1034; *Laws*, 1906, § 1113; *Hemingway's* 1917, § 839; *Laws*, 1930, § 864; *Laws*, 1942, § 2090; *Laws*, 1998, ch. 432, § 1, eff from and after July 1, 1998.

Editor's Note — Pursuant to Miss. Constn., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Nuisances, see §§ 95-3-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.

1. In general.

Criminal statute prohibiting disorderly conduct by failing or refusing to promptly reply with or obey request or order of law enforcement officer was not unconstitu-

tionally vague under due process clause as applied to arcade owner who carried baseball bat toward small crowd in his parking lot; regardless of whether owner was cursing or threatening officer, presence of baseball bat greatly enhanced possibility of grievous injury to police officers or others if disturbance escalated, case con-

cerned officer's right to control conduct greatly increasing potential for sudden violence, and statute provided adequate notice that failure to obey order under the circumstances could result in arrest. *Smith v. City of Picayune*, 701 So. 2d 1101 (Miss. 1997).

Abusive and obscene language addressed to deacon of church while in act of taking up collection just outside of church would constitute disturbance of member of congregation. *Stovall v. State*, 173 Miss. 755, 163 So. 504 (1935).

Disturbance of single member of congregation assembled for religious worship is in contemplation of law disturbance of congregation. *Stovall v. State*, 173 Miss. 755, 163 So. 504 (1935).

In prosecution for obstructing justice by assisting in escape of one being arrested for disturbance of church congregation, whether party who escaped was creating disturbance which warranted his arrest

and thus made assisting his escape an obstruction to justice held for jury. *Stovall v. State*, 173 Miss. 755, 163 So. 504 (1935).

In prosecution for obstructing justice, whether accused assisted party who was allegedly creating disturbance to escape from officer making arrest held for jury. *Stovall v. State*, 173 Miss. 755, 163 So. 504 (1935).

2. Indictment.

Indictment charging accused unlawfully and wilfully disturbed "a congregation of persons lawfully assembled at Prospect Church for religious worship, by then and there talking in a loud tone of voice in the presence and hearing of said congregation," held sufficient. *State v. Sowell*, 102 Miss. 599, 59 So. 848 (1912).

Indictment is defective fatally if it fail to state the nature or character of the disturbance. *Conerly v. State*, 66 Miss. 96, 5 So. 625 (1889).

§ 97-35-18. Disturbance by disruptive protest of funeral, burial service, or memorial service.

(1) For purposes of this section, the following terms shall have the following meanings:

(a) "Funeral ceremony" means a service or rite commemorating the deceased with the body present.

(b) "Funeral service" means any services which may be used to:

(i) Care for and prepare dead human bodies for burial, cremation or other final disposition; and

(ii) Arrange, supervise, or conduct the funeral ceremony or the final disposition of dead human bodies.

(c) "Graveside service" means a service or rite, conducted at the place of interment, commemorating the deceased with the body present.

(d) "Memorial service" means a ceremony or rite commemorating the deceased without the body present.

(e) "Targeted residential picketing" includes the following acts when committed on more than one (1) occasion:

(i) Marching, standing or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security or privacy of an occupant of the building; or

(ii) Marching, standing or patrolling by one or more persons which prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located.

(a) Whoever does any of the following shall be guilty of a misdemeanor:

(i) With intent to disrupt a funeral service, graveside service, memorial service, or funeral ceremony, protests or pickets within 1,000 feet of

the location or locations at which the service or ceremony is being conducted within one (1) hour before, during, and one (1) hour following the service or ceremony;

(ii) With intent to disrupt a funeral procession impedes vehicles that are part of the funeral procession;

(iii) Intentionally blocks access to a funeral service, funeral ceremony, graveside service or memorial service; or

(iv) Engages in targeted residential picketing at the home or domicile of any surviving member of the deceased person's immediate family on the date of the service or ceremony, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

(b) Whoever is convicted of a second or subsequent violation of paragraph (a) shall be guilty of a gross misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment. For purposes of this paragraph, a second or subsequent violation includes a violation of a statute from another state in conformity with this statute.

(3) In addition to the criminal penalties provided in subsection (2) of this section, the court may enjoin conduct prohibited in subsection (2) of this section, and may in such proceeding award damages, including attorney fees or other appropriate relief against a person, if there is credible evidence that the person has violated, or is likely to violate, subsection (2) of this section. Any surviving member of the deceased person's immediate family who is damaged or threatened with loss or injury by reason of a violation described in subsection (2) of this section is entitled to sue for and have injunctive relief and appropriate remedial compensation in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation thereof.

SOURCES: Laws, 2006, ch. 591, § 1, eff from and after July 1, 2006.

Editor's Note — Laws, 2006, ch. 591, § 3 provides as follows:

“SECTION 3. Section 1 of this act shall be codified within Chapter 35, Title 97, Mississippi Code of 1972.”

§ 97-35-19. Hydraulic brake fluid; sale of inferior quality unlawful; standards.

(1) It is the public policy of this state to prohibit the sale of inferior and dangerous qualities and grades of hydraulic brake fluid and only such hydraulic brake fluid which meets the minimum standard of the society of automotive engineers can be lawfully sold or offered for sale in this state. Containers which contain heavy duty hydraulic brake fluid which meets the minimum standards of the society of automotive engineers shall bear the

stamp or mark "SAE 70R1," or a later SAE designator, stamp or mark may be used, if the same is assigned to the hydraulic brake fluid on the basis of its being an improved product. Any brands or types of such hydraulic brake fluid being offered for sale in this state after the effective date of this section which do not bear such a mark or stamp on the label of the container in which they are offered for sale, or meet such minimum standards, shall be impounded, taken up, taken off the market and returned to the seller or manufacturer.

(2) It shall be unlawful for any person to sell or offer for sale, any type or brand of hydraulic brake fluid which does not meet the minimum standards of the society of automotive engineers or the container of which does not bear the stamp or mark "SAE 70R1" or a later designator for an improved product, and it shall be unlawful for any person to mark any container of hydraulic brake fluid with the minimum standard number mentioned herein if the container does not in fact contain fluid which meets such minimum standards, or to offer for sale any such fluid which has been improperly marked. The State Chemist is hereby vested with all the rights, powers and duties necessary to administer this section and to adopt and promulgate reasonable rules and regulations for its accomplishment. Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than Ten Dollars (\$10.00), nor more than Twenty-five Dollars (\$25.00), for each violation, and each sale of such unlawful hydraulic brake fluid shall constitute a separate offense and violation of this section.

SOURCES: Codes, 1942, § 2233.5; Laws, 1956, ch. 244, §§ 1, 2; Laws, 1958, ch. 189, eff. January 1, 1959; Laws, 1986, ch. 395, § 28, eff from and after July 1, 1986.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-35-21. Lighthouse property and navigation lights; destroying, extinguishing, etc.

Every person who shall wilfully break into, deface or destroy any lighthouse station, post, platform, steps, lamp or other structure pertaining to such lighthouse station, or shall extinguish any light erected by the United States upon or along the navigable waters of this state to aid in the navigation thereof, shall, upon conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment.

SOURCES: Codes, 1906, § 1395; Hemingway's 1917, § 1138; Laws, 1930, § 1169; Laws, 1942, § 2412; Laws, 1894, ch. 41.

Cross References — Statutory definition of term "navigable waters," see § 1-3-31. Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-35-23. Obstructing public streets, etc.; intentional obstruction of, or interference with, vehicle or pedestrian.

(1) It shall be unlawful for any person or persons to intentionally obstruct, or interfere with the normal or ordinary free use and passage of vehicles of or on, any public street or highway provided for use by vehicular traffic, or for any person or persons to intentionally obstruct, or interfere with the normal or ordinary free use and passage of pedestrians of or on any public sidewalk provided for foot travel by pedestrians, and any person or persons who so do shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than four hundred dollars (\$400.00), or by imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2296.6; Laws, 1960, ch. 253, §§ 1, 2.

Cross References — Picketing interfering with ingress or egress to and from public buildings, etc., see § 97-7-63.

Picketing or demonstrating in or near courthouse or residence of judge, etc., see § 97-9-67.

Obstruction of highways, generally, see § 97-15-37.

Disorderly conduct and breach of the peace, see §§ 97-35-3 through 97-35-7.

Wilful obstruction of, or interference with, use or passage of public streets, see § 97-35-25.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Validity, construction, and operation of statute or regulation forbidding, regulating, or limiting peaceful residential picketing. 113 A.L.R.5th 1.

§ 97-35-25. Obstructing public streets, etc.; wilful obstruction of use by impeding traffic.

(1) It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

SOURCES: Codes, 1942, § 2296.5; Laws, 1960, ch. 244, §§ 1, 2.

Cross References — Picketing interfering with ingress or egress to and from public buildings, etc., see § 97-7-63.

Picketing or demonstrating in or near courthouse or residence of judge, etc., see § 97-9-67.

Obstruction of highways, generally, see § 97-15-37.

Disorderly conduct and breach of the peace, see §§ 97-35-3 through 97-35-7.

Intentional obstruction of, or interference with, use or passage of public streets, see § 97-35-23.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-35-27. Registration of convicted felons residing in state.

(1) Any person who has been since January 1, 1960 or is hereafter convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as a felony, shall within thirty (30) days after the effective date of this chapter or within thirty (30) days of his coming into any county or city, or city and county in which he resides or is temporarily domiciled for such length of time, register with the chief of police of the city in which he resides or the sheriff of the county if he resides in an unincorporated area.

(2) Such registration shall consist of (a) a statement in writing signed by such person, giving such information as may be required by the identification bureau of the Mississippi Highway Safety Patrol, and (b) the fingerprints and photograph of such person. Within three (3) days thereafter the registering law enforcement agency shall forward such statement, fingerprints and photograph to the identification bureau of the Mississippi Highway Safety Patrol.

(3) If any person required to register hereunder changes his residence address he shall inform, in writing within ten (10) days, the law enforcement agency with whom he last registered of his new address. The law enforcement agency shall, within three (3) days after receipt of such information, forward it to the identification bureau of the Mississippi Highway Safety Patrol. The identification bureau of the Mississippi Highway Safety Patrol shall forward appropriate registration data to the law enforcement agency having local jurisdiction of the new place of residence.

(4) Any person required to register under the provisions of this section who shall violate any of the provisions thereof is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding three (3) months, or by fine not exceeding one hundred dollars (\$100.00), or both.

(5) The statements, photographs and fingerprints herein required shall not be open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer.

SOURCES: Codes, 1942, § 2563.7; Laws, 1962, ch. 325, §§ 1-5, eff from and after passage (approved June 1, 1962).

Cross References — Sheriffs, see §§ 19-25-1 et seq.

Highway safety patrol, see §§ 45-3-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. State statutes or ordinances requiring persons previously convicted of crime to register with authorities. 36 A.L.R.5th 161.

§ 97-35-29. Tramps; definition.

Any male person over sixteen years of age, and not blind, who shall go about from place to place begging and asking subsistence by charity, and all who stroll over the country without lawful occasion, and can give no account of their conduct consistent with good citizenship, shall be held to be tramps.

SOURCES: Codes, 1880, § 2960; 1892, § 1309; Laws, 1906, § 1383; Hemingway's 1917, § 1126; Laws, 1930, § 1156; Laws, 1942, § 2393.

Cross References — Vagrants, see § 97-35-37 through 97-35-43.

RESEARCH REFERENCES

ALR. Laws regulating begging, panhandling, or similar activity by poor or homeless persons. 7 A.L.R.5th 455.

§ 97-35-31. Tramps; arrest by any person permitted; proceedings.

Any person may arrest a tramp and take him before a justice of the peace, who shall at once take the affidavit of such person charging the offense, and shall then try the accused for being a tramp, and deal with him accordingly, if found guilty.

SOURCES: Codes, 1880, § 2962; 1892, § 1311; Laws, 1906, § 1385; Hemingway's 1917, § 1128; Laws, 1930, § 1158; Laws, 1942, § 2395.

Editor's Note — Pursuant to Miss. Constn., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Another section derived from same 1942 code section, see § 99-3-27.

§ 97-35-33. Tramps; punishment.

Every person, on conviction of being a tramp, shall be punished by a fine of not more than fifty dollars, or imprisonment in the county jail not more than one month, or both.

SOURCES: Codes, 1880, § 2961; 1892, § 1310; Laws, 1906, § 1384; Hemingway's 1917, § 1127; Laws, 1930, § 1157; Laws, 1942, § 2394.

Cross References — Punishment of tramps as vagrants, see § 97-35-37.

§ 97-35-35. Tramps; penalty for not leaving house, etc. on request, carrying weapons, or threatening injury.

Any tramp who shall enter any dwelling house, or yard, or enclosure about a dwelling house without the permission of the owner or occupant thereof, and shall not immediately depart when requested, or shall be found carrying firearms or other dangerous weapons, or shall do or threaten to do any injury to any person or the real or personal property of another, shall, upon conviction, be imprisoned in the county jail not more than three months.

SOURCES: Codes, 1880, § 2964; 1892, § 1312; Laws, 1906, § 1386; Hemingway's 1917, § 1129; Laws, 1930, § 1159; Laws, 1942, § 2396.

§ 97-35-37. Vagrants; defined.

The following persons are and shall be punished as vagrants, viz.:

(a) Persons known as tramps, wandering or strolling about in idleness, who are able to work and have no property to support them.

(b) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work.

(c) All persons able to work, having no property to support them, and who have no visible or known means of a fair, honest and reputable livelihood. The term "visible and known means of a fair, honest and reputable livelihood," as used in this section, shall be construed to mean reasonably continuous employment at some lawful occupation for reasonable compensation, or a fixed and regular income from property or other investment, which income is sufficient for the support and maintenance of such person.

(d) All able-bodied persons who habitually loaf, loiter and idle in the cities, towns, and villages, or about steamboat landings or railroad stations or any other public place in the state, for the larger portion of their time, without any regular employment and without any visible means of support. An offense under paragraph (d) of this section shall be made out whenever it is shown that any person has no visible means of support and only occasionally has employment at odd jobs, being for the most of the time out of employment.

(e) Persons trading or bartering stolen property, or who unlawfully sell or barter any vinous, alcoholic, malt, intoxicating or spirituous liquors.

(f) Every common gambler or person who for the most part maintains himself by gambling.

(g) Every able-bodied person who shall go begging for a livelihood.

(h) Every common prostitute.

(i) Every keeper of a house of prostitution.

(j) Every keeper of a house of gambling or gaming.

(k) Every able-bodied person who lives without employment or labor, and who has no visible means of support.

(l) All persons who are able to work and do not work, but hire out their minor children or allow them to be hired out, and live upon their wages.

(m) All persons over sixteen years of age and under twenty-one, able to work and who do not work, and have no property to support them, and have not some known visible means of a fair, honest, and reputable livelihood, and whose parents or those in loco parentis are unable to support them, and who are not in attendance upon some educational institution.

SOURCES: Codes, 1906, § 5055; Hemingway's 1917, § 3332; Laws, 1930, § 3472; Laws, 1942, § 2666; Laws, 1904, ch. 144.

Cross References — Statutory definition of term "minor," see § 1-3-27.

Tramps, generally, see §§ 97-35-29 through 97-35-35.

JUDICIAL DECISIONS

1. In general.
2. Who is a vagrant.

1. In general.

In vagrancy prosecution based on non-support, evidence of misconduct of defendant's wife prior to marriage held not admissible. *Runnels v. State*, 154 Miss. 621, 122 So. 769 (1929).

A bill by children, who have been abandoned, to ascertain what amount is sufficient for their support, and for a decree that such amount be paid monthly by the father, cannot be entertained. *Rawlings v. Rawlings*, 121 Miss. 140, 83 So. 146, 7 A.L.R. 1259 (1919).

The offense is a continuing one and prosecution is not barred by a former prosecution for the same offense. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

Trial of a husband and father for vagrancy for failure to support his wife and child is in effect a controversy between the husband and wife and the wife is competent to testify against him. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

Plea of former jeopardy of a defendant charged with abandoning his wife and children and failing to support them, held insufficient as failing to show that since the date of the former trial he had supported his family or that his wife continued to refuse to live with him. *Vance v. State*, 104 Miss. 227, 61 So. 305 (1913).

This section [Code 1942, § 2666], par. i, does not exclude the right to prosecute

such person for keeping a bawdyhouse, as the latter offense, which is distinct from vagrancy, is an offense at common law, which still prevails in Mississippi, where not abrogated by statute. *Gavin v. State*, 96 Miss. 377, 50 So. 498 (1909).

2. Who is a vagrant.

A person who has sufficient money on hand from legitimate sources to take care of all his decent needs as a respectable member of the community without any imposition on others is not a vagrant within the meaning of paragraph (k) this section [Code 1942, § 2666], although he does no work and keeps his money concealed on his person or in some hidden depository. *Gentry v. Town of Booneville*, 199 Miss. 1, 24 So. 2d 88 (1945).

Proof that the accused "has no visible means of support" makes out a prima facie case for the prosecution and is sufficient to sustain a conviction unless the accused proceeds with proof that he has money or means, legitimately obtained, sufficient to take care of his decent needs, although hidden or otherwise not open and apparent, whereupon the question then becomes one of fact to be determined by the jury. However, the jury is not bound to accept the unsupported testimony of the accused even though no witness is produced who is able to testify directly to the contrary. *Gentry v. Town of Booneville*, 199 Miss. 1, 24 So. 2d 88 (1945).

RESEARCH REFERENCES

ALR. Constitutionality of vagrancy statutes and ordinances. 25 A.L.R.3d 792.

Laws regulating begging, panhandling, or similar activity by poor or homeless persons. 7 A.L.R.5th 455.

Validity, construction, and application of loitering statutes and ordinances. 72 A.L.R.5th 1.

Am Jur. 63C Am. Jur. 2d, Prostitution §§ 1 et seq.

77 Am. Jur. 2d, Vagrancy §§ 1 et seq.

CJS. 91 C.J.S., Vagrancy §§ 1 et seq.

Law Reviews. Whitfield, A guide to finding a right to shelter for the homeless. 9 Miss. College L. R. 295, Spring 1989.

§ 97-35-39. Vagrants; penalty for vagrancy; bond.

Whenever any person shall have been convicted of being a vagrant, the justice of the peace or mayor or police justice by whom such person was tried shall commit the person to jail for not less than ten nor more than thirty days, or shall require such person to give bond, with sufficient security, to be approved by said justice or mayor or police justice, in any sum not less than two hundred and one dollars, for the future industry and good conduct of such person for one year from the date of giving of such bond.

SOURCES: Codes, 1906, § 5058; Hemingway's 1917, § 3335; Laws, 1930, § 3475; Laws, 1942, § 2669.

Editor's Note — Pursuant to Miss. Constn., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Other sections derived from same 1942 code section, see §§ 99-29-5, 99-29-9.

JUDICIAL DECISIONS

1. In general.

Provision relating to liberation of one committed to jail for vagrancy, if invasion of pardoning power, held separable from provision fixing penalty. *Runnels v. State*, 154 Miss. 621, 122 So. 769 (1929).

The court cannot require one convicted of vagrancy to give bond to keep the peace for two years, and such provision renders the whole judgment excessive and unlawful. *Daniels v. State*, 110 Miss. 440, 70 So. 458 (1916).

Trial of a husband and father for vagrancy for failure to support his wife and child is in effect a controversy between the husband and wife and the wife is competent to testify against him. *McRae v. State*, 104 Miss. 861, 61 So. 977 (1913).

Judgment imposing a sentence and requiring a bond is unauthorized, after suspension of sentence during good behavior

without the requirement of a bond, under a former plea of guilty, though accused's misbehavior is renewed. *Warwick v. State*, 102 Miss. 143, 59 So. 2 (1912).

It being shown that defendants, charged with being common prostitutes, had no other means of support, did not work, but habitually arrayed themselves in the evening and sat on the front steps or strolled on the street and solicited men, who went into the house with them, when the doors would be closed, together with evidence of other like acts, a conviction will not be disturbed. In such cases direct proof of guilt is not required; it may be inferred from circumstances. *Peabody v. State*, 72 Miss. 104, 17 So. 213 (1894).

One charged with vagrancy and required by a justice of the peace to give bond for good behavior or be committed to jail may appeal to the circuit court. *Jones v. State*, 70 Miss. 398, 12 So. 710 (1893).

RESEARCH REFERENCES

ALR. Validity of vagrancy statutes and ordinances. 25 A.L.R.3d 792.

Am Jur. 77 Am. Jur. 2d, Vagrancy §§ 1 et seq.

CJS. 91 C.J.S., Vagrancy § 6.

§ 97-35-41. Vagrants; penalty for second offense; payment of costs in all cases.

Whenever any person shall be convicted of a second offense of vagrancy, he shall be committed to jail for not less than ninety days nor more than six months, and shall serve said sentence for the prescribed time. In all cases where any person shall be convicted of vagrancy, in addition to being committed to jail is herein provided, such person shall also pay all costs, and shall stand committed until same is paid, and this shall apply to all cases, whether such persons give bond as provided in Section 97-35-39 or not.

SOURCES: Codes, 1906, § 5061; Hemingway's 1917, § 3338; Laws, 1930, § 3478; Laws, 1942, § 2672.

Cross References — Enforcement of sentences of county and municipal convicts, see § 47-1-1.

JUDICIAL DECISIONS

1. In general.

Judgment imposing a sentence and requiring a bond is unauthorized, after suspension of sentence during good behavior without the requirement of a bond, under a former plea of guilty, though accused's

misbehavior is renewed. *Warwick v. State*, 102 Miss. 143, 59 So. 2 (1912).

It was error to inflict the punishment provided for the second offense on defendant's first conviction thereof. *Oaks v. State*, 100 Miss. 737, 57 So. 1 (1912).

RESEARCH REFERENCES

Am Jur. 77 Am. Jur. 2d, Vagrancy §§ 1 et seq.

CJS. 91 C.J.S., Vagrancy § 6.

§ 97-35-43. Vagrants; officers punished for failing in their duty.

If any of the officers named in Section 99-29-1 shall fail, refuse, or neglect to perform the duties therein required, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars.

SOURCES: Codes, 1906, § 5062; Hemingway's 1917, § 3339; Laws, 1930, § 3479; Laws, 1942, § 2673.

Cross References — Criminal liability for failure of public officers to perform duty, generally, see § 97-11-37.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-35-45. False alarm of fire.

It shall be unlawful for any person to report a fire to another by any means, knowing that such report is false. Any violation of this section shall be punishable by imprisonment in the county jail not to exceed one (1) year or by fine not to exceed five hundred dollars (\$500.00), or both.

SOURCES: Laws, 1978, ch. 505, § 1, eff from and after July 1, 1978.

RESEARCH REFERENCES

ALR. Giving false alarm by telephone as minor criminal offense. 97 A.L.R.2d 510.

§ 97-35-47. False reporting of crime.

It shall be unlawful for any person to report a crime or any element of a crime to any law enforcement or any officer of any court, by any means, knowing that such report is false. A violation of this section shall be punishable by imprisonment in the county jail not to exceed one (1) year or by fine not to exceed One Thousand Dollars (\$1,000.00), or both. In addition to any fine and imprisonment, and upon proper showing made to the court, the defendant shall be ordered to pay as restitution to the law enforcement agency reimbursement for any reasonable costs directly related to the investigation of the falsely reported crime and the prosecution of any person convicted under this section.

SOURCES: Laws, 2000, ch. 387, § 1, eff from and after July 1, 2000.

§ 97-35-49. Focusing laser beam at law enforcement officer, fire fighter or other emergency personnel; penalties.

(1) It shall be unlawful for a person intentionally and without legal justification to focus, point or aim a laser beam directly or indirectly at a law enforcement officer, fire fighter or any emergency personnel who is in uniform and engaged in the performance of official duty in such a manner as to harass, annoy or injure such law enforcement officer, fire fighter or emergency personnel.

(2) A person who violates this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Thousand Dollars (\$1,000.00).

SOURCES: Laws, 2003, ch. 537, § 2, eff from and after passage (approved Apr. 21, 2003.)

Editor's Note —

Laws, 2003, ch. 537, § 2, provides as follows:

"SECTION 2. This act shall be known and may be cited as the Gary Funchess Act."

CHAPTER 37

Weapons and Explosives

SEC.

- 97-37-1. Deadly weapons; carrying while concealed; use or attempt to use; penalties.
- 97-37-3. Deadly weapons; forfeiture of weapon; return upon dismissal or acquittal; confiscated firearms may be sold at auction; proceeds of sale used to purchase bulletproof vests for seizing law enforcement agency.
- 97-37-5. Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.
- 97-37-7. Deadly weapons; persons permitted to carry weapons; bond; permit to carry weapon; grounds for denying application for permit; required weapons training course; reciprocal agreements.
- 97-37-9. Deadly weapons; defenses against indictment for carrying deadly weapon.
- 97-37-11. Deadly weapons; dealers to keep record of weapons sold.
- 97-37-13. Deadly weapons; weapons and cartridges not to be given to minor or intoxicated person.
- 97-37-14. Possession of handgun by minor; act of delinquency; exceptions.
- 97-37-15. Parent or guardian not to permit minor son to have or carry weapon; penalty.
- 97-37-17. Possession of weapons by students; aiding or encouraging.
- 97-37-19. Deadly weapons; exhibiting in rude, angry, or threatening manner.
- 97-37-21. Explosives and weapons of mass destruction; false report of placing.
- 97-37-23. Unlawful possession of explosives; duty of officers to make search and to seize explosives; exception to prohibition.
- 97-37-25. Explosives and weapons of mass destruction; unlawful use.
- 97-37-27. Fireworks; unlawful to explode in certain places.
- 97-37-29. Shooting into dwelling house.
- 97-37-31. Silencers on firearms; armor piercing ammunition; manufacture, sale, possession or use unlawful.
- 97-37-33. Toy pistols; sale of pistol or cartridges prohibited; cap pistols excepted.
- 97-37-35. Stolen firearms; possession, receipt, acquisition or disposal; offense; punishment.
- 97-37-37. Enhanced penalty for use of firearm during commission of felony.

§ 97-37-1. Deadly weapons; carrying while concealed; use or attempt to use; penalties.

(1) Except as otherwise provided in Section 45-9-101, any person who carries, concealed in whole or in part, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall upon conviction be punished as follows:

(a) By a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail

for not more than six (6) months, or both, in the discretion of the court, for the first conviction under this section.

(b) By a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, for the second conviction under this section.

(c) By imprisonment in the State Penitentiary for not less than one (1) year nor more than five (5) years, for the third or more convictions under this section.

(d) By imprisonment in the State Penitentiary for not less than one (1) year nor more than five (5) years for any person previously convicted of any felony who is convicted under this section.

(2) It shall not be a violation of this section for any person over the age of eighteen (18) years to carry a firearm or deadly weapon concealed in whole or in part within the confines of his own home or his place of business, or any real property associated with his home or business or within any motor vehicle.

(3) It shall not be a violation of this section for any person to carry a firearm or deadly weapon concealed in whole or in part if the possessor of the weapon is then engaged in a legitimate weapon-related sports activity or is going to or returning from such activity. For purposes of this subsection, "legitimate weapon-related sports activity" means hunting, fishing, target shooting or any other legal sports activity which normally involves the use of a firearm or other weapon.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; Laws, 1906, § 1103; Hemingway's 1917, § 829; Laws, 1930, § 853; Laws, 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1991, ch. 609, § 4, eff from and after July 1, 1991.

Cross References — Constitutional provision empowering legislature to regulate or forbid carrying concealed weapons, see Miss. Const. Art. 3, § 12.

License to carry concealed pistol or revolver, see § 45-9-101.

Prohibition and punishment for furnishing weapons to offenders or taking such item on property occupied by them, see §§ 47-5-191 through 47-5-195.

Murder perpetrated on educational property, see § 97-3-19.

Other sections derived from same 1942 code section, see §§ 97-37-3, 97-37-5, 97-37-7.

Persons who may be permitted to carry weapons, see § 97-37-7.

Defenses to charge of carrying deadly weapon, see § 97-37-9.

Prohibition of sound mufflers for firearms, see § 97-37-31.

Dueling, see §§ 97-39-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
- 1.5. Construction.
2. Weapons to which statute applies.
3. Concealment; mode of carrying.

4. Indictment or affidavit charging of fense.
5. Instructions.

1. In general.

The evidence was insufficient to support a conviction for carrying a concealed weapon under this section where the State presented no evidence to prove that the shotgun carried by the defendant had a barrel length of less than 18 inches; a gun with a barrel length in excess of 18 inches does not fall within the ambit of this section, and, therefore, the length of the barrel was an indispensable, statutory element which the State was required to prove beyond a reasonable doubt. *Carlson v. State*, 597 So. 2d 657 (Miss. 1992).

A high school student was properly adjudicated delinquent for having handguns on school grounds, where the guns were found in the student's locker, the student had exclusive possession of the locker and kept it under lock and key, and a second student testified that the first student had offered to sell him 2 handguns and had told him that he had the guns at school. *S.C. v. State*, 583 So. 2d 188 (Miss. 1991).

In the trial of a capital murder charge, no reversible error resulted from allowing testimony which sought to elicit the fact that a sawed-off shotgun barrel produces enhanced danger and a more severe wound when fired than does a barrel of regulation length. *Wiley v. State*, 484 So. 2d 339 (Miss. 1986), cert. denied, 479 U.S. 906, 107 S. Ct. 304, 93 L. Ed. 2d 278 (1986), reh'g denied, 479 U.S. 999, 107 S. Ct. 604, 93 L. Ed. 2d 604 (1986), overruled on other grounds, *Willie v. State*, 585 So. 2d 660 (Miss. 1991), vacated, 635 So. 2d 802 (Miss. 1993).

The effect of double enhancement where the crime of carrying a concealed weapon after conviction of a felony is combined with sentencing under the habitual offenders statute does not render the latter statute unconstitutional. Failure of the state to specify in an indictment which section of the habitual criminal statute, § 99-19-81 or § 99-19-83, applies to a defendant is not error since the statutes are not criminal offenses and only affect sentencing. *Osborne v. State*, 404 So. 2d 545 (Miss. 1981).

Throwing flashlight on person on street held not unlawful search, rendering incompetent evidence thus secured that she was unlawfully carrying a pistol partly concealed. *Daniels v. City of Gulfport*, 146 Miss. 517, 112 So. 686 (1927).

This section [Code 1942, § 2079] is constitutional and under it one cannot carry a concealed weapon in his own home. *Wilson v. State*, 81 Miss. 404, 33 So. 171 (1903).

The statute makes the fact of carrying a weapon concealed criminal, regardless of intent. *Strahan v. State*, 68 Miss. 347, 8 So. 844 (1891).

The act of 1888, amendatory of the Code 1880, on the subject of carrying weapons concealed, was ex post facto in its application to offenses previously committed. (1) It cut off a defense, and (2) it changed, but did not mitigate, the penalty. *Lindsey v. State*, 65 Miss. 542, 5 So. 99 (1888); *Hodnett v. State*, 66 Miss. 26, 5 So. 518 (1888).

1.5. Construction.

The fact that a defendant is a priorly convicted felon is a necessary element of finding a defendant guilty of possession of a firearm by a priorly convicted felon and therefore must be presented to the jury during the guilt phase of a trial. *Evans v. State*, 802 So. 2d 137 (Miss. Ct. App. 2001).

The court rejected the contention that § 97-37-5 should be read in pari materia with this section to permit a convicted felon to possess a firearm in his own home. *James v. State*, 731 So. 2d 1135 (Miss. 1999).

2. Weapons to which statute applies.

A pistol is a "deadly weapon" within statute denouncing the exhibition or carrying of such weapon, even without proof that the pistol is loaded or presently capable of committing a violent injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

Carrying a pistol concealed is not necessarily a violation of this statute [Code 1942, § 2079]. *Floyd v. Missouri State Life Ins. Co.*, 11 F. Supp. 1001 (S.D. Miss. 1935), aff'd, 84 F.2d 35 (5th Cir. 1936).

Worn out pistol totally beyond use as such, not a weapon. *Burnside v. State*, 105 Miss. 408, 62 So. 420 (1913).

Razor not deadly weapon. *Brown v. State*, 105 Miss. 367, 62 So. 353, Am. Ann. Cas. 1916E,307 (1913).

Object once a "pistol" does not cease to be one by becoming temporarily inefficient. *Mitchell v. State*, 99 Miss. 579, 55 So. 354, Am. Ann. Cas. 1913E,512 (1911).

Whether a weapon is deadly is a question of fact. *State v. Sims*, 80 Miss. 381, 31 So. 907 (1902).

An unloaded pistol is within this section [Code 1942, § 2079]. *State v. Bollis*, 73 Miss. 57, 19 So. 99 (1895).

3. Concealment; mode of carrying.

A pistol seen under a leg of a motorist and removed by a patrolman who had halted the car to check the driver's license is not obtained by an unlawful search and seizure so as to be inadmissible in a prosecution for carrying a concealed weapon. *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

Carrying of pistol is within prohibition of statute where weapon is so carried that it is readily accessible. *Clark v. City of Jackson*, 155 Miss. 668, 124 So. 807 (1929).

Evidence showing pistol was on floor of automobile concealed by defendant's feet held sufficient to sustain conviction for carrying concealed pistol. *Clark v. City of Jackson*, 155 Miss. 668, 124 So. 807 (1929).

Under ordinance in words of statute prohibiting carrying concealed pistols, one carrying pistol concealed in whole or in part is guilty regardless of intent. *Clark v. City of Jackson*, 155 Miss. 668, 124 So. 807 (1929).

Circumstances sufficient to go to the jury on issue of defendant carrying concealed pistol found under him when he arose from his seat. *Duckworth v. Town of Taylorsville*, 142 Miss. 440, 107 So. 666 (1926).

Person carrying deadly weapon only part of which is concealed, carries a "concealed weapon." *Martin v. State*, 93 Miss. 764, 47 So. 426 (1908); *Reed v. State*, 199 So. 2d 803 (Miss. 1967), appeal dismissed, cert. denied, 390 U.S. 413, 88 S. Ct. 1113, 19 L. Ed. 2d 1273 (1968).

4. Indictment or affidavit charging offense.

In a prosecution for possession of a deadly weapon by a defendant previously

convicted of a felony, failure to charge in the indictment that the weapon had been "concealed in whole or in part" as provided in this section did not entitle defendant to a directed verdict and a peremptory instruction of not guilty where the defense never objected to the defective indictment by means of a demurrer as required by § 99-7-21, where the defendant was fully informed of the charges against him by the inclusion in the indictment of § 97-37-5 in conjunction with this section, and where there was no statute making it a crime to carry a deadly weapon unless it was concealed in whole or in part. *Jones v. State*, 383 So. 2d 498 (Miss. 1980).

Section 97-37-5 requires that the indictment allege with particularity and specificity the state or federal jurisdiction of the prior felony conviction; additionally, such indictment must also substantially set forth the date of judgment of prior conviction, and nature or description of offense constituting previous felony conviction. *Morgan v. United States Fid. & Guar. Co.*, 291 So. 2d 741 (Miss. 1974).

A charge under this section [Code 1942, § 2079] cannot be consolidated with a charge of exhibiting a deadly weapon (Code 1942, § 2086) and a charge of assault and battery with fists (Code 1942, § 2562), and one trial had of the consolidated case. *Woods v. State*, 200 Miss. 527, 27 So. 2d 895 (1946).

Affidavit charging defendant carried deadly weapon, to wit, a pistol concealed on his person, etc., but not charging that it was unlawfully carried, was fatally defective. *Jordan v. State*, 87 Miss. 170, 39 So. 895 (1905); *Whittaker v. State*, 45 So. 145 (Miss. 1908); *Pitman v. State*, 107 Miss. 154, 65 So. 123 (1914).

Since whether a weapon is deadly is a question of fact, an indictment is not demurrable because the weapon is not specifically mentioned in this statute [Code 1942, § 2079]. *State v. Sims*, 80 Miss. 381, 31 So. 907 (1902).

5. Instructions.

An instruction in a prosecution for assault and battery with intent to kill and murder, in which it was assumed that the pistol used was a deadly weapon, is not erroneous since the statute denominates a pistol as a deadly weapon. *Rowland v. State*, 182 Miss. 886, 183 So. 527 (1938).

Not error to instruct jury that if defendant carried concealed, in whole or in part, a pistol which was defective he

would be guilty. *Mitchell v. State*, 99 Miss. 579, 55 So. 354, Am. Ann. Cas. 1913E, 512 (1911).

ATTORNEY GENERAL OPINIONS

This section sets forth stated exceptions to state law which makes it crime to carry certain weapons, including handguns, concealed in whole or part, including in motor vehicle or in home or business, including property surrounding such

home or business. Bowen, Jan. 14, 1993, A.G. Op. #92-0934.

Mace is not considered to be "deadly" weapon within meaning of 97-37-1. Parlin, March 10, 1994, A.G. Op. #93-0865.

RESEARCH REFERENCES

ALR. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 A.L.R.2d 492.

Application of statute or regulation dealing with registration or carrying of weapons to transient nonresident. 68 A.L.R.3d 1253.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license. 69 A.L.R.3d 1054.

Statutory presumption of possession of weapon by occupants of place or vehicle where it was found. 87 A.L.R.3d 949.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle. 2 A.L.R.4th 1342.

What constitutes a "bludgeon," "black-jack," or "billy" within meaning of criminal possession statute. 11 A.L.R.4th 1272.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms. 37 A.L.R.4th 1179.

Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of,

crime from acquiring, having, carrying, or using firearms or weapons. 39 A.L.R.4th 967.

Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 39 A.L.R.4th 983.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

What amounts to "control" under state statute making it illegal for felon to have possession or control of firearm or other dangerous weapon. 66 A.L.R.4th 1240.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Petition for relief, under 18 USCS § 925(c) and implementing regulations, from disabilities imposed by federal gun control laws upon persons convicted of crime. 66 A.L.R. Fed. 351.

Am Jur. 79 Am. Jur. 2d, Weapons and Firearms §§ 12 et seq.

13 Am. Jur. Trials, Defending Minor Felony Cases §§ 1 et seq.

CJS. 94 C.J.S., Weapons §§ 18-21.

§ 97-37-3. Deadly weapons; forfeiture of weapon; return upon dismissal or acquittal; confiscated firearms may be sold at auction; proceeds of sale used to purchase bulletproof vests for seizing law enforcement agency.

(1) Any weapon used in violation of Section 97-37-1, or used in the

commission of any other crime, shall be seized by the arresting officer, may be introduced in evidence, and in the event of a conviction, shall be ordered to be forfeited, and shall be disposed of as ordered by the court having jurisdiction of such offense. In the event of dismissal or acquittal of charges, such weapon shall be returned to the accused from whom it was seized.

(2)(a) If the weapon to be forfeited is merchantable, the court may order the weapon forfeited to the seizing law enforcement agency.

(b) A weapon so forfeited to a law enforcement agency may be sold at auction as provided by Sections 19-3-85 and 21-39-21 to a federally-licensed firearms dealer, with the proceeds from such sale at auction to be used to buy bulletproof vests for the seizing law enforcement agency.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; Laws, 1906, §§ 1103, 1104; Hemingway's 1917, §§ 829, 830; Laws, 1930, §§ 853, 854; Laws, 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1979, ch. 396; Laws, 2003, ch. 349, § 1, eff from and after July 1, 2003.

Cross References — Other sections derived from same 1942 code section, see §§ 97-37-1, 97-37-5, 97-37-7.

JUDICIAL DECISIONS

1. In general.
2. Forfeiture improper.

1. In general.

Defendant, who was convicted of illegal possession of firearms by convicted felon, had a constitutionality protected property interest in the firearms which could not be extinguished without according the defendant due process. *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990), reh'g denied, 912 F.2d 1465 (5th Cir. 1990).

Defendant's acquittal on criminal charges involving firearms does not preclude subsequent in rem forfeiture proceeding against same firearms because neither collateral estoppel or double jeopardy bars civil, remedial forfeiture proceeding initiated following acquittal on related criminal charges. *United States v. One Assortment of 89 Firearms*, 465 U.S.

354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), overruled on other grounds, *Ferguson v. United States*, 911 F. Supp. 424 (C.C. Cal. 1995), but see *Cooper v. Greenwood*, 904 F.2d 302 (5th Cir. 1990).

A pistol seen under a leg of a motorist and removed by a patrolman who had halted the car to check the driver's license is not obtained by an unlawful search and seizure so as to be inadmissible in a prosecution for carrying a concealed weapon. *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

2. Forfeiture improper.

Forfeiture of minor defendant's handgun was improper in a case where there was no charge filed against the minor that would have made the seizure of the handgun legal. *Miss. Comm'n on Judicial Performance v. Lewis*, 830 So. 2d 1138 (Miss. 2002).

ATTORNEY GENERAL OPINIONS

There is no requirement that the confiscated weapons be destroyed; the court may order the disposition of such weapons by public auction after all appeal rights have been exhausted or such further time

as the court deems proper. Donald, April 10, 1998, A.G. Op. #98-0193.

The fact that the judge who heard the case is no longer in office does not remove jurisdiction over confiscated weapons

from the court in which the case was disposed. Aldridge, October 9, 1998, A.G. Op. #98-0627.

The statute places the manner of disposition of confiscated weapons in the discretion of the court having jurisdiction over the offense. Aldridge, October 9, 1998, A.G. Op. #98-0627.

The Mississippi Department of Public Safety may not recognize a Louisiana first offender pardon for the purposes of issuing a weapons permit. Spann, Jan. 25, 2002, A.G. Op. #02-0012.

If an individual is convicted of a crime in municipal court and a weapon was used in that crime, the court may forfeit the weapon to the municipality. Spearnock, Feb. 27, 2004, A.G. Op. 04-0072.

If a city wishes to dispose of the firearms it acquired in drug-related cases it must follow the requirements set out in this section. Elliott, Nov. 30, 2004, A.G. Op. 04-0581.

RESEARCH REFERENCES

ALR. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 A.L.R.2d 492.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Seizure and forfeiture of firearms or ammunition under 18 USCS § 924(d). 57 A.L.R. Fed. 234.

What circumstances fall within "inevitable discovery" exception to rule preclud-

ing admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 A.L.R. Fed. 331.

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§ 97-37-5. Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.

(1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the U.S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

(2) Any person violating this section shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

(3) A person who has been convicted of a felony under the laws of this state may apply to the court in which he was convicted for a certificate of rehabilitation. The court may grant such certificate in its discretion upon a showing to the satisfaction of the court that the applicant has been rehabilitated and has led a useful, productive and law-abiding life since the completion of his sentence and upon the finding of the court that he will not be likely to act in a manner dangerous to public safety.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; Laws, 1906, § 1103; Hemingway's 1917, § 829; Laws, 1930, § 853; Laws, 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1993, ch. 482, § 1, eff from and after July 1, 1993.

Cross References — Other sections derived from same 1942 code section, see §§ 97-37-1, 97-37-3, 97-37-7.

JUDICIAL DECISIONS

1. In general.
2. Constitutionality.
3. Construction.
4. Jury instructions.
5. Photo identification.
6. Sufficient evidence.

1. In general.

Where witness testimony, including that of a defense witness, placed defendant at the crime scene with a gun, the evidence was sufficient to find defendant guilty of being a felon in possession of a firearm. *Hope v. State*, 840 So. 2d 747 (Miss. Ct. App. 2003).

While defendant offered contrary testimony, the State produced witnesses who either identified defendant as the shooter or to whom he was alleged to have confessed, creating a classic credibility question which the jury resolved adversely to defendant; considering that testimony, there was no error when the jury found that defendant possessed a weapon beyond a reasonable doubt. *Fort v. State*, 752 So. 2d 458 (Miss. Ct. App. 1999).

A sentence of life imprisonment without probation or parole for a defendant convicted of carrying a concealed weapon after conviction of a felony under this section did not violate the prohibition against cruel and unusual punishment. *Baker v. State*, 394 So. 2d 1376 (Miss. 1981).

In a prosecution for possession of a deadly weapon by a defendant previously convicted of a felony, failure to charge in the indictment that the weapon had been "concealed in whole or in part" as provided in § 97-37-1 did not entitle defendant to a directed verdict and a peremptory instruction of not guilty where the defense never objected to the defective indictment by means of a demurrer as required by § 99-7-21, where the defendant was fully informed of the charges against him by the

inclusion in the indictment of this section in conjunction with § 97-37-1, and where there was no statute making it a crime to carry a deadly weapon unless it was concealed in whole or in part. *Jones v. State*, 383 So. 2d 498 (Miss. 1980).

This section requires that the indictment allege with particularity and specificity the state or federal jurisdiction of the prior felony conviction; additionally, such indictment must also substantially set forth the date of judgment of prior conviction, and nature or description of offense constituting previous felony conviction. *Morgan v. United States Fid. & Guar. Co.*, 291 So. 2d 741 (Miss. 1974).

2. Constitutionality.

This section does not violate the rights of citizens to keep and bear arms, as provided in Article 3, Section 12 of the Constitution. *James v. State*, 731 So. 2d 1135 (Miss. 1999).

3. Construction.

The court rejected the contention that this section should be read in pari materia with § 97-37-1 to permit a convicted felon to possess a firearm in his own home. *James v. State*, 731 So. 2d 1135 (Miss. 1999).

4. Jury instructions.

Trial court did not err in failing to issue a limiting jury instruction, sua sponte, regarding defendant's prior felony convictions because Miss. Code Ann. § 97-37-5 did not limit the number of prior felony convictions to be proven to show that defendant was a felon in possession of a firearm; thus, while giving a limiting instruction sua sponte might have been the better practice, failure to give the limiting instruction sua sponte was not reversible error. *Ferguson v. State*, 856 So. 2d 334 (Miss. Ct. App. 2003).

5. Photo identification.

Application of the Biggers factors to defendant's case established that: (1) the victim of the armed robbery had ample opportunity to observe defendant; (2) while defendant was present in the store, there was nothing to distract the victim's attention from him; (3) the victim phoned a description of the robber to the police department immediately after the robbery; (4) the victim did not express any uncertainty about the identification of defendant; and (5) the time between the robbery and the identification was short; thus, there were sufficient indicia of reliability to allow the identification of defendant, and defendant's convictions for armed robbery and possession of a firearm by a convicted felon were affirmed. *Ferguson v. State*, 856 So. 2d 334 (Miss. Ct. App. 2003).

6. Sufficient evidence.

Evidence was sufficient to sustain defendant's convictions for aggravated assault, kidnapping, and unlawful possession of a firearm where, according to the victim's testimony, she was accosted by defendant who grabbed her, placed a gun to her head, and physically forced her into a van against her will; an eyewitness testified that he saw the victim jump out of the van and saw the van swing back in such a fashion so as to accomplish a "perfect hit" on the woman in flight. In addition, the State presented two witnesses attesting to the fact that defendant was in possession of a firearm, and it introduced the gun into evidence with additional proof that the gun was recovered when defendant was arrested. *Jones v. State*, 920 So. 2d 465 (Miss. 2006).

Sufficient evidence existed to convict the defendant for being a felon in possession of a firearm in violation of Miss. Code Ann. § 97-37-5(1) as (1) the State presented a "pen pac" which revealed that defendant had been previously convicted of grand larceny and pled guilty to manslaughter at different times, (2) defendant knew he could not possess a gun, and (3) the gun was located in the bedroom occupied by defendant and his wife. *Koger v. State*, 919 So. 2d 1058 (Miss. Ct. App. 2005).

Sufficient evidence supported defendant's conviction for possession of a firearm by a felon under Miss. Code Ann. § 97-37-5(1) because the evidence was sufficient to show defendant was intentionally and consciously in possession of the weapon on the day charged. Defendant admitted that she had previously been convicted of a felony and that she knew that the weapon belonged to her ex-husband, that it had been reported stolen, and that she was required to return it if she found it in her home after their divorce, but that she had not yet returned it. *Young v. State*, 908 So. 2d 819 (Miss. Ct. App. 2005).

Defendant's convictions for murder and for being a felon in the possession of a firearm were proper where he admitted during cross-examination that he lied when he was interrogated by police. Further, the State produced witnesses who testified that defendant had a gun in his possession before the shooting and that defendant was angry and desired to get even with the victim. *Hayes v. State*, 907 So. 2d 385 (Miss. Ct. App. 2005), cert. denied, 910 So. 2d 574 (Miss. 2005).

Where police recovered a handgun directly behind defendant's house and the gun was identified as the one used by defendant to shoot at his girlfriend, defendant was properly convicted of possession of a firearm by a convicted felon. He was sentenced to three years in the custody of the Mississippi Department of Corrections. *Griffin v. State*, 883 So. 2d 1201 (Miss. Ct. App. 2004).

Where defendant's wife testified that defendant killed her ex-boyfriend, set his house on fire, and threw the pistol into the Tennessee River, the evidence was sufficient to convict defendant of murder, arson, and possession of a firearm by a felon. A diver recovered the pistol pieces from the river; the trial court properly denied defendant's motion for judgment notwithstanding the verdict. *Roland v. State*, 882 So. 2d 262 (Miss. Ct. App. 2004).

In defendant's trial for resisting arrest and possession of a firearm by a convicted felon, defendant's motion for new trial was properly denied where the arresting officers both testified that defendant pointed a chrome-colored pistol at them during the

initial struggle, a third officer testified to finding a chrome-colored pistol in residents' yard near the scene of the altercation, and the resident testified to having heard an object hit the roof about the time of the incident. *Harvey v. State*, 875 So. 2d 1133 (Miss. Ct. App. 2004).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, the record lacked any evidence that defendant presented himself as anything but mentally competent and there was no evidence to indicate that defendant's attorney was on notice of any psychiatric problem or that defendant's mind was or could be impaired; thus, there was no basis for defendant's attorney to request a mental evaluation for defendant, he was not incompetent for failing to request a mental evaluation for defendant, and defendant's motion for post-conviction relief was properly denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant testified under oath that he understood what he was doing and that his mind was clear, and, additionally, he did not produce any supporting affidavits to the appellate court to establish his alleged mental deficiency, as required by Miss. Code Ann. § 99-39-9(e); thus, the trial judge did not abuse her discretion in not ordering, upon her own motion, a psychiatric evaluation of defendant pursuant to Miss. Code Ann. § 99-13-11 because she determined that the accused was competent to understand the nature of the charges as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(4)(a) and

defendant's motion for post-conviction relief was denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant was fully informed of the nature of the charge against him, the rights he would waive by pleading guilty, and the maximum sentence he could receive, and he expressed full satisfaction with his attorney, denying that he had been coerced into pleading guilty; thus, defendant entered his plea voluntarily, knowingly, and intelligently and his motion for post-conviction relief was properly denied. *Richardson v. State*, 856 So. 2d 758 (Miss. Ct. App. 2003).

There was sufficient evidence presented to support defendant's conviction for possession of a firearm by a felon because defendant had been convicted of at least two separate felonies arising out of different incidents, defendant owed a laser sighted weapon, and a clip for the weapon was found under the seat where defendant had been riding. *Crosby v. State*, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Evidence was sufficient to support defendant's convicted felon in possession of firearm conviction, because defendant admitted he was a convicted felon; a woman who called the police testified that she saw that defendant had a gun in his hand; and an officer testified that he saw defendant walk toward the front of a nearby vehicle, take his hand from his pocket and make a stopping movement and then kicking movement with his foot, and later found a gun under the vehicle. *McNulty v. State*, 847 So. 2d 274 (Miss. Ct. App. 2003).

ATTORNEY GENERAL OPINIONS

Possession of weapon by convicted felon is simply prima facie evidence of violation of statute prohibiting carrying concealed weapon; in order for convicted felon to be able to qualify for gun permit, he could receive governor's pardon or executive order expressly restoring his privilege to obtain gun permit, and provisions of statute would have no application to convicted felon who has received pardon from governor, or who has received executive order

expressly placing him outside operation statute. *Murphy*, Nov. 20, 1992, A.G. Op. #92-0861.

A muzzle loading rifle or a muzzle loading shotgun is within the meaning of the term "firearm" as used in this section. A convicted felon may possess and consequently hunt with a traditional bow and arrow or crossbow. *Maples*, Feb. 13, 2004, A.G. Op. 04-0043.

RESEARCH REFERENCES

ALR. Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence. 37 A.L.R.4th 1168.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms. 37 A.L.R.4th 1179.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 43 A.L.R.4th 788.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

What amounts to "control" under state statute making it illegal for felon to have

possession or control of firearm or other dangerous weapon. 66 A.L.R.4th 1240.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

Petition for relief, under 18 USCS § 925(c) and implementing regulations, from disabilities imposed by federal gun control laws upon persons convicted of crime. 66 A.L.R. Fed. 351.

What constitutes receipt of firearm, under 18 USCS § 922(h), prohibiting certain persons from receiving any firearm which has been shipped or transported in interstate or foreign commerce. 74 A.L.R. Fed. 486.

§ 97-37-7. Deadly weapons; persons permitted to carry weapons; bond; permit to carry weapon; grounds for denying application for permit; required weapons training course; reciprocal agreements.

(1)(a) It shall not be a violation of Section 97-37-1 or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried by duly constituted bank guards, company guards, watchmen, railroad special agents or duly authorized representatives who are not sworn law enforcement officers, agents or employees of a patrol service, guard service, or a company engaged in the business of transporting money, securities or other valuables, while actually engaged in the performance of their duties as such, provided that such persons have made a written application and paid a nonrefundable permit fee of One Hundred Dollars (\$100.00) to the Department of Public Safety.

(b) No permit shall be issued to any person who has ever been convicted of a felony under the laws of this or any other state or of the United States. To determine an applicant's eligibility for a permit, the person shall be fingerprinted. If no disqualifying record is identified at the state level, the fingerprints shall be forwarded by the Department of Public Safety to the Federal Bureau of Investigation for a national criminal history record check. The department shall charge a fee which includes the amounts required by the Federal Bureau of Investigation and the department for the national and state criminal history record checks and any necessary costs incurred by the department for the handling and administration of the criminal history background checks. In the event a legible set of fingerprints, as determined

by the Department of Public Safety and the Federal Bureau of Investigation, cannot be obtained after a minimum of three (3) attempts, the Department of Public Safety shall determine eligibility based upon a name check by the Mississippi Highway Safety Patrol and a Federal Bureau of Investigation name check conducted by the Mississippi Safety Patrol at the request of the Department of Public Safety.

(c) A person may obtain a duplicate of a lost or destroyed permit upon payment of a Fifteen Dollar (\$15.00) replacement fee to the Department of Public Safety, if he furnishes a notarized statement to the department that the permit has been lost or destroyed.

(d)(i) No less than ninety (90) days prior to the expiration date of a permit, the Department of Public Safety shall mail to the permit holder written notice of expiration together with the renewal form prescribed by the department. The permit holder shall renew the permit on or before the expiration date by filing with the department the renewal form, a notarized affidavit stating that the permit holder remains qualified, and the renewal fee of Fifty Dollars (\$50.00); provided, however, that honorably retired law enforcement officers shall be exempt from payment of the renewal fee. A permit holder who fails to file a renewal application on or before its expiration date shall pay a late fee of Fifteen Dollars (\$15.00).

(ii) Renewal of the permit shall be required every four (4) years. The permit of a qualified renewal applicant shall be renewed upon receipt of the completed renewal application and appropriate payment of fees.

(iii) A permit cannot be renewed six (6) months or more after its expiration date, and such permit shall be deemed to be permanently expired; the holder may reapply for an original permit as provided in this section.

(2) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried by Department of Wildlife, Fisheries and Parks law enforcement officers, railroad special agents who are sworn law enforcement officers, investigators employed by the Attorney General, district attorneys, legal assistants to district attorneys, criminal investigators employed by the district attorneys, investigators or probation officers employed by the Department of Corrections, employees of the State Auditor who are authorized by the State Auditor to perform investigative functions, or any deputy fire marshal or investigator employed by the State Fire Marshal, while engaged in the performance of their duties as such, or by fraud investigators with the Department of Human Services, or by judges of the Mississippi Supreme Court, Court of Appeals, circuit, chancery, county and municipal courts. Before any person shall be authorized under this subsection to carry a weapon, he shall complete a weapons training course approved by the Board of Law Enforcement Officer Standards and Training. Before any criminal investigator employed by a district attorney shall be authorized under this section to carry a pistol, firearm or other weapon, he shall have complied with Section 45-6-11 or any training program required for employment as an agent of the Federal Bureau of Investigation. A law

enforcement officer, as defined in Section 45-6-3, shall be authorized to carry weapons in courthouses in performance of his official duties. This section shall in no way interfere with the right of a trial judge to restrict the carrying of firearms in the courtroom.

(3) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons, to be carried by any out-of-state, full-time commissioned law enforcement officer who holds a valid commission card from the appropriate out-of-state law enforcement agency and a photo identification. The provisions of this subsection shall only apply if the state where the out-of-state officer is employed has entered into a reciprocity agreement with the state that allows full-time commissioned law enforcement officers in Mississippi to lawfully carry or possess a weapon in such other states. The Commissioner of Public Safety is authorized to enter into reciprocal agreements with other states to carry out the provisions of this subsection.

SOURCES: Codes, 1880, § 2985; 1892, § 1026; Laws, 1906, § 1103; Hemingway's 1917, § 829; Laws, 1930, § 853; Laws, 1942, § 2079; Laws, 1898, p. 86; Laws, 1960, ch. 242, § 1; Laws, 1962, ch. 310, § 1; Laws, 1973, ch. 437, § 1; Laws, 1974, ch. 323 § 1; Laws, 1981, ch. 415, § 1; Laws, 1986, ch. 372; Laws, 1990, ch. 483, § 1; Laws, 1991, ch. 609, § 5; Laws, 1995, ch. 534, § 1; Laws, 1998, ch. 472, § 1; Laws, 2000, ch. 439, § 1; Laws, 2001, ch. 566, § 2; Laws, 2002, ch. 577, § 1, eff from and after July 1, 2002.

Cross References — Department of Wildlife, Fisheries and Parks generally, see §§ 49-4-1 et seq.

Authority of agents and inspectors of the alcoholic beverage control division to bear arms, see § 67-1-31.

Right of railroad police officers to bear firearms, see § 77-9-505.

Other sections derived from same 1942 code section, see §§ 97-37-1, 97-37-3, 97-37-5.

Federal Aspects — Federal Bureau of Investigation generally, see 28 USCS §§ 531 et seq.

ATTORNEY GENERAL OPINIONS

Sheriff has authority, in his discretion, to issue permit to guards or watchmen to carry firearms while on duty. McMullen, July 22, 1992, A.G. Op. #92-0482.

This section allows permit for carrying concealed weapons by security guards, bank guards, etc. Bowen, Jan. 14, 1993, A.G. Op. #92-0934.

A permit obtained from the Commissioner under either Section 45-9-101 or this section obviates the need to obtain a

permit from the Sheriff. Pope, August 2, 1996, A.G. Op. #96-0491.

A park ranger for the Pat Harrison Waterway District is not authorized to carry firearms, and even if such a ranger is also deputized as a Deputy Sheriff, the authority to carry a firearm does not extend to actions taken while serving in the capacity of a park ranger. Mathews, July 11, 1997, A.G. Op. #97-0390.

RESEARCH REFERENCES

ALR. Scope and effect of exception, in statute forbidding carrying of weapons, as

to person on his own premises or at his place of business. 57 A.L.R.3d 938.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

What constitutes receipt of firearm, under 18 USCS § 922(h), prohibiting certain

persons from receiving any firearm which has been shipped or transported in interstate or foreign commerce. 74 A.L.R. Fed. 486.

§ 97-37-9. Deadly weapons; defenses against indictment for carrying deadly weapon.

Any person indicted or charged for a violation of Section 97-37-1 may show as a defense:

(a) that he was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend; or

(b) that he was traveling and was not a tramp, or was setting out on a journey and was not a tramp; or

(c) that he was a law enforcement or peace officer in the discharge of his duties; or

(d) that he was at the time in the discharge of his duties as a mail carrier; or

(e) that he was at the time engaged in transporting valuables for an express company or bank; or

(f) that he was a member of the Armed Forces of the United States, National Guard, State Militia, Emergency Management Corps, guard or patrolman in a state or municipal institution while in the performance of his official duties; or

(g) that he was in lawful pursuit of a felon; or

(h) that he was lawfully engaged in legitimate sports; or

(i) that at the time he was a company guard, bank guard, watchman, or other person enumerated in Section 97-37-7, and was then actually engaged in the performance of his duties as such, and then held a valid permit from the sheriff, the commissioner of public safety, or a valid permit issued by the secretary of state prior to May 1, 1974, to carry the weapon; and the burden of proving either of said defenses shall be on the accused.

SOURCES: Codes, 1892, § 1027; Laws, 1906, § 1105; Hemingway's 1917, § 831; Laws, 1930, § 855; Laws, 1942, § 2081; Laws, 1912, ch. 210; Laws, 1960, ch. 242, § 2; Laws, 1962, ch. 310, § 2; Laws, 1974, ch. 323, § 2; Laws, 1980, ch. 491, § 26, eff from and after passage (approved May 9, 1980).

Cross References — Authority of agents and inspectors of the alcoholic beverage control division to bear arms, see § 67-1-31.

JUDICIAL DECISIONS

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|------------------------------|------------------------------|
| 1. Apprehension of attack. | 4. Burden of proof. |
| 2. Carrying while traveling. | 5. Instructions. |
| 3. Peace officers. | 6. —Peremptory instructions. |

1. Apprehension of attack.

Whether the carrying of a weapon is justified by threats and is in good faith is a jury question. *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

Where, in defense of indictment for carrying concealed weapon, defendant proved that he apprehended attack, conviction could not be had on evidence that defendant had exhibited weapon in rude, angry, or threatening manner. *Talley v. State*, 174 Miss. 349, 164 So. 771 (1935).

In prosecution for carrying concealed weapon, defendant held entitled to show reason for and purpose of carrying weapon concealed. *Loggins v. State*, 161 Miss. 272, 136 So. 922 (1931).

Where defendant claimed he was carrying pistol because another had threatened him, evidence regarding reasons for threat held incompetent. *Sullivan v. State*, 156 Miss. 718, 126 So. 646 (1930).

Not necessary that pistol carried in anticipation of attack be loaded or usable. *Thomas v. City of Tupelo*, 133 Miss. 166, 97 So. 522 (1923).

Sufficient defense to charge of carrying deadly weapon to show apprehension of attack by one making threats. *Huffstickler v. State*, 129 Miss. 769, 93 So. 1 (1922).

One threatened with attack may carry a concealed weapon, though he does not anticipate the attack at a particular time and place; and he need not disarm himself whenever he is temporarily so situated that for the time being he is in no immediate danger. *Harvey v. State*, 102 Miss. 544, 59 So. 841 (1912).

Under paragraph (a) that a person accused of carrying a deadly weapon was informed that he had been threatened, and had good reason to apprehend an attack, constitutes a defense, and testimony of witness telling accused of threats was competent. *Hurst v. State*, 101 Miss. 402, 58 So. 206 (1912).

Good faith of accused person in carrying deadly weapon after threats is a question for the jury. *Hurst v. State*, 101 Miss. 402, 58 So. 206 (1912).

That defendant had been informed of threats of violence made against him, which he had reasonable grounds to believe in, is a defense to a prosecution for

carrying concealed a deadly weapon. *Page v. State*, 99 Miss. 72, 54 So. 725 (1911).

Accused's testimony that on a previous night there had been a disturbance among the chickens on his premises and he believed one or two chickens had been stolen, and that on an earlier occasion a window in his home had been broken, was too indefinite to constitute a defense to charge of carrying a concealed pistol since it was not shown that the breaking of the window had anything to do with the disturbance of the chickens, and it was not proved that any chickens had been stolen. *Wilson v. State*, 81 Miss. 404, 33 So. 171 (1903).

This statute [Code 1942, § 2081] requires the apprehension of bodily harm, which constitutes a defense, to be the apprehension of great bodily harm. *Strother v. State*, 74 Miss. 447, 21 So. 147 (1897).

One threatened with an attack may lawfully carry a concealed weapon, although the attack be not threatened to be made at a particular time or on a particular occasion. *Suddith v. State*, 70 Miss. 250, 11 So. 680 (1892).

The threats must not be too remote. *McGuirk v. State*, 64 Miss. 209, 1 So. 103 (1887).

Even if the accused be "threatened" and entertain the "apprehension," it will be no defense if he carried the weapon for some other reason, and for some other purpose. *McGuirk v. State*, 64 Miss. 209, 1 So. 103 (1887).

"Threatened with an attack" does not contemplate mere denunciation, but menace such as to cause a reasonable apprehension of an attack that might properly be resisted with the deadly weapon. *Tipler v. State*, 57 Miss. 685 (1880).

2. Carrying while traveling.

In a prosecution for carrying a concealed weapon, the defendant was authorized by statute to carry a weapon, whether concealed or not, where the evidence showed that he had about \$100 on his person, and was therefore not a tramp, and was transporting a large amount of valuable musical equipment a distance of 85 miles for the purpose of conducting a record hop as a disc jockey. *Joseph v. State*, 299 So. 2d 211 (Miss. 1974).

Where a defendant was able to show without contradiction that he was traveling on a gravel road through a wooded area, at the time when an officer stopped him and asked to see his driver's license, and then, upon observing a ceremonial sword in the defendant's automobile, conducted a thorough search of the automobile which disclosed a loaded revolver in the unlocked glove compartment, and further testified without contradiction that he was a longtime citizen of the county and not a tramp, he made a complete defense to the charge of carrying a concealed weapon, under the specific provisions of this section [Code 1942, § 2081]. *Jefferson v. State*, 241 So. 2d 679 (Miss. 1970).

A person, not a tramp, traveling 62 miles from his place of residence, beyond the circle of his friends in the pursuit of legitimate business, and having a substantial sum of money on his person, is not guilty of unlawfully carrying a concealed weapon. *Patterson v. State*, 251 Miss. 565, 170 So. 2d 635 (1965).

Traveler carrying concealed weapon ten miles from home, and who was unacquainted with people living between home and place to which he was traveling, and who was carrying weapon for purpose of protection, held not guilty of offense of carrying concealed weapon. *Basham v. Town of Sebastopol*, 172 Miss. 194, 159 So. 847 (1935).

A person ceases to be a traveler within the meaning of this section [Code 1942, § 2081] when he reaches the point of his destination and engages a room at a boarding house or hotel, intending to stay an indefinite time and to return home only after the business for which he made the journey is completed. *Rosaman v. City of Okolona*, 85 Miss. 583, 37 So. 641, 107 Am. St. R. 303 (1905).

The pursuit of a fugitive daughter begun without knowing where it will lead to is "traveling on a journey." *Heywood v. State*, 66 Miss. 402, 6 So. 237 (1889).

The "traveling or setting out on a journey" in the statute means a travel of some distance as to take one beyond the circle of his friends and acquaintances. *McGuirk v. State*, 64 Miss. 209, 1 So. 103 (1887); *Morgan v. Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).

3. Peace officers.

This section [Code 1942, § 2081] authorizes a deputy United States marshal, while executing criminal process in this state and also in his district, to carry a concealed weapon. *State v. Williams*, 72 Miss. 992, 18 So. 486 (1895).

The revised statutes of the United States § 788 authorizes a deputy marshal executing criminal process in his district, to carry concealed weapons. *State v. Williams*, 72 Miss. 992, 18 So. 486 (1895).

4. Burden of proof.

A defendant charged with carrying a concealed weapon has the burden of establishing as a defense that he was traveling and was not a tramp, or was setting out on a journey and was not a tramp. *Bush v. Mississippi Emp. Sec. Comm'n*, 184 So. 2d 866 (Miss. 1966).

One charged with carrying deadly weapons has burden of establishing defense of threats and apprehension of attack. *Huffstickler v. State*, 129 Miss. 769, 93 So. 1 (1922); *Garland v. State*, 130 Miss. 310, 94 So. 210 (1922).

Burden on one accused of carrying concealed weapons to show apprehended attacks; burden on state to prove accused guilty beyond reasonable doubt. *Garland v. State*, 130 Miss. 310, 94 So. 210 (1922).

5. Instructions.

In a prosecution for murder, the trial court committed reversible error in refusing a requested defense instruction stating that the defendant had a right to carry a concealed weapon if he had been threatened and had good reason to fear a serious attack from an enemy, and did in fact fear such an attack, where the prosecuting attorney pointed out in his argument before the jury that the victim was not armed, from which the jury might have inferred that the defendant was in the wrong in being armed. *Duvall v. State*, 634 So. 2d 524 (Miss. 1994).

In a prosecution for murder the accused is entitled to an instruction as to his right to carry and use a concealed weapon. *Ray v. State*, 381 So. 2d 1032 (Miss. 1980).

Instruction to find accused guilty of carrying a concealed weapon, unless while carrying same 10 miles from home he had good reason to apprehend and did appre-

hend attack, held too restrictive. *Haley v. State*, 106 Miss. 358, 63 So. 670 (1913).

Instruction against carrying deadly weapon where accused threatened, held erroneous in view of evidence. *Harvey v. State*, 102 Miss. 544, 59 So. 841 (1912).

Where the evidence on the trial of an accused for carrying a deadly weapon concealed showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed. *Mendin v. State*, 82 Miss. 507, 33 So. 944 (1903).

6. —Peremptory instructions.

Defendant establishing his defense that he was carrying pistol because of threats held entitled to peremptory instruction requested. *Sullivan v. State*, 156 Miss. 718, 126 So. 646 (1930).

On disputed evidence that one accused of carrying concealed weapon was making journey beyond neighborhood of his acquaintance, and was not a tramp, he was entitled to peremptory instruction to acquit. *McLeod v. State*, 140 Miss. 897, 105 So. 757 (1925).

ATTORNEY GENERAL OPINIONS

This section sets forth certain affirmative defenses to charge of carrying con-

cealed weapon. *Bowen*, Jan. 14, 1993, A.G. Op. #92-0934.

RESEARCH REFERENCES

ALR. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 A.L.R.2d 492.

Statutory presumption of possession of weapon by occupants of place or vehicle where it was found. 87 A.L.R.3d 949.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Am Jur. 79 Am. Jur. 2d, Weapons and Firearms §§ 19-21.

79 Am. Jur. 2d, Weapon and firearms § 22.

CJS. 94 C.J.S., Weapons §§ 3-8.

§ 97-37-11. Deadly weapons; dealers to keep record of weapons sold.

Every merchant or dealer or pawnbroker that sells bowie-knives, dirk-knives, pistols, brass or metallic knuckles or slungshots, shall keep a record of all sales of such weapons sold, showing the description of the weapons, the name of the purchaser, and the description of weapons and date of sale. This record to be opened to public inspection at any time to persons desiring to see it. The dealer who violates this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than Five Dollars (\$5.00) nor more than Twenty-five Dollars (\$25.00).

SOURCES: Codes, 1906, § 1106; Hemingway's 1917, § 832; Laws, 1930, § 856; Laws, 1942, § 2082; Laws, 2002, ch. 429, § 1, eff from and after July 1, 2002.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 A.L.R.2d 492.

§ 97-37-13. Deadly weapons; weapons and cartridges not to be given to minor or intoxicated person.

It shall not be lawful for any person to sell, give or lend to any minor under eighteen (18) years of age or person intoxicated, knowing him to be a minor under eighteen (18) years of age or in a state of intoxication, any deadly weapon, or other weapon the carrying of which concealed is prohibited, or pistol cartridge; and, on conviction thereof, he shall be punished by a fine not more than One Thousand Dollars (\$1,000.00), or imprisoned in the county jail not exceeding one (1) year, or both.

SOURCES: Codes, 1880, § 2986; 1892, § 1028; Laws, 1906, § 1107; Hemingway's 1917, § 833; Laws, 1930, § 857; Laws, 1942, § 2083; Laws, 1994, ch. 607, § 8, eff from and after July 2, 1994.

Cross References — Statutory definition of term "infant," see § 1-3-21. Statutory definition of term "minor," see § 1-3-27.

JUDICIAL DECISIONS

1. In general.

In an action based on common-law negligence and violation of this section and federal statute, discount department store and sales clerk were found liable for injuries sustained by a customer while held hostage by a mentally deranged customer

who obtained a pistol, along with ammunition, from the sales clerk who had made no effort to ascertain that the minor customer to whom she was about to deliver a deadly weapon was high on alcohol and drugs. *Howard Bros. of Phenix City, v. Penley*, 492 So. 2d 965 (Miss. 1986).

RESEARCH REFERENCES

ALR. Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 42 A.L.R.2d 492.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Liability of one who sells gun to child for injury to third party. 4 A.L.R.4th 331.

Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime. 44 A.L.R.4th 595.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal respon-

sibility under weapons statute. 81 A.L.R.4th 745.

Am Jur. 25 Am. Jur. Pl & Pr Forms (Rev), Weapons and Firearms, Form 26 (complaint, petition or declaration, negligence entrustment of firearm to minor, against firearm owner and minor — including cause of action alleging violation of statute).

25 Am. Jur. Pl & Pr Forms (Rev), Weapons and Firearms Form 37 (Answer, defense, assault firearm stolen from registered owner — Theft reported to law enforcement authorities within time prescribed by assault and weapon control statute).

§ 97-37-14. Possession of handgun by minor; act of delinquency; exceptions.

(1) Except as otherwise provided in this section, it is an act of delinquency for any person who has not attained the age of eighteen (18) years knowingly to have any handgun in such person's possession.

(2) This section shall not apply to:

(a) Any person who is:

(i) In attendance at a hunter's safety course or a firearms safety course; or

(ii) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited; or

(iii) Engaging in an organized competition involving the use of a firearm, or participating in or practicing for a performance by an organized group under 501(c)(3) as determined by the federal internal revenue service which uses firearms as a part of such performance; or

(iv) Hunting or trapping pursuant to a valid license issued to such person by the Department of Wildlife, Fisheries and Parks or as otherwise allowed by law; or

(v) Traveling with any handgun in such person's possession being unloaded to or from any activity described in subparagraph (i), (ii), (iii) or (iv) of this paragraph (a) and paragraph (b).

(b) Any person under the age of eighteen (18) years who is on real property under the control of an adult and who has the permission of such adult to possess a handgun.

(3) This section shall not apply to any person who uses a handgun or other firearm to lawfully defend himself from imminent danger at his home or place of domicile and any such person shall not be held criminally liable for such use of a handgun or other firearm.

(4) For the purposes of this section, "handgun" means a pistol, revolver or other firearm of any description, loaded or unloaded, from which any shot, bullet or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable or magazine breech, is less than sixteen (16) inches.

SOURCES: Laws, 1994, ch. 595, § 12, eff from and after July 1, 1994.

ATTORNEY GENERAL OPINIONS

If a gun is not utilized in the act of breaking and entering, the crime would still be in the jurisdiction of the youth court. See Sections 43-21-151 and 97-37-14. Weissinger, October 4, 1995, A.G. Op. #95-0652.

Any lease contract, lease or leasehold

must contain a provision which provides that replacement equipment shall be the property of the state in order to meet the requirements of Section 27-31-34 and be exempt from ad valorem taxation. Ross, October 5, 1995, A.G. Op. #95-0651.

RESEARCH REFERENCES

ALR. What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

Am Jur. 79 Am. Jur. 2d, Weapons and Firearms § 25.

§ 97-37-15. Parent or guardian not to permit minor son to have or carry weapon; penalty.

Any parent, guardian or custodian who shall knowingly suffer or permit any child under the age of eighteen (18) years to have or to own, or to carry concealed, in whole or in part, any weapon the carrying of which concealed is prohibited, shall be guilty of a misdemeanor, and, on conviction, shall be fined not more than One Thousand Dollars (\$1,000.00), and shall be imprisoned not more than six (6) months in the county jail. The provisions of this section shall not apply to a minor who is exempt from the provisions of Section 97-37-14.

SOURCES: Codes, 1880, § 2987; 1892, § 1029; Laws, 1906, § 1108; Hemingway's 1917, § 834; Laws, 1930, § 858; Laws, 1942, § 2084; Laws, 1994, ch. 607, § 9, eff from and after July 2, 1994.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

ALR. Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 A.L.R.3d 825.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Am Jur. 19 Am. Jur. Pl & Pr Forms (Rev), Parent and Child, Forms 122, 125, 125.1 (liability of parents for conduct of child).

25 Am. Jur. Pl & Pr Forms (Rev), Weapons and Firearms, Form 26 (complaint, petition or declaration, negligence entrustment of firearm to minor, against firearm owner and minor — including cause of action alleging violation of statute).

§ 97-37-17. Possession of weapons by students; aiding or encouraging.

(1) The following definitions apply to this section:

(a) "Educational property" shall mean any public or private school building or bus, public or private school campus, grounds, recreational area, athletic field, or other property owned, used or operated by any local school board, school, college or university board of trustees, or directors for the administration of any public or private educational institution or during a school related activity; provided however, that the term "educational prop-

erty” shall not include any sixteenth section school land or lieu land on which is not located a school building, school campus, recreational area or athletic field.

(b) “Student” shall mean a person enrolled in a public or private school, college or university, or a person who has been suspended or expelled within the last five (5) years from a public or private school, college or university, whether the person is an adult or a minor.

(c) “Switchblade knife” shall mean a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance.

(d) “Weapon” shall mean any device enumerated in subsection (2) or (4) of this section.

(2) It shall be a felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

(3) It shall be a felony for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

(4) It shall be a misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

(5) It shall be a misdemeanor for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade, knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving) and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a

misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

(6) It shall not be a violation of this section for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind on educational property if:

(a) The person is not a student attending school on any educational property;

(b) The firearm is within a motor vehicle; and

(c) The person does not brandish, exhibit or display the firearm in any careless, angry or threatening manner.

(7) This section shall not apply to:

(a) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;

(b) Armed forces personnel of the United States, officers and soldiers of the militia and National Guard, law enforcement personnel, any private police employed by an educational institution, State Militia or Emergency Management Corps and any guard or patrolman in a state or municipal institution, when acting in the discharge of their official duties;

(c) Home schools as defined in the compulsory school attendance law, Section 37-13-91;

(d) Competitors while participating in organized shooting events;

(e) Any person as authorized in Section 97-37-7 while in the performance of his official duties;

(f) Any mail carrier while in the performance of his official duties; or

(g) Any weapon not prescribed by Section 97-37-1 which is in a motor vehicle under the control of a parent, guardian or custodian, as defined in Section 43-21-105, which is used to bring or pick up a student at a school building, school property or school function.

(8) All schools shall post in public view a copy of the provisions of this section.

SOURCES: Codes, 1880, § 2988; 1892, § 1030; Laws, 1906, § 1109; Hemingway's 1917, § 835; Laws, 1930, § 859; Laws, 1942, § 2085; Laws, 1994, ch. 607, § 1; Laws, 1995, ch. 607, § 1, eff from and after July 1, 1995.

Cross References — Enforcement of school rules and regulations, see § 37-9-69.

Penalty for abuse of school superintendent, principal, teacher, or bus driver, see § 37-11-21.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

A high school student was properly adjudicated delinquent for having handguns on school grounds, where the guns were found in the student's locker, the student had exclusive possession of the locker and

kept it under lock and key, and a second student testified that the first student had offered to sell him 2 handguns and had told him that he had the guns at school. *S.C. v. State*, 583 So. 2d 188 (Miss. 1991).

ATTORNEY GENERAL OPINIONS

Except for the circumstances allowed in subsection 6, it appears to be a violation of state law for a school principal to carry a weapon, whether concealed or not, on

school property, and neither the superintendent nor the school board may grant permission for such an action. *Webster*, July 31, 1998, A.G. Op. #98-0427.

RESEARCH REFERENCES

ALR. Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal respon-

sibility under weapons statute. 81 A.L.R.4th 745.

What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law. 88 A.L.R.5th 121.

§ 97-37-19. Deadly weapons; exhibiting in rude, angry, or threatening manner.

If any person, having or carrying any dirk, dirk-knife, sword, sword-cane, or any deadly weapon, or other weapon the carrying of which concealed is prohibited, shall, in the presence of three or more persons, exhibit the same in a rude, angry, or threatening manner, not in necessary self-defense, or shall in any manner unlawfully use the same in any fight or quarrel, the person so offending, upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars or be imprisoned in the county jail not exceeding three months, or both. In prosecutions under this section it shall not be necessary for the affidavit or indictment to aver, nor for the state to prove on the trial, that any gun, pistol, or other firearm was charged, loaded, or in condition to be discharged.

SOURCES: Codes, *Hutchinson's* 1848, ch. 64, art. 9(9); 1857, ch. 64, art. 56; 1871, § 2699; 1880, § 2804; 1892, § 1031; *Laws*, 1906, § 1110; *Hemingway's* 1917, § 836; *Laws*, 1930, § 860; *Laws*, 1942, § 2086.

Cross References — Peace bonds, see §§ 99-23-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Indictment.
3. Defenses.

1. In general.

In prosecution for exhibiting a deadly weapon, it was not necessary for the state to prove that weapon was exhibited at any particular individual but only that the deadly weapon was exhibited in the presence of three or more persons. *Sykes v. City of Crystal Springs*, 216 Miss. 18, 61 So. 2d 387 (1952).

In prosecution for unlawfully exhibiting a deadly weapon, it was not necessary for the city to introduce into evidence a certified copy of the city ordinance making all offenses under the penal laws of this state which are misdemeanors, criminal offenses against the city within whose corporate limits the offense was committed. *Sykes v. City of Crystal Springs*, 216 Miss. 18, 61 So. 2d 387 (1952).

A pistol is a "deadly weapon" within statute denouncing the exhibition or carrying of such weapon, even without proof that the pistol is loaded or presently capable of committing a violent injury. *Cittadino v. State*, 199 Miss. 235, 24 So. 2d 93 (1945).

This section [Code 1942, § 2086] applicable generally to any persons committing acts prohibited by Code 1906, §§ 1106-1109 [Code 1942, §§ 2082-2085]. *State v. Ware*, 102 Miss. 634, 59 So. 854 (1912).

Section [Code 1942, § 2086] not limited to the person described in the four preceding sections [Code 1942, §§ 2082-2085], but the word "such" should be regarded as

having been inserted by a clerical mistake, and this section should be construed as applicable generally to any person. *State v. Ware*, 102 Miss. 634, 59 So. 854 (1912).

Pocket knife is deadly weapon. *State v. Ware*, 102 Miss. 634, 59 So. 854 (1912).

2. Indictment.

A charge under this section [Code 1942, § 2086] cannot be consolidated with a charge of carrying concealed a deadly weapon and a charge of assault and battery with fists, and the consolidated case had in one trial. *Woods v. State*, 200 Miss. 527, 27 So. 2d 895 (1946).

Indictment must allege that accused exhibited a deadly weapon in the presence of three or more persons. *Parrett v. State*, 101 Miss. 306, 58 So. 1 (1912).

The omission of the word "manner," after the words "rude, angry and threatening," in an indictment, is a formal defect, and may be amended as such. In such indictment it is unnecessary to aver that the defendant was "carrying" the weapon. *Gamblin v. State*, 45 Miss. 658 (1871).

3. Defenses.

Where defendant, in indictment for carrying concealed weapon, proved that he apprehended attack, conviction could not be had on ground he had exhibited weapon in rude, angry, or threatening manner. *Talley v. State*, 174 Miss. 349, 164 So. 771 (1935).

A provocation to justify the exhibiting of a deadly weapon must arise at the time of the exhibition. *Cannon v. State*, 75 Miss. 364, 22 So. 827 (1897).

RESEARCH REFERENCES

ALR. Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 A.L.R.4th 607.

Validity of state statute proscribing possession or carrying of knife. 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute. 81 A.L.R.4th 745.

Am Jur. 6 Am. Jur. 2d, Assault and Battery §§ 37 et seq., 134, 141.

79 Am. Jur. 2d, Weapons § 30.

CJS. 94 C.J.S., Weapons §§ 18-21.

§ 97-37-21. Explosives and weapons of mass destruction; false report of placing.

It shall be unlawful for any person to report to another by any means, including telephone, mail, e-mail, mobile phone, fax or any means of communication, that a bomb or other explosive or chemical, biological or other weapons of mass destruction has been, or is to be, placed or secreted in any public or private place, knowing that such report is false. Any person who shall be convicted of a violation of this section shall be fined not more than Ten Thousand Dollars (\$10,000.00) or shall be committed to the custody of the Department of Corrections for not more than ten (10) years, or both.

SOURCES: Codes, 1942, § 2143.3; Laws, 1971, ch. 351, § 1; Laws, 1979, ch. 485; Laws, 2002, ch. 384, § 1; Laws, 2003, ch. 409, § 1, eff from and after July 1, 2003.

JUDICIAL DECISIONS

1. In general.

Three 13-year old youths found to be delinquent for violating a statute making it a misdemeanor to falsely report the placement of a bomb in a public place, were not subjected to cruel and unusual punishment or a deprivation of equal protection of the law by being sentenced to a training school until they attained the age

of 20 years or until the earlier further orders of the court, despite the fact that the statute violated provided a penalty of imprisonment in the county jail not to exceed one year and a fine not to exceed \$500, since there is a distinction and difference between the penal statutes and the juvenile delinquency statutes. In re Wilder, 347 So. 2d 520 (Miss. 1977).

RESEARCH REFERENCES

ALR. Criminal offense of bomb hoax or making false report as to planting of explosive. 93 A.L.R.2d 304.

Imposition of state or local penalties for threatening to use explosive devices at schools or other buildings. 79 A.L.R.5th 1.

Validity, construction, and application of 18 U.S.C.S. § 844(e), prohibiting use of

mail, telephone, telegraph, or other instrument of commerce to convey bomb threat. 160 A.L.R. Fed. 625.

Law Reviews. 1979 Mississippi Supreme Court Review: Criminal Law and Procedure. 50 Miss. L. J. 763, December 1979.

§ 97-37-23. Unlawful possession of explosives; duty of officers to make search and to seize explosives; exception to prohibition.

(1) Except for persons who are engaged in lawful business activities or persons who are engaged in educational activities conducted by educational institutions, it is unlawful for any person to have in his possession:

(a) Dynamite caps, nitroglycerine caps, fuses, detonators, dynamite, nitroglycerine, explosives, gas or stink bombs, or other similar explosives peculiarly possessed and adapted to aid in the commission of a crime; except such person or persons who are engaged in a lawful business which ordinarily requires the use thereof in the ordinary and usual conduct of such

business, and who possess said articles for the purpose of use in said business;

(b) Any:

(i) Bomb;

(ii) Grenade;

(iii) Rocket having a propellant charge of more than four (4) ounces;

(iv) Missile having an explosive or incendiary charge of more than one-quarter ($\frac{1}{4}$) ounce;

(v) Mine;

(vi) Any combination of parts either designed or intended for use in converting any device into one or more of the destructive devices described in this paragraph (b); or

(vii) Any device which consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one (1) individual acting alone; and

(viii) Or other similar explosives peculiarly possessed and adapted to aid in the commission of a crime; and

(c) Upon conviction of any person thereof, he shall be punished by imprisonment in the penitentiary for a term not to exceed five (5) years. The possession of such explosives by one who does not customarily use same in his regular and ordinary occupational activities shall be prima facie evidence of an intention to use same for such unlawful purposes.

(2) It shall be the duty of any sheriff, constable, marshal, or policeman in a municipality, or any person vested with general police authority, who has reason to believe and does believe that the above described explosives are being transported or possessed for aid in the commission of a crime, forthwith to make a reasonable search of such person or vehicle, and to seize such explosives and to at once arrest the person or persons having possession or control thereof. Such officer or officers proceeding in good faith shall not be liable either civilly or criminally for such a search and seizure without a warrant, so long as said search and seizure is conducted in a reasonable manner, it appearing that the officer or officers had reason to believe and did believe that the law was being violated at the time such search was instituted. And the officer or officers making such search shall be competent to testify as a witness or witnesses as to all facts ascertained by means of said reasonable search or seizure, and all such explosives seized shall be admitted in evidence. But this section shall not authorize the search of a residence or home, or room, or building, or the premises belonging to or in the possession lawfully of the party suspected, without a search warrant.

(3) In order to invoke the exception provided in subsection (1) for persons who possess explosive articles for business purposes, such person must comply with the provisions of this subsection as follows:

(a) One or more individuals shall be designated by the owner of a business employing explosive articles subject to this section as the custodian for such articles; and

(b) The custodian shall notify the sheriff of any county wherein such articles are utilized or employed by registering with the sheriff in writing prior to such use and including in such registration:

- (i) The business name and address of the owner of the articles;
- (ii) The name, address and local address of the custodian;
- (iii) The location of the job site where such articles shall be employed;
- (iv) In the event subject articles will not be in the immediate possession of the custodian, the custodian shall advise the sheriff of the specific location where such articles are left or stored;

(v) Whenever business operations subject to this section or the storage of articles subject to this section occur within an incorporated municipality, the mayor or chief of police shall also be notified as required by this subsection.

(4) Any person who fails to comply with the provisions of subsection (3) of this section shall, upon conviction thereof, be punished by imprisonment in the state penitentiary for a term not to exceed one (1) year or by a fine in an amount not to exceed Ten Thousand Dollars (\$10,000.00), or by both.

(5) The provisions of subsections (3) and (4) of this section are supplemental to any other statutory provision, ordinances of local governments or liabilities or duties otherwise imposed by law.

SOURCES: Codes, 1942, § 2143.5; Laws, 1947, 2nd Ex. ch. 6, §§ 1, 2; Laws, 1986, ch. 385; Laws, 2000, ch. 538, § 1, eff from and after July 1, 2000.

Cross References — Regulation of explosives, see §§ 45-13-101 et seq.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

RESEARCH REFERENCES

ALR. Possession of bomb, Molotov cocktail, or similar device as criminal offense. 42 A.L.R.3d 1230.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime. 29 A.L.R.4th 771.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises. 51 A.L.R.5th 375.

Admissibility of evidence discovered in

search of adult defendant's property or residence authorized by defendant's minor child—state cases. 51 A.L.R.5th 425.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 A.L.R. Fed. 331.

Am Jur. 31A Am. Jur. 2d, Explosions and Explosives §§ 174 et seq.

§ 97-37-25. Explosives and weapons of mass destruction; unlawful use.

It shall be unlawful for any person at any time to bomb, or to plant or place any bomb, or other explosive matter or chemical, biological or other weapons of mass destruction or thing in, upon or near any building, residence, ship, vessel, boat, railroad station, railroad car or coach, bus station, or depot, bus, truck,

aircraft, or other vehicle, gas and oil stations and pipelines, radio station or radio equipment or other means of communication, warehouse or any electric plant or water plant, telephone exchange or any of the lines belonging thereto, wherein a person or persons are located or being transported, or where there is being manufactured, stored, assembled or shipped or in the preparation of shipment any goods, wares, merchandise or anything of value, with the felonious intent to hurt or harm any person or property, and upon conviction thereof shall be imprisoned for life in the State Penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the State Penitentiary the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine, but not to be less than five (5) years.

SOURCES: Codes, 1942, § 2143; Laws, 1942, ch. 204; Laws, 1947, 2nd Ex. ch. 7; Laws, 1974, ch. 576, § 5; Laws, 2000, ch. 538, § 2; Laws, 2003, ch. 409, § 2, eff from and after July 1, 2003.

Cross References — Regulation of explosives, see §§ 45-13-101 et seq.

Murder perpetrated by use of bomb or explosive device as constituting capital murder, see § 97-3-19.

Arson at state supported school buildings, see § 97-17-3.

Penalty for false report of placing bomb, see § 97-37-21.

Applicability of the Racketeer Influenced and Corrupt Organization Act to this section, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, reh den 409 U.S. 902, 34 L. Ed. 2d 163, 93 S. Ct. 89 and on remand 229 Ga 731, 194 SE2d 410. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

This section [Code 1942, § 2143] makes it unlawful for any person to plant any bomb or other explosive matter or thing near any building where there is being stored any goods, wares, merchandise, or anything of value, with a felonious intent to harm the personal property. *Tarrants v. State*, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823 (1971).

It is not necessary that a bomb have a fuse or detonating device in order to constitute a violation of this section [Code

1942, § 2143]. *Tarrants v. State*, 236 So. 2d 360 (Miss. 1970), cert. denied, 401 U.S. 920, 91 S. Ct. 907, 27 L. Ed. 2d 823 (1971).

The particular evil sought to be curbed by the enactment of this section [Code 1942, § 2143] was violence to persons or property, and the classifying characteristics of that particular evil is the employment or use of bombs or other explosives in, upon or near any bus or other objects and places designated in the statute as a means and place to accomplish the evil. *Rogers v. State*, 228 Miss. 873, 89 So. 2d 860 (1956).

The noun "bomb" was intended to designate an infernal machine employing explosives contrived by criminals to accomplish bodily injury or destruction of property. *Rogers v. State*, 228 Miss. 873, 89 So. 2d 860 (1956).

The court is not authorized to limit the application of this section [Code 1942, § 2143] to cases where the bus in question was carrying passengers on public ways, or when there was a strike in progress.

Rogers v. State, 228 Miss. 873, 89 So. 2d 860 (1956).

It is not necessary to hurl, throw or drop a bomb onto a bus to constitute the bombing of a bus. Rogers v. State, 228 Miss. 873, 89 So. 2d 860 (1956).

Where, pursuant to a plan to kill a bus driver, the accused attached dynamite to an empty bus in such a manner that it exploded upon the ignition being turned on, and the intended victim was horribly injured, the presence of the bus driver at the time of the explosion satisfied the

statutory requirements that the bus must be occupied. Rogers v. State, 228 Miss. 873, 89 So. 2d 860 (1956).

Where the accused, pursuant to a plan to kill a bus driver, attached dynamite to a bus in such a manner that it exploded upon the ignition being turned on, and the intended victim was horribly maimed, the offense came within the purview of this section [Code 1942, § 2143], rather than Code 1942, § 2011. Rogers v. State, 228 Miss. 873, 89 So. 2d 860 (1956).

RESEARCH REFERENCES

ALR. Criminal offense of bomb hoax or making false report as to planting of explosive. 93 A.L.R.2d 304.

Recovery of damages for emotional distress, fright, and the like, resulting from blasting operations. 75 A.L.R.3d 770.

Jurisdictional basis for prosecution under 18 USCS § 844(i), making it a federal

offense to destroy, by means of explosive, property used in interstate commerce or in any activity affecting interstate commerce. 54 A.L.R. Fed. 752.

Am Jur. 31A Am. Jur. 2d, Explosions and Explosives §§ 174 et seq.

CJS. 35 C.J.S., Explosives §§ 1 et seq.

§ 97-37-27. Fireworks; unlawful to explode in certain places.

It shall be unlawful to explode any fire-crackers, roman candles, sky-rockets or any kind of fireworks in any unincorporated town or village in this state, within three hundred yards of any railroad depot, and cotton or hay warehouse or any cotton-yard. And any one violating the provisions of this section shall, upon conviction, before any justice of the peace, be fined not more than ten dollars nor less than one dollar, or imprisoned not more than ten days, or may be both fined and imprisoned.

SOURCES: Codes, 1906, § 1171; Hemingway's 1917, § 900; Laws, 1930, § 927; Laws, 1942, § 2156; Laws, 1896, ch. 169.

Editor's Note — Pursuant to Miss. Constn., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Regulation of fireworks, see §§ 45-13-1 et seq.

JUDICIAL DECISIONS

1. In general.

Ordinance of incorporated municipality prohibiting sale, possession, or control of fireworks within the city limits is unau-

thorized under this section [Code 1942, § 2156]. King v. City of Louisville, 207 Miss. 612, 42 So. 2d 813 (1949).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state or local laws regulating the

sale, possession, use, or transport of fireworks. 48 A.L.R.5th 659.

§ 97-37-29. Shooting into dwelling house.

If any person shall willfully and unlawfully shoot or discharge any pistol, shotgun, rifle or firearm of any nature or description into any dwelling house or any other building usually occupied by persons, whether actually occupied or not, he shall be guilty of a felony whether or not anybody be injured thereby and, on conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not to exceed ten (10) years, or by imprisonment in the county jail for not more than one (1) year, or by fine of not more than five thousand dollars (\$5,000.00), or by both such imprisonment and fine, within the discretion of the court.

SOURCES: Codes, 1942, § 2086.5; Laws, 1966, ch. 387, § 1, eff from and after passage (approved May 20, 1966).

Cross References — Carrying deadly weapons, see §§ 97-37-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.
2. Sentence proper.

1. In general.

Trial judge properly refused to direct a verdict in defendant's favor where the evidence offered by the State was such that fair-minded jurors could find defendant guilty as charged; eyewitnesses testified that they had seen the defendant kill the victim and shoot into the air and gun residue tests indicated that defendant had been in the environment of a discharged weapon. *Maxwell v. State*, 856 So. 2d 513 (Miss. Ct. App. 2003), cert. denied, 892 So. 2d 824 (Miss. 2005).

Having been indicted separately for both murder, under § 97-3-19, and for felony of shooting into occupied building, under this section, defendant who was tried on murder indictment alone, and who had been convicted only of manslaughter, could not be prosecuted in second trial for shooting felony, since, under circumstances of case, it was lesser offense that was included in murder charge. *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986).

When defendant has been tried for murder and convicted of lesser offense of manslaughter, subsequent indictment for separate felony of shooting into occupied

building based on same criminal episode is barred on double jeopardy grounds. *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986).

The evidence was sufficient to support a conviction of shooting into a building usually occupied by other people under this section where there was overwhelming evidence that shot gun pellets went into the exterior of a door to a motel room; the meaning and intention of the statute were met even though there was no evidence as to the condition of the inside of the door. *May v. State*, 569 So. 2d 1188 (Miss. 1990).

The offenses of aggravated assault under § 97-3-7 and shooting into a dwelling house under this section did not constitute the "same offense" for double jeopardy purposes where at least 18 shots were fired into the house and the victim was not struck with all 18 shots; the 2 statutes require proof of different facts in that shooting into a dwelling house is not required to establish an aggravated assault, and neither injury nor attempt to injure is required to prove the offense of shooting into a dwelling house. *Shook v. State*, 552 So. 2d 841 (Miss. 1989).

Defendant accused of shooting into occupied building is not deprived of fair and impartial trial by improper admission of testimony concerning threats made to

chief prosecuting witness and witness' family and employees, as well as improper hearsay testimony as to police chief's opinion of reason for shooting; testimony by eyewitness that defendant participated in crime and evidence that gun used was found in defendant's possession is sufficient to support conviction. *Walker v. State*, 473 So. 2d 435 (Miss. 1985).

Conviction for shooting into occupied dwelling may not be based upon practically unsupported testimony of witness whose story is constantly changing, particularly in case which also involves possible perjury, inadequate instructions and possibility of illicit attempts to influence jury. *Rainer v. State*, 473 So. 2d 172 (Miss. 1985).

Evidence offered pursuant to a void indictment returned under this section [Code 1942, § 2086.5] would be sufficient, were the indictment not void, to withstand a motion by the defendants for a directed verdict. *Whitney v. State*, 205 So. 2d 284 (Miss. 1967).

2. Sentence proper.

Inmate was not entitled to post-conviction relief simply because he was sentenced to 10 years for the shooting into a dwelling house, which was the maximum sentence, even though he was a first time offender, because sentences were generally upheld on appeal if they were within the statutory range. *Johnson v. State*, 908 So. 2d 900 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assault and Battery §§ 37 et seq.
79 Am. Jur. 2d, Weapons § 30.

13 Am. Jur. Trials 465, Defending Minor Felony Cases §§ 1 et seq.

§ 97-37-31. Silencers on firearms; armor piercing ammunition; manufacture, sale, possession or use unlawful.

It shall be unlawful for any person, persons, corporation or manufacturing establishment, not duly authorized under federal law, to make, manufacture, sell or possess any instrument or device which, if used on firearms of any kind, will arrest or muffle the report of said firearm when shot or fired or armor piercing ammunition as defined in federal law. Any person violating this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than Five Hundred Dollars (\$500.00), or imprisoned in the penitentiary not more than thirty (30) days, or both. All such instruments or devices shall be registered with the Department of Public Safety and any law enforcement agency in possession of such instruments or devices shall submit an annual inventory of such instruments and devices to the Department of Public Safety. The Commissioner of Public Safety shall document the information required by this section.

SOURCES: Codes, Hemingway's 1917, §§ 1110 et seq.; Laws, 1930, § 1139; Laws, 1942, § 2376; Laws, 1910, ch. 139; Laws, 2000, ch. 496, § 1, eff from and after July 1, 2000.

Cross References — Carrying of deadly weapons, see §§ 97-37-1 et seq.

Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

ATTORNEY GENERAL OPINIONS

It is unlawful to manufacture, sell, possess, or use any silencer or suppressor for use with a firearm in the state even if a

person has a federal permit to do so. Head, November 20, 1998, A.G. Op. #98-0619.

§ 97-37-33. Toy pistols; sale of pistol or cartridges prohibited; cap pistols excepted.

If any person shall sell, or offer, or expose for sale any toy pistol, or cartridges, or other contrivance by which such pistols are fired or made to cause an explosion, he shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment in the county jail not less than three days nor more than thirty days, or both.

It is expressly provided, however, that nothing herein shall be construed to prohibit the sale, or offering, or exposure for sale of any toy cap pistols, or other devices, in which paper caps manufactured in accordance with United States Interstate Commerce Commission regulations for packing or shipping of toy paper caps are used or exploded, and the sale of such toy cap pistols is hereby declared to be permissible.

SOURCES: Codes, 1892, § 1247; Laws, 1906, § 1322; Hemingway's 1917, § 1055; Laws, 1930, § 1086; Laws, 1942, § 2319; Laws, 1884, p. 82; Laws, 1952, ch. 257.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 97-37-35. Stolen firearms; possession, receipt, acquisition or disposal; offense; punishment.

(1) It is unlawful for any person knowingly or intentionally to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm or attempt to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm.

(2) It is unlawful for any person knowingly or intentionally to sell, deliver or transfer a stolen firearm or attempt to sell, deliver or transfer a stolen firearm.

(3) Any person convicted of violating this section shall be guilty of a felony and shall be punished as follows:

(a) For the first conviction, punishment by commitment to the Department of Corrections for five (5) years;

(b) For the second and subsequent convictions, the offense shall be considered trafficking in stolen firearms punishable by commitment to the Department of Corrections for not less than fifteen (15) years.

(c) For a conviction where the offender possesses two (2) or more stolen firearms, the offense shall be considered trafficking in stolen firearms

punishable by commitment to the Department of Corrections for not less than fifteen (15) years.

(4) Any person who commits or attempts to commit any other crime while in possession of a stolen firearm shall be guilty of a separate felony of possession of a stolen firearm under this section and, upon conviction thereof, shall be punished by commitment to the Department of Corrections for five (5) years, such term to run consecutively and not concurrently with any other sentence of incarceration.

SOURCES: Laws, 1998, ch. 431, § 1, eff from and after July 1, 1998.

§ 97-37-37. Enhanced penalty for use of firearm during commission of felony.

Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any person who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of five (5) years, which sentence shall not be reduced or suspended.

SOURCES: Laws, 2004, ch. 392, § 1, eff from and after July 1, 2004.

CHAPTER 39

Dueling

SEC.

- 97-39-1. Giving, accepting, or carrying challenge; advising, attending or aiding duel; penalty.
- 97-39-3. Further penalties.
- 97-39-5. Leaving the state for purposes of duel.
- 97-39-7. Posting or publishing or vilifying another.
- 97-39-9. Arrest of person about to engage in duel; peace bond.
- 97-39-11. Fighting in public place with deadly weapon, or seconding such a fight; penalty.

§ 97-39-1. Giving, accepting, or carrying challenge; advising, attending or aiding duel; penalty.

Every person who shall challenge another to fight a duel, or who shall send, deliver, or cause to be delivered, any written or verbal message purporting or intended to be such challenge, or who shall accept any such challenge or message, or who shall knowingly carry or deliver any such message or challenge, or who shall be present at the time of fighting any duel with deadly weapons, either as second, aid, or surgeon, or who shall advise or give assistance to such duel, shall, on conviction thereof, be fined in a sum not less than three hundred dollars nor exceeding one thousand dollars, or be imprisoned not less than six months in the county jail, or both.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 9(1); 1857, ch. 64, art. 51; 1871, § 2531; 1880, § 2745; 1892, § 1036; Laws, 1906, § 1114; Hemingway's 1917, § 840; Laws, 1930, § 865; Laws, 1942, § 2091.

Cross References — Compelling one duelist to testify against another, see § 99-17-23.

RESEARCH REFERENCES

CJS. 28 C.J.S., Dueling §§ 1 et seq.

§ 97-39-3. Further penalties.

If any person shall fight a duel, or give or accept a challenge to fight a duel, or knowingly carry or deliver such challenge or the acceptance thereof, or be second to either party to any duel, whether such act be done in the state or out of it, or who shall go out of the state to fight a duel, or to assist in the same as second, or to send, accept, or carry a challenge, shall be disqualified from holding any office, be disenfranchised, and incapable of holding or being elected to any post of honor, profit or emolument, civil or military, under the constitution and laws of this state; and the appointment of any such person to office, as also all votes given to any such person, are illegal, and none of the votes given to such person for any office shall be taken or counted.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 9(2); 1857, ch. 64, art. 52; 1871, § 2532; 1880, § 2746; 1892, § 1037; Laws, 1906, § 1115; Hemingway's 1917, § 841; Laws, 1930, § 866; Laws, 1942, § 2092.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The word "disfranchised" was changed to "disenfranchised". The Joint Committee ratified the correction at its December 3, 1996 meeting.

Cross References — Prosecution for murder for death in this state of person mortally wounded in duel out of state, see § 97-3-23.

RESEARCH REFERENCES

CJS. 28 C.J.S., Dueling §§ 1 et seq.

§ 97-39-5. Leaving the state for purposes of duel.

If any person shall send, deliver, or cause to be sent or delivered, any challenge, written or verbal, in this state, to any person to fight a duel out of this state, or shall leave this state to fight a duel out of the same, or shall accept such challenge out of this state, and shall leave this state for the purpose of fighting a duel; or if any person shall leave this state for the purpose of sending, accepting, or bearing a challenge, or the acceptance thereof, to fight a duel or shall knowingly bear any challenge, or be concerned as second, aid, or surgeon, of either party, without this state, the person so offending shall be subject to the like punishment as is provided in Sections 97-39-1 and 97-39-3.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 9(4); 1857, ch. 64, art. 53; 1871, § 2533; 1880, § 2747; 1892, § 1038; Laws, 1906, § 1116; Hemingway's 1917, § 842; Laws, 1930, § 867; Laws, 1942, § 2093.

Cross References — Prosecution for murder for death in this state of person mortally wounded in duel out of state, see § 97-3-23.

RESEARCH REFERENCES

CJS. 28 C.J.S., Dueling §§ 1 et seq.

§ 97-39-7. Posting or publishing or vilifying another.

If any person shall post or publish another for not fighting a duel or for not sending or accepting a challenge to fight a duel, or shall use any reproachful or contemptuous language, whether oral, written, or printed, to or concerning another for not accepting or sending a challenge to fight a duel, or with intent to provoke a duel, he shall be guilty of a misdemeanor and be punished accordingly.

SOURCES: Codes, 1880, § 2748; 1892, § 1039; Laws, 1906, § 1117; Hemingway's 1917, § 843; Laws, 1930, § 868; Laws, 1942, § 2094.

Cross References — Criminal libel, see §§ 97-3-55, 97-3-57.

RESEARCH REFERENCES

CJS. 28 C.J.S., Dueling §§ 1 et seq.

§ 97-39-9. Arrest of person about to engage in duel; peace bond.

Any person, being about to violate the provisions of this chapter against dueling, may be arrested, and be required by any conservator of the peace to furnish bail to keep the peace and not violate the law against dueling for the period of two years. In default of such bail, or on giving bail, he shall be dealt with as provided in other cases of security to keep the peace, and all the provisions of the statute on that subject shall apply to bail as herein provided for.

SOURCES: Codes, 1880, § 2749; 1892, § 1040; Laws, 1906, § 1118; Hemingway's 1917, § 844; Laws, 1930, § 869; Laws, 1942, § 2095.

Cross References — Peace bonds, see §§ 99-23-1 et seq.

RESEARCH REFERENCES

CJS. 28 C.J.S., Dueling §§ 1 et seq.

§ 97-39-11. Fighting in public place with deadly weapon, or seconding such a fight; penalty.

If any person shall be guilty of fighting in any city, town, village, or other public place, and shall in such fight use any rifle, shotgun, sword, sword-cane, pistol, dirk, bowie-knife, dirk-knife, or any other deadly weapon, or if any person shall be second or aid in such fight, the person so offending shall be fined not less than three hundred dollars, and shall be imprisoned not less than three months; and if any person shall be killed in such fight, the person so killing the other may be prosecuted and convicted as in other cases of murder.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 9(5); 1857, ch. 64, art. 54; 1871, § 2534; 1880, § 2750; 1892, § 1041; Laws, 1906, § 1119; Hemingway's 1917, § 845; Laws, 1930, § 870; Laws, 1942, § 2096.

Cross References — Carrying deadly weapon, see §§ 97-37-1 et seq.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2096] is designed to punish fighting willingly in a public place. It is a part of the legislation

against dueling. It does not deprive one of the right to defend himself by repelling an attack. *Hunter v. State*, 62 Miss. 540 (1885).

RESEARCH REFERENCES

ALR. Fact that gun was unloaded as affecting criminal responsibility. 68 A.L.R.4th 507.

CJS. 28 C.J.S., Dueling §§ 1 et seq.

CHAPTER 41

Cruelty to Animals

SEC.

- 97-41-1. Living creatures not to be cruelly treated.
- 97-41-2. Authority to seize maltreated, neglected, or abandoned animals.
- 97-41-3. Authority to kill injured, neglected, etc. animal.
- 97-41-5. Carrying creature in a cruel manner.
- 97-41-7. Confining creatures without food or water.
- 97-41-9. Failure of owner or custodian to provide sustenance.
- 97-41-11. Fighting animals or cocks.
- 97-41-13. Penalty for violating certain sections.
- 97-41-15. Malicious or mischievous injury to livestock; penalty; restitution.
- 97-41-16. Malicious or mischievous injury to dog or cat; penalty; restitution.
- 97-41-17. Poisons; administering to animals.
- 97-41-18. Prohibition against intentionally conducting fight between canine and hog; exceptions; penalties. [Repealed effective July 1, 2008].
- 97-41-19. Dog fights.
- 97-41-21. Harassment of guide or leader dogs, penalties.
- 97-41-23. Injury and killing of public service animals; penalties.

§ 97-41-1. Living creatures not to be cruelly treated.

If any person shall override, overdrive, overload, torture, torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink; or to be cruelly beaten or needlessly mutilated or killed, any living creature, every such offender shall, for every offense, be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 804; 1892, § 1014; Laws, 1906, § 1091; Hemingway's 1917, § 817; Laws, 1930, § 841; Laws, 1942, § 2067.

Cross References — Livestock laws, see §§ 69-13-1 et seq.

Care and disposition of glandered animal, see § 97-27-7.

JUDICIAL DECISIONS

1. In general.

Miss. Code Ann. § 97-41-1, under which defendant was convicted of animal cruelty, was unconstitutionally vague; it lacked words of intent, and left defendant no room for discretion in deciding whether he would be able to heal his horse without

having to destroy it. *Davis v. State*, 806 So. 2d 1098 (Miss. 2001).

One merely riding with and paying a fare to another, who hired a team, cannot be convicted of cruelty to the team in overloading and overdriving. *Strickland v. State*, 81 Miss. 134, 32 So. 921 (1902).

RESEARCH REFERENCES

ALR. What constitutes statutory offense of cruelty to animals. 82 A.L.R.2d 794.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals. 42 A.L.R.4th 860.

Cat a subject to larceny. 55 A.L.R.4th 1080.

What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Validity, construction, and application of Animal Welfare Act (7 USCS §§ 2131 et seq). 36 A.L.R. Fed. 627.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

37 Am. Jur. Proof of Facts 2d 711, Justifiable Destruction of Animal.

CJS. 3B C.J.S., Animals §§ 194 et seq.

§ 97-41-2. Authority to seize maltreated, neglected, or abandoned animals.

(1) All courts in the State of Mississippi may order the seizure of an animal by a law enforcement agency, for its care and protection upon a finding of probable cause to believe said animal is being cruelly treated, neglected or abandoned. Such probable cause may be established upon sworn testimony of any person who has witnessed the condition of said animal. The court may appoint an animal control agency, agent of an animal shelter organization, veterinarian or other person as temporary custodian for the said animal, pending final disposition of the animal pursuant to this section. Such temporary custodian shall directly contract and be responsible for any care rendered to such animal, and may make arrangements for such care as may be necessary. Upon seizure of an animal, the law enforcement agency responsible for removal of the animal shall serve notice upon the owner of the animal, if possible, and shall also post prominently a notice to the owner or custodian to inform such person that the animal has been seized. Such process and notice shall contain a description of the animal seized, the date seized, the name of the law enforcement agency seizing the animal, the name of the temporary custodian, if known at the time, and shall include a copy of the order of the court authorizing the seizure.

(2) Within five (5) days of seizure of an animal, the owner of the animal may request a hearing in the court ordering the animal to be seized to determine whether the owner is able to provide adequately for the animal and is fit to have custody of the animal. The court shall hold such hearing within fourteen (14) days of receiving such request. The hearing shall be concluded and the court order entered thereon within twenty-one (21) days after the hearing is commenced. Upon requesting a hearing, the owner shall have three (3) business days to post a bond or security with the court clerk in an amount determined by the court to be sufficient to repay all reasonable costs sufficient to provide for the animal's care. Failure to post such bond within three (3) days shall result in forfeiture of the animal to the court. If the temporary custodian has custody of the animal upon the expiration of the bond or security, the animal shall be forfeited to the court unless the court orders otherwise.

(3) In determining the owner's fitness to have custody of an animal, the court may consider, among other matters:

(a) Testimony from law enforcement officers, animal control officers, animal protection officials, and other witnesses as to the condition the animal was kept in by its owner or custodian.

(b) Testimony and evidence as to the type and amount of care provided to the animal by its owner or custodian.

(c) Expert testimony as to the proper and reasonable care of the same type of animal.

(d) Testimony from any witnesses as to prior treatment or condition of this or other animals in the same custody.

(e) Violations of laws relating to animal cruelty that the owner or custodian has been convicted of prior to the hearing.

(f) Any other evidence the court considers to be material or relevant.

(4) Upon proof of costs incurred as a result of the animal's seizure, including, but not limited to, animal medical and boarding, the court may order that the animal's owner reimburse the temporary custodian for such costs. A lien for authorized expenses is hereby created upon all animals seized under this section, and shall have priority to any other lien on such animal.

(5) If the court finds the owner of the animal is unable or unfit to adequately provide for the animal, or that the animal is severely injured, diseased, or suffering, and, therefore, not likely to recover, the court may order that the animal be permanently forfeited and released to an animal control agency, animal protection organization or to the appropriate entity to be euthanized or the court may order that such animal be sold at public sale in the manner now provided for judicial sales; any proceeds from such sale shall go first toward the payment of expenses and costs relating to the care and treatment of such animal, and any excess amount shall be paid to the owner of the animal.

(6) Upon notice and hearing as provided in this section, or as a part of any proceeding conducted under the terms of this section, the court may order that other animals in the custody of the owner that were not seized be surrendered and further enjoin the owner from having custody of other animals in the future.

(7) If the court determines the owner is able to provide adequately for, and have custody of, the animal, the court shall order the animal be claimed and removed by the owner within seven (7) days after the date of the order.

(8) Nothing in this section shall be construed to prevent or otherwise interfere with a law enforcement officer's authority to seize an animal as evidence or require court action for the taking into custody and making proper disposition of animals as authorized in Sections 21-19-9 and 41-53-11.

(9) For the purposes of this section the term "animal" or "animals" means any feline, exotic animal, canine, horse, mule, jack or jennet.

SOURCES: Laws, 1997, ch. 575, § 1; Laws, 2001, ch. 497, § 1; Laws, 2003, ch. 357, § 1, eff from and after passage (approved Mar. 12, 2003.)

Cross References — Justice Courts, see §§ 9-11-2 et seq.

RESEARCH REFERENCES

ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

CJS. 3B C.J.S. Animals § 194 et seq.

§ 97-41-3. Authority to kill injured, neglected, etc. animal.

Any sheriff, constable, policeman, or agent of a society for the prevention of cruelty to animals may kill, or cause to be killed, any animal found neglected or abandoned, if in the opinion of three respectable citizens it be injured or diseased past recovery, or by age has become useless.

SOURCES: Codes, 1892, § 1015; Laws, 1906, § 1092; Hemingway's 1917, § 818; Laws, 1930, § 842; Laws, 1942, § 2068.

Cross References — Another section derived from same 1942 code section, see § 97-41-9.

Penalty for violation of this section, see § 97-41-13.

RESEARCH REFERENCES

ALR. Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 A.L.R.3d 822.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domes-

tic animals by public authorities. 42 A.L.R.4th 839.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

37 Am. Jur. Proof of Facts 2d 711, Justifiable Destruction of Animal.

CJS. 3B C.J.S., Animals §§ 194 et seq.

§ 97-41-5. Carrying creature in a cruel manner.

If any person shall carry, or cause to be carried by hand or in or upon any vehicle or other conveyance, any creature in a cruel or inhuman manner, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 808; 1892, § 1018; Laws, 1906, § 1095; Hemingway's 1917, § 821; Laws, 1930, § 845; Laws, 1942, § 2071.

Cross References — Penalty for violation of this section, see § 97-41-13.

RESEARCH REFERENCES

ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

CJS. 3B C.J.S., Animals §§ 194 et seq.

§ 97-41-7. Confining creatures without food or water.

If any person shall confine, or cause to be confined, in any stable, lot, or other place, any living creature, without supplying the same during such

confinement with a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1880, § 806; 1892, § 1017; Laws, 1906, § 1094; Hemingway's 1917, § 820; Laws, 1930, § 844; Laws, 1942, § 2070.

Cross References — Penalty for violation of this section, see § 97-41-13.

RESEARCH REFERENCES

<p>ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.</p>	<p>Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq. CJS. 3B C.J.S., Animals §§ 194 et seq.</p>
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§ 97-41-9. Failure of owner or custodian to provide sustenance.

If any person be the owner or have the custody of any living creature and unjustifiably neglect or refuse to furnish it necessary sustenance, food, or drink, he shall be guilty of a misdemeanor.

SOURCES: Codes, 1892, § 1015; Laws, 1906, § 1092; Hemingway's 1917, § 818; Laws, 1930, § 842; Laws, 1942, § 2068.

Cross References — Another section derived from same 1942 code section, see § 97-41-3.
Penalty for violation of this section, see § 97-41-13.

RESEARCH REFERENCES

<p>ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.</p>	<p>Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq. CJS. 3B C.J.S., Animals §§ 194 et seq.</p>
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§ 97-41-11. Fighting animals or cocks.

Any person who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting any bear, cock or other creature, except a dog, or of tormenting or torturing the same, and every person who shall encourage, aid, or assist therein, or who shall permit or suffer any place to be so kept or used, shall be guilty of a misdemeanor. It shall be the duty of any policeman or other officer of the law, county or municipal, to enter into any such place kept for such purpose, and to arrest each and every person concerned or participating therein.

SOURCES: Codes, 1880, § 805; 1892, § 1016; Laws, 1906, § 1093; Hemingway's 1917, § 819; Laws, 1930, § 843; Laws, 1942, § 2069; Laws, 1987, ch. 489, § 3, eff from and after July 1, 1987.

Cross References — Penalty for violation of this section, see § 97-41-13.

Prohibition of dog fights and the penalties with respect thereto, see § 97-41-19.
Arrests, generally, see §§ 99-3-1 et seq.

ATTORNEY GENERAL OPINIONS

In regard to “wild hog baying and catching,” if the animals are fought, killed, maimed, wounded, injured, tormented or tortured, then the practice would be ille-

gal. However, such is a question of fact for the courts to decide. Johnson, Mar. 9, 2004, A.G. Op. 04-0078.

RESEARCH REFERENCES

ALR. Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as “pit bulls” or “bull terriers”. 80 A.L.R.4th 70.

What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Am Jur. 4 Am. Jur. 2d, Animals, §§ 28 et seq.

CJS. 3B C.J.S., Animals §§ 194 et seq.

§ 97-41-13. Penalty for violating certain sections.

Any person who shall violate any of Sections 97-41-3 to 97-41-11, or Section 97-27-7 on the subject of cruelty to animals shall, on conviction, be fined not less than ten dollars nor more than one hundred dollars, or shall be imprisoned in the county jail not less than ten days nor more than one hundred days or both.

SOURCES: Codes, 1880, § 813; 1892, § 1020; Laws, 1906, § 1097; Hemingway’s 1917, § 823; Laws, 1930, § 847; Laws, 1942, § 2073.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

CJS. 3B C.J.S., Animals §§ 194 et seq.

§ 97-41-15. Malicious or mischievous injury to livestock; penalty; restitution.

(1) Any person who shall maliciously, either out of a spirit of revenge or wanton cruelty, or who shall mischievously kill, maim or wound, or injure any livestock, or cause any person to do the same, shall be guilty of a felony and upon conviction, shall be committed to the custody of the State Department of Corrections for not less than twelve (12) months nor more than five years, and fined an amount not less than One Thousand Five Hundred Dollars (\$1,500.00), nor more than Ten Thousand Dollars (\$10,000.00).

(2) In addition to any such fine or imprisonment which may be imposed, the court shall order that restitution be made to the owner of any animal listed in subsection (1) of this section. The measure for restitution in money shall be the current replacement value of such loss and/or the actual veterinarian fees, special supplies, loss of income and other costs incurred as a result of actions in violation of subsection (1) of this section.

(3) For purposes of this section, the term "livestock" shall mean horses, cattle, swine, sheep and other domestic animals produced for profit.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 7(1); 1857, ch. 64, art. 201; 1871, § 8708; 1880, § 2917; 1892, § 1022; Laws, 1906, § 1099; Hemingway's 1917, § 825; Laws, 1930, § 849; Laws, 1942, § 2075; Laws, 1981, ch 448, § 1; Laws, 1993, ch. 438, § 2, eff from and after July 1, 1993.

Cross References — Shooting or killing deer or livestock by headlighting or other lighting devices, see § 49-7-95.

Restitution to owner for poultry or livestock killed by dogs, see § 95-5-21.

Penalty for feloniously taking livestock, and definition of livestock, see § 97-17-53.

Restitution to victims of crimes, generally, see §§ 99-37-1 et seq.

JUDICIAL DECISIONS

1. In general.

Affidavit for maliciously shooting animal which neither gives names nor description of horse, cannot be amended so as to allege ownership in another than persons set out in affidavit. *White v. State*, 95 Miss. 75, 48 So. 611 (1909).

Guilt is determinable by the intent and purpose which prompts the act. *Stephens v. State*, 65 Miss. 329, 3 So. 458 (1888).

But an indictment which avers that the offense was "maliciously" done, without adding the words, "out of a spirit of revenge or wanton cruelty," is good. These words merely describe and define "maliciously."

Rembert v. State, 56 Miss. 280 (1879).

And the affidavit or indictment must aver one or the other. *Thompson v. State*, 51 Miss. 353 (1875).

The section [Code 1942, § 2075] defines two distinct attributes of malicious injury, within one or the other of which the facts must bring a case to warrant conviction: (1) that the injury was done "maliciously; either out of a spirit of revenge or wanton cruelty;" or (2) that it was done "mischievously." *Duncan v. State*, 49 Miss. 331 (1873).

ATTORNEY GENERAL OPINIONS

As long as animals in dog baying contest involving dogs and wild hogs were not fought, killed, maimed, wounded or injured or tormented, then practice would not be illegal. *Simmons*, June 16, 1993, A.G. Op. #93-0365.

RESEARCH REFERENCES

ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

52 Am. Jur. 2d, Malicious Mischief §§ 1 et seq.

CJS. 3B C.J.S., Animals §§ 194 et seq.

54 C.J.S., Malicious or Criminal Mischief or damage to property §§ 1 and 2.

§ 97-41-16. Malicious or mischievous injury to dog or cat; penalty; restitution.

(1) Any person who shall maliciously, either out of a spirit of revenge or wanton cruelty, or who shall mischievously kill, maim or wound, or injure any dog or cat, or cause any person to do the same, shall be fined not more than One Thousand Dollars (\$1,000.00) or be imprisoned not exceeding six (6) months.

(2) In addition to such fine or imprisonment which may be imposed, the court shall order that restitution be made to the owner of such dog or cat. The measure for restitution in money shall be the current replacement value of such loss and the actual veterinarian fees, special supplies, loss of income and other cost incurred as a result of actions in violation of subsection (1) of this section.

SOURCES: Laws, 1993, ch. 438, § 3; Laws, 2006, ch. 491, § 1, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment inserted “or cat” following “dog” in (1) and (2); and substituted “and” for “and/or” following “value of such loss” in the last sentence of (2).

JUDICIAL DECISIONS

1. Constitutionality.

Ordinary person giving a fair reading of Miss. Code Ann. § 97-41-16 would have concluded that defendant's conduct in shooting his neighbor's dog was prohibited, and that § 97-41-16 was not unconstitutionally so vague that it would not

have given defendant sufficient notice that the conduct in which he engaged was proscribed; section 97-41-16 was not unconstitutionally vague under the due process clause. *Hill v. State*, 853 So. 2d 100 (Miss. 2003).

RESEARCH REFERENCES

ALR. What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

Am Jur. 4 Am. Jur. 2d, Animals §§ 28 et seq.

52 Am. Jur. 2d, Malicious Mischief § 11.
CJS. 3B C.J.S., Animals §§ 317-332, 431-451.

§ 97-41-17. Poisons; administering to animals.

Every person who shall wilfully and unlawfully administer any poison to any horse, mare, colt, mule, jack, jennet, cattle, deer, dog, hog, sheep, chicken, duck, goose, turkey, pea-fowl, guinea-fowl, or partridge, or shall maliciously expose any poison substance with intent that the same should be taken or swallowed by any horse, mare, colt, mule, jack, jennet, cattle, dog, hog, sheep, chicken, duck, goose, turkey, pea-fowl, guinea-fowl, or partridge, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by a fine not exceeding five hundred dollars.

SOURCES: Codes, Hutchinson's 848, ch. 64, art. 12, Title 7(13); 1857, ch. 64, art. 215; 1871, § 2671; 1880, § 2938; 1892, § 1256; Laws, 1906, § 1332; Hemingway's 1917, § 1065; Laws, 1930, § 1096; Laws, 1942, § 2329.

Cross References — Regulation of sale of poisons, etc., see §§ 41-29-1 et seq.

Poisoning food or drink, generally, see § 97-3-61.

Poisoning person with intent to kill, see § 97-3-63.

Criminal offenses in sale of poisons, see §§ 97-27-21 et seq.

RESEARCH REFERENCES

ALR. Cat as subject of larceny. 55
A.L.R.4th 1080.

What constitutes offense of cruelty to
animals—modern cases. 6 A.L.R.5th 733.

§ 97-41-18. Prohibition against intentionally conducting fight between canine and hog; exceptions; penalties. [Repealed effective July 1, 2008].

(1) For the purposes of this section, “hog” means a pig, swine or boar.

(2) It is unlawful for any person to organize or conduct any commercial event commonly referred to as a “catch” wherein there is a display of combat or fighting among one or more domestic or feral canines and feral or domestic hogs and in which it is intended or reasonably foreseeable that the canines or hogs would be injured, maimed, mutilated or killed.

(3) It is unlawful for any person to organize, conduct or financially or materially support any event prohibited by this section.

(4) The provisions of this section shall not apply to any competitive event in which canines trained for hunting or herding activities are released in an open or enclosed area to locate and corner hogs, commonly referred to as a “bay event,” and in which competitive points are deducted if a hog is caught and held.

(5) The provisions of this section shall not apply to the lawful hunting of hogs with canines or the use of canines for the management, farming or herding of hogs which are livestock or the private training of canines for the purposes enumerated in this subsection provided that such training is conducted for the field using accepted dog handling and training practices and is not in violation of the provisions of subsection (1) of this section.

(6) Any person convicted under the provisions of this section shall be fined not more than One Thousand Dollars (\$1,000.00), imprisoned for not more than six (6) months, or both.

(7) This section shall stand repealed on July 1, 2008.

SOURCES: Laws, 2006, ch. 491, § 2, eff from and after July 1, 2006.

§ 97-41-19. Dog fights.

(1) If any person (a) shall sponsor, promote, stage or conduct a fight or fighting match between dogs, or (b) shall wager or bet, promote or encourage the wagering or betting of any money or other valuable thing upon any such fight or upon the result thereof, or (c) shall own a dog with the intent to wilfully enter it or to participate in any such fight, or (d) shall train or transport a dog for the purposes of participation in any such fight, he shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than One Thousand Dollars (\$1,000.00) nor more than Five Thousand Dollars (\$5,000.00), or by imprisonment in the State Penitentiary for a term of not less than one (1) nor more than three (3) years, or by both such fine and imprisonment, in the discretion of the court.

(2) If any person shall be present, as a spectator, at any location where preparations are being made for an exhibition of a fight between dogs with the intent to be present at such preparations, or if any person shall be present at an exhibition of a fight between dogs with the intent to be present at such exhibition, he shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00), or by imprisonment in the State Penitentiary for a term of not more than one (1) year, or by both such fine and imprisonment, in the discretion of the court.

(3) Any law enforcement officer making an arrest under subsection (1) of this section may lawfully take possession of all dogs and all paraphernalia, implements, equipment or other property used in violation of subsection (1) of this section. Such officer shall file with the circuit court of the county within which the alleged violation occurred an affidavit stating therein (a) the name of the person charged, (b) a description of the property taken, (c) the time and place of the taking, (d) the name of the person who claims to own such property, if known, and (e) that the affiant has reason to believe, stating the ground of such belief, that the property taken was used in such violation. He shall thereupon deliver the property to such court which shall, by order in writing, place such dogs, paraphernalia, implements, equipment, or other property in the custody of a licensed veterinarian, the local humane society or other animal welfare agency, or other suitable custodian, to be kept by such custodian until the conviction or final discharge of the accused, and shall send a copy of such order without delay to the district attorney of the county. The custodian named and designated in such order shall immediately assume the custody of such property and shall retain same, subject to order of the court.

Upon the certification of a licensed veterinarian or officer of the humane society or animal welfare agency that, in his professional judgment, a dog which has been seized is not likely to survive the final disposition of the charges or that, by reason of the physical condition of the dog, it should be humanely euthanized before such time, the court may order the dog humanely euthanized. The court shall make its finding of whether to issue such an order within seven (7) days from the certification by the veterinarian or officer of the humane society or animal welfare agency. The owner of a dog which is euthanized without an order of the court with such certification of a licensed veterinarian or officer of the humane society or other animal welfare agency shall have a right of action for damages against the department or agency by which the arresting or seizing officer is employed. Upon conviction of the person charged with a violation of subsection (1) of this section, all dogs seized shall be adjudged by the court to be forfeited and the court shall order a humane disposition of the same. In no event shall the court order the dog to be euthanized without the certification of a licensed veterinarian or officer of the humane society or other animal welfare agency that, in his judgment, the dog is not likely to survive or that, by reason of its physical condition, the dog should be humanely euthanized. In the event of the acquittal or final discharge without conviction of the accused, the court shall direct the delivery of the

property so held in custody to the owner thereof. All reasonable expenses incurred by the custodian of seized dogs and property shall be charged as costs of court, to be taxed against the owner or county in the discretion of the court.

(4) Nothing in subsection (1) of this section shall prohibit any of the following:

- (a) The use of dogs in the management of livestock, by the owner of such livestock or other persons in lawful custody thereof;
- (b) The use of dogs in lawful hunting; and
- (c) The training of dogs for any purpose not prohibited by law.

SOURCES: Laws, 1987, ch. 489, § 1, eff from and after July 1, 1987.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. Euthanization of dogs.

Dogs seized under statute could be humanely euthanized before final disposition of criminal case by reason of the physical condition of the dog; statute meant to prosecute individuals who engaged in business of dog fighting, betting,

and attendance, statute made provisions not only for what constituted crime, but seizure and disposition of those things utilized in perpetration of the crime. 32 Pit Bulldogs v. County of Prentiss, 808 So. 2d 971 (Miss. 2002).

RESEARCH REFERENCES

ALR. Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers". 80 A.L.R.4th 70.

What constitutes offense of cruelty to animals—modern cases. 6 A.L.R.5th 733.

§ 97-41-21. Harassment of guide or leader dogs, penalties.

(1) An individual shall not do either of the following:

(a) Willfully and maliciously assault, beat, harass, injure, or attempt to assault, beat, harass or injure, a dog that he or she knows or has reason to believe is a guide or leader dog for a blind individual, a hearing dog for a deaf or audibly impaired individual, or a service dog for a physically limited individual.

(b) Willfully and maliciously impede or interfere with, or attempt to impede or interfere with, duties performed by a dog that he or she knows or has reason to believe is a guide or leader dog for a blind individual, a hearing dog for a deaf or audibly impaired individual, or a service dog for a physically limited individual.

(2) An individual who violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than ninety (90) days or a fine of not more than Five Hundred Dollars (\$500.00), or both.

(3) In a prosecution for a violation of subsection (1), evidence that the defendant initiated or continued conduct directed toward a dog described in

subsection (1) after being requested to avoid or discontinue that conduct or similar conduct by a blind, deaf, audibly impaired or physically limited individual being served or assisted by the dog shall give rise to a rebuttable presumption that the conduct was initiated or continued maliciously.

(4) A conviction and imposition of a sentence under this section does not prevent a conviction and imposition of a sentence under any other applicable provision of law.

(5) As used in this section:

(a) "Audibly impaired" means the inability to hear air conduction thresholds at an average of forty (40) decibels or greater in the individual's better ear.

(b) "Blind" means having a visual acuity of $\frac{20}{200}$ or less in the individual's better eye with correction, or having a limitation of the individual's field of vision such that the widest diameter of the visual field subtends an angular distance not greater than twenty (20) degrees.

(c) "Deaf" means the individual's hearing is totally impaired or the individual's hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input, including, but not limited to, lip reading, sign language, finger spelling or reading.

(d) "Harass" means to engage in any conduct directed toward a guide, leader, hearing or service dog that is likely to impede or interfere with the dog's performance of its duties or that places the blind, deaf, audibly impaired or physically limited individual being served or assisted by the dog in danger of injury.

(e) "Injure" means to cause any physical injury to a dog described in subsection (1).

(f) "Maliciously" means any of the following:

(i) With intent to assault, beat, harass or injure a dog described in subsection (1).

(ii) With intent to impede or interfere with duties performed by a dog described in subsection (1).

(iii) With intent to disturb, endanger or cause emotional distress to a blind, deaf, audibly impaired or physically limited individual being served or assisted by a dog described in subsection (1).

(iv) With knowledge that the individual's conduct will, or is likely to, harass or injure a dog described in subsection (1).

(v) With knowledge that the individual's conduct will, or is likely to, impede or interfere with duties performed by a dog described in subsection (1).

(vi) With knowledge that the individual's conduct will, or is likely to, disturb, endanger or cause emotional distress to a blind, deaf, audibly impaired or physically limited individual being served or assisted by a dog described in subsection (1).

(g) "Physically limited" means having limited ambulatory abilities and includes, but is not limited to, having a temporary or permanent impairment or condition that does one or more of the following:

- (i) Causes the individual to use a wheelchair or walk with difficulty or insecurity.
- (ii) Affects sight or hearing to the extent that an individual is insecure or exposed to danger.
- (iii) Causes faulty coordination.
- (iv) Reduces mobility, flexibility, coordination or perceptiveness.

SOURCES: Laws, 1997, ch. 426, § 1, eff from and after passage (approved March 25, 1997).

Cross References — Right to be accompanied by guide dog, see §§ 43-6-7, 43-6-9. Penalties for interference of rights of handicapped persons, see § 43-6-11. Mississippi Support Animal Act, see §§ 43-6-151 et seq.

§ 97-41-23. Injury and killing of public service animals; penalties.

(1) It is unlawful for any person to willfully and maliciously taunt, torment, tease, beat, strike, or to administer, expose or inject any desensitizing drugs, chemicals or substance to any public service animal. Any person who violates this section is guilty of a misdemeanor, and upon conviction thereof shall be fined not more than Two Hundred Dollars (\$200.00) and be imprisoned not more than five (5) days, or both.

(2) Any person who, without just cause, purposely kills or injures any public service animal is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) and be imprisoned not more than five (5) years, or both.

(3) For purposes of this section, the term "public service animal" means any animal trained and used to assist a law enforcement agency, public safety entity or search and rescue agency.

(4) Any person guilty of violating subsection (2) of this section shall also be required to make restitution to the law enforcement agency or owner aggrieved thereby.

(5) The provisions of this section shall not apply to the lawful practice of veterinary medicine.

SOURCES: Laws, 2003, ch. 498, § 1, eff from and after July 1, 2003.

CHAPTER 43

Racketeer Influenced and Corrupt Organization Act (RICO)

SEC.

- 97-43-1. Short title.
- 97-43-3. Definitions.
- 97-43-5. Prohibited activities.
- 97-43-7. Penalties.
- 97-43-9. Powers and duties of circuit court; civil forfeiture of property; seizure; civil proceedings; injunctions; damages; attorneys fees; jury trial; intervention by attorney general; limitation of actions.
- 97-43-11. Seizure and forfeiture of property; procedures.

§ 97-43-1. Short title.

This chapter shall be known and may be cited as the "Racketeer Influenced and Corrupt Organization Act."

SOURCES: Laws, 1984, ch. 433, § 1; reenacted, 1986, ch. 461, § 1, eff from and after passage (approved April 11, 1986).

Editor's Note — Laws, 1984, ch. 433, § 7, provided that this section would stand repealed from and after June 30, 1986. Laws, 1986, ch. 461, § 7, removed the repeal date specified in ch. 433, Laws, 1984.

Federal Aspects — Federal anti-racketeering act, generally, see 18 USCS §§ 1951 et seq.

JUDICIAL DECISIONS

1. In general.

State RICO Act does not set out level of intent required for prosecution of usury as collection of unlawful debt and, thus, RICO would omit essential element of crime and would be too vague to satisfy due process; although RICO is general intent crime that takes its intent from

underlying crimes, level of intent for usury is defined by civil statute and would not apply to criminal prosecution. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

RESEARCH REFERENCES

ALR. Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Criminal prosecutions under state RICO statutes for engaging in organized criminal activity. 89 A.L.R.5th 629.

Validity, construction and effect of 18 USCS § 1952, making it a federal offense to use interstate or foreign travel or transportation in aid of racketeering enterprises. 1 A.L.R. Fed. 838.

Elements of offense proscribed by the Hobbs Act (18 USCS § 1951) against racketeering in interstate or foreign commerce. 4 A.L.R. Fed. 881.

Construction and application of provision of Organized Crime Control Act of 1970 (18 USCS § 1965(a)) that civil action or proceeding under Act against any person may be instituted in Federal District Court for district in which such person resides, is found, has agent, or transacts his affairs. 20 A.L.R. Fed. 803.

Validity, construction, and application of 18 USCS § 1962, making unlawful certain acts involving "pattern of racketeering activity" or "collection of an unlawful debt,". 29 A.L.R. Fed. 826.

What is an "enterprise," as defined at 18 USCS § 1961(4), for purposes of the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 USCS §§ 1961 et seq.). 52 A.L.R. Fed. 818.

Construction and application of provision of Organized Crime Control Act of 1970 (18 USCS § 1963(a)) that whoever violated 18 USCS § 1962 shall forfeit to United States any interest in unlawful enterprise. 61 A.L.R. Fed. 879.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS secs. 1961-1968. 89 A.L.R. Fed. 887.

Validity, construction, and application of Racketeer Influenced and Corrupt Or-

ganization Act, 18 U.S.C.A. § et seq. Supreme Court cases. 171 A.L.R. Fed. 1.

Am Jur. 67 Am. Jur. 2d, Robbery §§ 131-136.

10 Am. Jur. Proof of Facts 3d 289, "Pattern of Racketeering Activity" Under the Racketeer Influence and Corrupt Organization Act (RICO).

CJS. 15 C.J.S. Commerce § 137.

15A C.J.S. Conspiracy §§ 249, 250.

22 C.J.S. Criminal Law § 183.

51 C.J.S. Labor Relations § 12.

Lawyers' Edition. Validity, construction, and application of the Hobbs Act (18 USCS § 1951) against racketeering in interstate or foreign commerce—federal cases. 4 L. Ed. 2d 1843.

Law Reviews. Ray, Constitutional and statutory authority of the Attorney General to prosecute actions. 59 Miss. L. J. 165, Spring, 1989.

§ 97-43-3. Definitions.

The following terms shall have the meanings ascribed to them herein unless the context requires otherwise:

(a) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce or intimidate another person to commit any crime which is chargeable under the following provisions of the Mississippi Code of 1972:

(1) Section 97-19-71, which relates to fraud in connection with any state or federally funded assistance programs.

(2) Section 75-71-735, which relates to violations of the Mississippi Securities Act.

(3) Sections 45-13-105, 45-13-109, 97-37-23 and 97-37-25, which relate to unlawful possession, use and transportation of explosives.

(4) Sections 97-3-19 and 97-3-21, which relate to murder.

(5) Section 97-3-7(2), which relates to aggravated assaults.

(6) Section 97-3-53, which relates to kidnapping.

(7) Sections 97-3-73 through 97-3-83, which relate to robbery.

(8) Sections 97-17-19 through 97-17-37, which relate to burglary.

(9) Sections 97-17-1 through 97-17-13, which relate to arson.

(10) Sections 97-29-49, 97-29-51 and 97-29-53, which relate to prostitution.

(11) Sections 97-5-5 and 97-5-31 through 97-5-37, which relate to the exploitation of children and enticing children for concealment, prostitution or marriage.

(12) Section 41-29-139, which relates to violations of the Uniform Controlled Substances Law; provided, however, that in order to be

classified as “racketeering activity,” such offense must be punishable by imprisonment for more than one (1) year.

(13) Sections 97-21-1 through 97-21-63, which relate to forgery and counterfeiting.

(14) Sections 97-9-1 through 97-9-77, which relate to offenses affecting administration of justice.

(15) Sections 97-33-1 through 97-33-49, which relate to gambling and lotteries.

(b) “Unlawful debt” means money or any other thing of value constituting principal or interest of a debt which is legally unenforceable in whole or in part because the debt was incurred or contracted in gambling activity in violation of state law or in the business of lending money at a rate usurious under state law, where the usurious rate is at least twice the enforceable rate.

(c) “Enterprise” means any individual, sole proprietorship, partnership, corporation, union or other legal entity, or any association or group of individuals associated in fact although not a legal entity. It includes illicit as well as licit enterprises and governmental, as well as other, entities.

(d) “Pattern of racketeering activity” means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date of this chapter and that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct.

SOURCES: Laws, 1984, ch. 433, § 2; Laws, 1985, ch. 321; reenacted, 1986, ch. 461, § 2, eff from and after passage (approved April 11, 1986).

Editor’s Note — Sections 97-17-19, 97-17-21, and 97-17-27 referred to in (a)(8) were repealed by Laws, 1996, ch. 519 §§ 2-4, eff from and after passage (approved April 11, 1996).

JUDICIAL DECISIONS

1. In general.

State’s RICO Act does not limit enforcement to types of unlawful loans traditionally associated with loansharking and intimidation or brutality. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh’g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

State RICO Act does not set out level of intent required for prosecution of usury as collection of unlawful debt and, thus, RICO would omit essential element of crime and would be too vague to satisfy due process; although RICO is general

intent crime that takes its intent from underlying crimes, level of intent for usury is defined by civil statute and would not apply to criminal prosecution. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh’g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

All crimes used as bases for State RICO Act prosecution are outlined in RICO Act, and there are cross-references between RICO and underlying criminal statutes, and, therefore, application of RICO to usury would violate due process for lack of notice that usury is prosecutable offense;

no reference to RICO is made in usury statute or other statutes on interest and finance charges, and person of ordinary intelligence would not be given fair warning that usury is prosecutable offense. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Usury is not criminal under State law and, thus, application of State's RICO Act to usury would criminalize activity without fair notice and definite warning of prohibited conduct and would violate due process. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Evidence that State Attorney General's office encouraged check cashers' association to lobby Legislature for regulation of their industry supported determination that State did not give check cashing businesses adequate notice that usury could be prosecuted under State RICO Act and, thus, that RICO was unconstitutionally vague as applied to check cashers; contact between check cashers and Attorney General's office led check cashers to believe that their business was legal. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. Proof of Facts 3d 289, "Pattern of Racketeering Activity"

Under the Racketeer Influence and Corrupt Organization Act (RICO).

§ 97-43-5. Prohibited activities.

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire to violate any of the provisions of subsections (1), (2) or (3) of this section.

SOURCES: Laws, 1984, ch. 433, § 3; reenacted, 1986, ch. 461, § 3, eff from and after passage (approved April 11, 1986).

Editor's Note — Laws, 1984, ch. 433, § 7, provided that this section would stand repealed from and after June 30, 1986. Laws, 1986, ch. 461, § 7, removed the repeal date specified in ch. 433, Laws, 1984.

JUDICIAL DECISIONS

1. In general.

All crimes used as bases for State RICO Act prosecution are outlined in RICO Act, and there are cross-references between RICO and underlying criminal statutes, and, therefore, application of RICO to usury would violate due process for lack of notice that usury is prosecutable offense; no reference to RICO is made in usury statute or other statutes on interest and finance charges, and person of ordinary intelligence would not be given fair warning that usury is prosecutable offense. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

State's RICO Act does not limit enforcement to types of unlawful loans traditionally associated with loansharking and intimidation or brutality. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

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and, thus, that RICO was unconstitutionally vague as applied to check cashers; contact between check cashers and Attorney General's office led check cashers to believe that their business was legal. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

Usury is not criminal under State law and, thus, application of State's RICO Act to usury would criminalize activity without fair notice and definite warning of prohibited conduct and would violate due process. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

State RICO Act does not set out level of intent required for prosecution of usury as collection of unlawful debt and, thus, RICO would omit essential element of crime and would be too vague to satisfy due process; although RICO is general intent crime that takes its intent from underlying crimes, level of intent for usury is defined by civil statute and would not apply to criminal prosecution. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. Proof of Facts 3d 289, "Pattern of Racketeering Activity"

Under the Racketeer Influence and Corrupt Organization Act (RICO).

§ 97-43-7. Penalties.

(1) Any person convicted of engaging in activity in violation of the provisions of this chapter shall be guilty of a felony and, upon conviction, shall be fined not more than Twenty-five Thousand Dollars (\$25,000.00) or imprisoned not more than twenty (20) years, or both.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of this chapter, through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed three (3) times the gross value gained or three (3) times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2) of this section.

(4) For the purposes of subsection (2) of this section, "pecuniary value" means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of One Hundred Dollars (\$100.00).

SOURCES: Laws, 1984, ch. 433, § 4; reenacted, 1986, ch. 461, § 4, eff from and after passage (approved April 11, 1986).

Editor's Note — Laws, 1984, ch. 433, § 7, provided that this section would stand repealed from and after June 30, 1986. Laws, 1986, ch. 461, § 7, removed the repeal date specified in ch. 433, Laws, 1984.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

State RICO Act does not set out level of intent required for prosecution of usury as collection of unlawful debt and, thus, RICO would omit essential element of crime and would be too vague to satisfy due process; although RICO is general intent crime that takes its intent from

underlying crimes, level of intent for usury is defined by civil statute and would not apply to criminal prosecution. *State v. Roderick*, 704 So. 2d 49 (Miss. 1997), reh'g denied, 703 So. 2d 863 (Miss. 1997), cert. denied, 524 U.S. 926, 118 S. Ct. 2319, 141 L. Ed. 2d 694 (1998).

§ 97-43-9. Powers and duties of circuit court; civil forfeiture of property; seizure; civil proceedings; injunctions; damages; attorneys fees; jury trial; intervention by attorney general; limitation of actions.

(1) Any circuit court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of this chapter by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of this chapter.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license or permit granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a

foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of this chapter and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of this chapter is subject to civil forfeiture to the state pursuant to the provisions of Section 97-43-11; provided, however, that a forfeiture of personal property encumbered by a bona fide security interest or real property encumbered by a bona fide mortgage, deed of trust, lien or encumbrance of record shall be subject to the interest of the secured party or subject to the interest of the holder of the mortgage deed of trust, lien of encumbrance of record if such secured party or holder neither had knowledge of or consented to the act or omission.

(3) Property subject to forfeiture may be seized by law enforcement officers upon process issued by any appropriate court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under a lawful administrative inspection;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this article;

(4) The Attorney General, any district attorney or any state agency having jurisdiction over conduct in violation of a provision of this chapter may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(5) Any aggrieved person may institute a civil proceeding under subsection (1) of this section against any person or enterprise convicted of engaging in activity in violation of this chapter. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of immediate and irreparable injury, loss or damage to the person shall have to be made.

(6) Any person who is injured by reason of any violation of the provisions of this chapter shall have a cause of action against any person or enterprise convicted of engaging in activity in violation of this chapter for threefold the actual damages sustained and, when appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred.

(a) The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this subsection.

(b) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(7) The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under subsections (5) or (6) of this section if he certifies that, in his opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Attorney General instituted the action or proceeding.

(8) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this chapter may be commenced at any time within five (5) years after the conduct in violation of a provision of this chapter terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent or restrain any violation of the provisions of this chapter, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsections (5) or (6) of this section which is based in whole or in part upon any matter complained of in any such prosecution, action or proceeding shall be suspended during the pendency of such prosecution, action or proceeding and for two (2) years following its termination.

(9) The application of one (1) civil remedy under any provision of this chapter shall not preclude the application of any other remedy, civil or criminal, under this chapter or any other provision of law. Civil remedies under this chapter are supplemental.

SOURCES: Laws, 1984, ch. 433, § 5; reenacted and amended, 1986, ch. 461, § 5, eff from and after passage (approved April 11, 1986).

Editor's Note — Laws, 1984, ch. 433, § 7, provided that this section would stand repealed from and after June 30, 1986. Laws, 1986, ch. 461, § 7, removed the repeal date specified in ch. 433, Laws, 1984.

Cross References — Punitive damages, generally, see § 11-1-65.

RESEARCH REFERENCES

ALR. Civil action for damages under state Racketeer Influenced and Corrupt Organizations Acts (RICO) for losses from racketeering activity. 62 A.L.R.4th 654.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Seizure under RICO Comprehensive Forfeiture Act of 1984 (18 USCS § 1963)

of funds received by attorney as fees from accused. 76 A.L.R. Fed. 258.

Statute of limitations in civil actions for damages under the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968. 156 A.L.R. Fed. 361.

§ 97-43-11. Seizure and forfeiture of property; procedures.

(1) When any property is seized pursuant to Section 97-43-9, proceedings under this section shall be instituted promptly.

(2)(a) A petition for forfeiture shall be filed promptly in the name of the State of Mississippi with the clerk of the circuit court of the county in which the seizure is made. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(i) The owner of the property, if address is known;

(ii) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the state by making a good faith effort to ascertain the identity of such secured party as described in paragraphs (b), (c), (d), (e) and (f) of this subsection;

(iii) Any other bona fide lienholder or secured party or other person holding an interest in the property in the nature of a security interest of whom the state has actual knowledge;

(iv) A holder of a mortgage, deed of trust, lien or encumbrance of record, if the property is real estate by making a good faith inquiry as described in paragraph (g) of this section; and

(v) Any person in possession of property subject to forfeiture at the time that it was seized.

(b) If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the state shall make inquiry of the State Tax Commission as to what the records of the State Tax Commission show as to who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(c) If the property is a motor vehicle and is not titled in the State of Mississippi, then the state shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the state shall make inquiry of the appropriate agency of that state as to what the records of the agency show as to who is the record owner of the vehicle and who, if anyone, holds any lien, security interest, or other instrument in the nature of a security device which affects the vehicle.

(d) If the property is of a nature that a financing statement is required by the laws of this state to be filed to perfect a security interest affecting the property and if there is any reasonable cause to believe that a financing statement covering the security interest has been filed under the laws of this state, the state shall make inquiry of the appropriate office designated in Section 75-9-501 as to what the records show as to who is the record owner of the property and who, if anyone, has filed a financing statement affecting the property.

(e) If the property is an aircraft or part thereof and if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make inquiry of the administrator of the Federal Aviation Administration as to what the records of the administrator show as to who is the record owner of the property and who, if anyone, holds an instrument in the nature of a security device which affects the property.

(f) In the case of all other personal property subject to forfeiture, if there is any reasonable cause to believe that an instrument in the nature of a security device affects the property, then the state shall make a good faith inquiry to identify the holder of any such instrument.

(g) If the property is real estate, the state shall make inquiry at the appropriate places to determine who is the owner of record and who, if anyone is a holder of a bona fide mortgage, deed of trust, lien or encumbrance.

(h) In the event the answer to an inquiry states that the record owner of the property is any person other than the person who was in possession of it when it was seized, or states that any person holds any lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust which affects the property, the state shall cause any record owner and also any lienholder, secured party, other person who holds an interest in the property in the nature of a security interest, or holder of an encumbrance, mortgage or deed of trust which affects the property to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(i) If the owner of the property cannot be found and served with a copy of the petition of forfeiture, or if no person was in possession of the property subject to forfeiture at the time that it was seized and the owner of the property is unknown, the state shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of _____," filling in the blank space with a reasonably detailed description of the property subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, and shall be served as provided in Section 11-33-37 for publication of notice for attachments at law.

(j) No proceedings instituted pursuant to the provisions of this article shall proceed to hearing unless the judge conducting the hearing is satisfied that this section has been complied with. Any answer received from an inquiry required by paragraphs (b) through (g) of this section shall be introduced into evidence at the hearing.

(3)(a) An owner of property that has been seized shall file a verified answer within twenty (20) days after the completion of service of process. If no answer is filed, the court shall hear evidence that the property is subject to forfeiture and forfeit the property to the state. If an answer is filed, a time for hearing on forfeiture shall be set within thirty (30) days of filing the answer or at the succeeding term of court if court would not be in progress within thirty (30) days after filing the answer. Provided, however, that upon request by the state or the owner of the property, the court may postpone said forfeiture hearing to a date past the time any criminal action is pending against said owner.

(b) If the owner of the property has filed a verified answer denying that the property is subject to forfeiture, then the burden is on the state to prove

that the property is subject to forfeiture. The burden of proof placed upon the state shall be clear and convincing proof. However, if no answer has been filed by the owner of the property, the petition for forfeiture may be introduced into evidence and is prima facie evidence that the property is subject to forfeiture.

(c) At the hearing any claimant of any right, title, or interest in the property may prove his lien, encumbrance, security interest, other interest in the nature of a security interest, mortgage or deed of trust to be bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture.

(d) If it is found that the property is subject to forfeiture, then the judge shall forfeit the property to the state. However, if proof at the hearing discloses that the interest of any bona fide lienholder, secured party, other person holding an interest in the property in the nature of a security interest or any holder of a bona fide encumbrance, mortgage or deed of trust is greater than or equal to the present value of the property, the court shall order the property released to him. If such interest is less than the present value of the property and if the proof shows that the property is subject to forfeiture, the court shall order the property forfeited to the state.

(4)(a) All personal property, including money, which is forfeited to the state and is not capable of being sold at public auction shall be liquidated and the proceeds, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited in the General Fund of the state.

(b) All real estate which is forfeited to the state shall be sold to the highest bidder at a public auction to be conducted by the state at such place, on such notice and in accordance with the same procedure, as far as practicable, as is required in the case of sales of land under execution of law. The proceeds of such sale shall first be applied to the cost and expense in administering and conducting such sale, then to the satisfaction of all mortgages, deeds of trusts, liens and encumbrances of record on such property. All proceeds in excess of the amount necessary for the cost of the sale of such land and the satisfaction of any liens thereon shall be deposited in the General Fund of the State Treasury.

(c) All other property that has been seized by the state and that has been forfeited shall, except as otherwise provided, be sold at a public auction for cash by the state to the highest and best bidder after advertising the sale for at least once each week for three (3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation throughout the State of Mississippi. Such notices shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be delivered to the circuit clerk and shall be disposed of as follows:

(i) To any bona fide lienholder, secured party, or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(ii) The balance, if any, after deduction of all storage and court costs, shall be forwarded to the State Treasurer and deposited with and used as general funds of the state.

(d) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

SOURCES: Laws, 1984, ch. 433, § 6; reenacted, 1986, ch. 461, § 6; Laws, 2001, ch. 495, § 28, eff from and after Jan. 1, 2002.

Editor's Note — Laws, 1984, ch. 433, § 7, provided that this section would stand repealed from and after June 30, 1986. Laws, 1986, ch. 461, § 7, removed the repeal date specified in ch. 433, Laws, 1984.

RESEARCH REFERENCES

ALR. Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

CHAPTER 44

Mississippi Streetgang Act

SEC.

- 97-44-1. Short title.
- 97-44-3. Definitions.
- 97-44-5. Cause of action.
- 97-44-7. Filing of complaint.
- 97-44-9. Venue.
- 97-44-11. Service of process.
- 97-44-13. Punitive damages.
- 97-44-15. Injunction, abatement, damages, or other remedies for unlawful use of private building by criminal street gang.
- 97-44-17. Forfeiture of firearms, ammunition, and dangerous weapons used by criminal street gangs; disposition of property seized; procedure.
- 97-44-19. Penalties for criminal street gang activity.

§ 97-44-1. Short title.

This chapter shall be known as the “Mississippi Streetgang Act.”

SOURCES: Laws, 1996, ch. 513, § 1, eff from and after July 1, 1996.

§ 97-44-3. Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings ascribed herein, unless the context clearly requires otherwise:

(a) “Streetgang” or “gang” or “organized gang” or “criminal streetgang” means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of three (3) or more persons with an established hierarchy that, through its membership or through the agency of any member, engages in felonious criminal activity.

For purposes of this chapter, it shall not be necessary to show that a particular conspiracy, combination or conjoining of persons possesses, acknowledges or is known by any common name, insignia, flag, means of recognition, secret signal or code, creed, belief, structure, leadership or command structure, method of operation or criminal enterprise, concentration or specialty, membership, age or other qualifications, initiation rites, geographical or territorial situs or boundary or location, or other unifying mark, manner, protocol or method of expressing or indicating membership when the conspiracy’s existence, in law or in fact, can be demonstrated by a preponderance of the competent evidence. However, any evidence reasonably tending to show or demonstrate, in law or in fact, the existence of or membership in any conspiracy, confederation or other association described herein, or probative of the existence of or membership in any such association, shall be admissible in any action or proceeding brought under this chapter.

(b) "Public authority" means the state and political subdivisions as defined in Section 11-46-1, Mississippi Code of 1972.

(c) "Streetgang member" or "gang member" means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a gang-related criminal activity, whether in a preparatory, executory or cover-up phase of any activity, or who knowingly performs, aids or abets any such activity.

(d) "Streetgang related" or "gang-related" means any criminal activity, enterprise, pursuit or undertaking directed by, ordered by, authorized by, consented to, agreed to, requested by, acquiesced in, or ratified by any gang leader, officer or governing or policymaking person or authority, or by any agent, representative or deputy of any such officer, person or authority:

(i) With intent to increase the gang's size, membership, prestige, dominance or control in any geographical area; or

(ii) With intent to exact revenge or retribution for the gang or any member of the gang; or

(iii) With intent to provide the gang with any advantage in, or any control or dominance over, any criminal market sector, including but not limited to the unlawful manufacture, delivery, possession or sale of controlled substances; arson; traffic in stolen property or stolen credit cards; traffic in prostitution, obscenity or pornography; or that involves robbery, armed robbery, burglary or larceny; or

(iv) With intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or

(v) With intent to otherwise, directly or indirectly, cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence or membership.

SOURCES: Laws, 1996, ch. 513, § 2, eff from and after July 1, 1996.

§ 97-44-5. Cause of action.

(1) A civil cause of action is hereby created in favor of any public authority expending money, allocating or reallocating police, firefighting, emergency or other personnel or resources, or otherwise incurring any loss, deprivation or injury, or sustaining any damage, impairment or harm whatsoever, proximately caused by any criminal activity.

(2) The cause of action created by this chapter shall lie against:

(a) Any streetgang in whose name, for whose benefit, on whose behalf or under whose direction the act was committed; and

(b) Any gang officer or director who causes, orders, suggests, authorizes, consents to, agrees to, requests, acquiesces in or ratifies any such act; and

(c) Any gang member who, in the furtherance of or in connection with, any gang-related activity, commits any such act; and

(d) Any gang officer, director, leader or member.

(3) The cause of action authorized by this chapter shall be brought by the Attorney General, the district attorney or attorneys, or the county attorney, or by his or their respective designees. This cause of action shall be in addition to any other civil or criminal proceeding authorized by the laws of this state or by federal law, and shall not be construed as requiring the prosecutor to elect a civil, rather than criminal, remedy, or as replacing any other cause of action. Liability of the gang, its officers, directors, leaders and members shall be joint and several subject only to the apportionment and allocation of punitive damage authorized under Section 97-44-13.

SOURCES: Laws, 1996, ch. 513, § 3, eff from and after July 1, 1996.

RESEARCH REFERENCES

ALR. Apportionment of liability between landowners and assailants for injuries to crime victims. 54 A.L.R.5th 379.

§ 97-44-7. Filing of complaint.

(1) An action may be commenced under this chapter by the filing of a complaint as in civil cases.

(2) A complaint filed under this chapter, and all other ancillary or collateral matters arising therefrom, including matter relating to discovery, motions, trial and the perfection or execution of judgments shall be subject to the Rules of Civil Procedure, except as may be otherwise provided in this chapter, or except as the court may otherwise order upon motion of the prosecutor in matters relating to immunity or the physical safety of witnesses.

(3) The complaint shall name the Attorney General or his designee, if a complainant, each complaining district attorney or his designee, each complaining county attorney, and the public authority represented by him or by them.

(4) The complaint shall also name as defendants the gang, all known gang officers, and any gang members specifically identified or alleged in the complaint as having participated in a gang-related criminal activity. The complaint may also name, as a class of defendants, all unknown gang members.

(5) When, at any point prior to trial, other specific gang officers or members become known, the complaint may be amended to include any such person as a named defendant.

(6) Any individual who suffers any injury under the provisions of this chapter shall have the right to file a civil action in his or her name.

SOURCES: Laws, 1996, ch. 513, § 4, eff from and after July 1, 1996.

§ 97-44-9. Venue.

(1) In an action brought under this chapter, venue shall lie in any county

where an act charged in the complaint as part of a gang-related criminal activity was committed.

(2) It shall not be necessary for all offenses necessary to establishing a criminal activity to have occurred in any one county where the district attorneys or county attorneys of several counties, or their designees, each complaining of any offense, elected to join in a complaint. In such instance, it shall be sufficient that the complaint, taken as a whole, alleges a gang-related criminal activity, and each count of any such joint complaint shall be considered as cumulative to other counts for purposes of alleging or demonstrating such an activity.

(3) Where an activity is alleged to have been committed or to have occurred in more than one county, the district attorney or county attorney of each such county, or their designees, may join their several causes of action in a single complaint, which may be filed in any such county agreed to by or among them, but no such joinder shall be had without the consent of the district attorney or county attorney having jurisdiction over each offense alleged as part of the activity.

SOURCES: Laws, 1996, ch. 513, § 5, eff from and after July 1, 1996.

§ 97-44-11. Service of process.

(1) All streetgangs and streetgang members engaged in a gang-related criminal activity within this state impliedly consent to service of process upon them as set forth in this section, or as may be otherwise authorized by the Rules of Civil Procedure.

(2) Service of process upon a streetgang may be had by leaving a copy of the complaint and summons directed to any officer of such gang, commanding the gang to appear and answer the complaint or otherwise plead at a time and place certain:

- (a) With any gang officer; or
- (b) With any individual member of the gang simultaneously named therein; or
- (c) In the manner provided for service by publication in a civil action; or
- (d) With any parent, legal guardian or legal custodian of any persons charged with a gang-related offense when any person sued civilly under this chapter is under seventeen (17) years of age and is also charged criminally or as a delinquent minor; or
- (e) With the director of any agency or department of this state who is the legal guardian, guardianship administrator or custodian of any person sued under this chapter; or
- (f) With the probation or parole officer of any person sued under this chapter; or
- (g) With such other person or agent as the court may, upon petition of the district attorney or his designee or the county attorney, authorize as appropriate and reasonable under all of the circumstances.

(3) If after being summoned a streetgang does not appear, the court shall enter an answer for the streetgang neither affirming nor denying the allegations of the complaint but demanding strict proof thereof, and proceed to trial and judgment without further process.

(4) When any person is named as a defendant streetgang member in any complaint, or subsequently becomes known and is added or joined as a named defendant, service of process may be had as authorized or provided for in the Rules of Civil Procedure for service of process in a civil case.

SOURCES: Laws, 1996, ch. 513, § 6, eff from and after July 1, 1996.

§ 97-44-13. Punitive damages.

(1) In any action brought under this chapter, and upon the verified application of the district attorney or his designee or the county attorney, the circuit court may at any time enter such restraining orders, injunctions or other prohibitions, or order such other relief as it deems proper, including but not limited to ordering any person to divest himself of any involvement or interest, direct or indirect, in any illegal streetgang activity and imposing other reasonable restrictions on the future illegal activities of any defendant.

(2) A final judgment in favor of a public authority under this chapter shall entitle it to recover compensatory damages for all damages, losses, impairments or other harm proximately caused, together with the costs of the suit and reasonable attorney's fees. Punitive damages may be assessed against any streetgang, against any streetgang officer or member found guilty of actual participation in, or to be legally accountable for, a criminal activity under this chapter. One hundred percent (100%) of punitive damages awarded will be expended by the public authority to implement preventative programs for juveniles or to fund existing programs.

SOURCES: Laws, 1996, ch. 513, § 7, eff from and after July 1, 1996.

§ 97-44-15. Injunction, abatement, damages, or other remedies for unlawful use of private building by criminal street gang.

(1) Every private building or place used by members of a criminal street gang for the commission of illegal activity is a nuisance and may be the subject of an injunction or cause of action for damages or for abatement of the nuisance as provided for in this chapter.

(2) Any person may file a petition for injunctive relief with the appropriate court seeking eviction from or closure of any premises used for commission of illegal activity by a criminal street gang. Upon clear and convincing proof by the plaintiff that the premises are being used by members of a criminal street gang for the commission of illegal activity, the court may order the owner of record or the lessee of the premises to remove or evict the persons from the premises and order the premises sealed, prohibit further use of the premises,

or enter such order as may be necessary to prohibit the premises from being used for the commission of illegal activity by a gang and to abate the nuisance.

(3) Any action for injunction, damages, abatement, or other relief filed pursuant to this section shall proceed according to the provisions of the Rules of Civil Procedure.

(4) The court shall not issue an injunction or assess a civil penalty against any owner of record or the lessee of the private building or place, unless there is a showing by clear and convincing proof that the person knew or should have known or had been notified of the use of the premises by a gang for illegal activity. Any injunctive relief other than that specifically authorized in subsection (6) of this section shall be limited to that which is necessary to protect the health and safety of the residents or the public or that which is necessary to prevent further illegal activity.

(5) A petition for injunction shall not be filed until thirty (30) days after notice of the unlawful use or criminal conduct has been provided to the owner of record or the lessee, by mail, return receipt requested, postage prepaid, to the owner's last known address, or by personal service. If the premises are abandoned or closed, or if the whereabouts of the owner of record or lessee is unknown, all notices, process, pleadings, and orders required to be delivered or served under this section may be attached to a door of the premises and mailed, return receipt requested, to the last address which is reflected on the ad valorem tax receipt on file in the office of the tax collector of the county where the property is located, and this shall have the same effect as personal service on the owner of record or lessee. No injunctive relief authorized by subsection (6) of this section shall be issued in the form of a temporary restraining order.

(6) If the court has previously issued injunctive relief ordering the owner of record or the lessee of the premises to close the premises or otherwise to keep the premises from being used for the commission by a gang of illegal activity, the court, upon proof of failure to comply with the terms of the injunction and that the premises continue to be used by a gang for the commission of illegal activity, may do one or more of the following:

(a) Order the premises demolished and cleared at the cost of the owner.

(b) Order the premises sold at public auction and the proceeds from the sale, minus the costs of the sale and the expenses of bringing the action, delivered to the owner.

(c) Order the defendant to pay damages to persons or local governing authorities who have been damaged or injured or have incurred expense as a result of the defendant's failure to take reasonable steps or precautions to comply with the terms of any injunction issued pursuant to the provisions of this chapter.

(d) Assess a civil penalty not to exceed Five Thousand Dollars (\$5,000.00) against the defendant based upon the severity of the nuisance and its duration. In establishing the amount of any civil penalty, the court shall consider all of the following factors:

(i) The actions taken by the defendant to mitigate or correct the problem at the private building or place or the reasons why no such action was taken.

(ii) Any failure of the plaintiff to provide notice as required by subsection (5) of this section.

(iii) Any other factor deemed by the court to be relevant.

(7) No nonprofit, fraternal or charitable organization which is conducting its affairs with ordinary care or skill nor any governmental entity shall be enjoined pursuant to the provisions of this chapter.

(8) Nothing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law.

SOURCES: Laws, 2001, ch. 525, § 1, eff from and after July 1, 2001.

§ 97-44-17. Forfeiture of firearms, ammunition, and dangerous weapons used by criminal street gangs; disposition of property seized; procedure.

(1) Any firearm, ammunition to be used in a firearm, or dangerous weapon in the possession of a member of a criminal street gang may be seized by any law enforcement agency or peace officer when the law enforcement agency or peace officer has probable cause to believe that the firearm, ammunition to be used in a firearm, or dangerous weapon is or has been used by a gang in the commission of illegal activity.

(2) The district attorney or an attorney for the seizing agency shall initiate, in a civil action, forfeiture proceedings by petition in the circuit courts as to any property seized pursuant to the provisions of this section within thirty (30) days of seizure. The district attorney shall provide notice of the filing of the petition to those members of the gang who become known to law enforcement officials as a result of the seizure and any related arrests, and to any person determined by law enforcement officials to be the owner of any of the property involved. After initial notice of the filing of the petition, the court shall assure that all persons so notified continue to receive notice of all subsequent proceedings related to the property.

(3) Any person who claims an interest in any seized property shall, in order to assert a claim that the property should not be forfeited, file a notice with the court, without necessity of paying costs, of the intent to establish either of the following:

(a) That the persons asserting the claim did not know of, could not have known of, or had no reason to believe in its use by a gang in the commission of illegal activity; or

(b) That the law enforcement officer lacked the requisite reasonable belief that the property was or had been used by a gang in the commission of illegal activity.

(4) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this section; however, for good cause shown, on motion by the district attorney, the court may stay civil forfeiture proceedings during the criminal trial for related criminal indictment or information alleging a violation of this section. Such a stay shall not be available pending an appeal.

(5) Except as otherwise provided by this section, all proceedings hereunder shall be governed by the provisions of the Mississippi Rules of Civil Procedure.

(6) The issue shall be determined by the court alone, and the hearing on the claim shall be held within sixty (60) days after service of the petition unless continued for good cause. The district attorney shall have the burden of showing by clear and convincing proof that forfeiture of the property is appropriate.

(7) Any person who asserts a successful claim in accordance with subsection (3) of this section shall be awarded the seized property by the court, together with costs of filing such action. All property as to which no claim is filed, or as to which no successful claim is made, may be destroyed, sold at a public sale, retained for use by the seizing agency or transferred without charge to any law enforcement agency of the state for use by it. Property that is sold shall be sold by the circuit court at a public auction for cash to the highest and best bidder after advertising the sale for at least once each week for three (3) consecutive weeks, the last notice to appear not more than ten (10) days nor less than five (5) days prior to such sale in a newspaper having a general circulation in the county. Such notice shall contain a description of the property to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the property present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale, less any expenses of concluding the sale, shall be deposited in the seizing agency's general fund to be used only for approved law enforcement activity affecting the agency's efforts to combat gang activities.

(8) Any action under the provisions of this section may be consolidated with any other action or proceedings pursuant to this section relating to the same property on motion of the district attorney.

SOURCES: Laws, 2001, ch. 525, § 2, eff from and after July 1, 2001.

§ 97-44-19. Penalties for criminal street gang activity.

(1) Any person who intentionally directs, participates, conducts, furthers, or assists in the commission of illegal gang activity shall be punished by imprisonment for not less than one (1) year nor more than one-half (½) of the maximum term of imprisonment provided for an underlying offense and may be fined an amount not to exceed Ten Thousand Dollars (\$10,000.00). Any sentence of imprisonment imposed pursuant to this section shall be in addition and consecutive to any sentence imposed for the underlying offense.

(2) Any person who is convicted of a felony or an attempted felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in the affairs of a criminal gang, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be imprisoned for not less than one (1) year

nor more than one-half ($\frac{1}{2}$) of the maximum term of imprisonment provided for that offense.

(3) Any person who is convicted of an offense other than a felony which is committed for the benefit of, at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct or enterprise by gang members, shall, in addition and consecutive to the penalty provided for that offense, be imprisoned for an additional period of not more than one (1) year.

(4) Any person who knowingly and willfully sells or buys goods or performs services for a criminal street gang in furtherance of illegal activity shall be punished by imprisonment for not less than one (1) year nor more than one-half ($\frac{1}{2}$) of the maximum term of imprisonment provided for the underlying offense and may be fined an amount not to exceed Ten Thousand Dollars (\$10,000.00).

(5) The court may elect to suspend all or a part of any additional mandatory punishment or enhanced punishment provided for in this chapter to impose alternative punishment in the form of properly supervised community service or placement in an appropriate adolescent offender program, if available, only in an unusual case where the interest of justice would best be served, and if the court specifies on the record and enters into the minutes the circumstances and reasons that the interests of justice would best be served by that suspension of enhanced punishment.

SOURCES: Laws, 2001, ch. 525, § 3, eff from and after July 1, 2001.

CHAPTER 45

Computer Crimes and Identity Theft

SEC.

- 97-45-1. Definitions.
- 97-45-2. Identity theft; definitions; investigative authority of Attorney General; form of subpoena; enforcement and penal provisions; refusal to produce documents as requested by subpoena; confidentiality of information.
- 97-45-3. Computer fraud; penalties.
- 97-45-5. Offense against computer users; penalties.
- 97-45-7. Offense against computer equipment; penalties.
- 97-45-9. Offense against intellectual property; penalties.
- 97-45-11. Venue.
- 97-45-13. Effect on other offenses.
- 97-45-15. "Cyberstalking"; penalties.
- 97-45-17. Posting of messages through electronic media for purpose of causing injury to any person; penalties.
- 97-45-19. Identity theft.
- 97-45-21. Jurisdiction for bringing criminal action.
- 97-45-23. Investigations and prosecutions.
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- 97-45-27. Identity theft; victim authorized to expunge record of false charges accrued on account of activities of the perpetrator.
- 97-45-29. Identity theft; Attorney General authorized to issue "Identity Theft Passports" verifying that expunction order has been entered or police report has been filed; access to identity theft information.
- 97-45-31. Using scanning device or reencoder to capture encoded information from magnetic strip on credit, debit or other payment card; definitions; penalty.

The publisher is directed to amend the chapter heading of Title 97, Chapter 45, Mississippi Code of 1972, so as to refer to "Computer Crimes and Identity Theft."

Editor's Note — Laws, 2004, ch. 526, § 9, provides:

"SECTION 9. The publisher is directed to amend the chapter heading of Title 97, Chapter 45, Mississippi Code of 1972, so as to refer to 'Computer Crimes and Identity Theft.'" Prior to the amendment, the chapter heading formerly read: "Computer Crimes."

§ 97-45-1. Definitions.

For the purposes of this chapter, the following words shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Access" means to program, to execute programs on, to communicate with, store data in, retrieve data from or otherwise make use of any resources, including data or programs, of a computer, computer system or computer network.

(b) "Computer" includes an electronic, magnetic, optical or other high-speed data processing device or system performing logical arithmetic and storage functions and includes any property, data storage facility or communications facility directly related to or operating in conjunction with such device or system. "Computer" shall not include an automated typewriter or typesetter, a machine designed solely for word processing which contains no database intelligence or a portable hand-held calculator nor shall "computer" include any other device which contains components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended unless the thus controlled device is a processor of data or is a storage of intelligence in which case it too is included.

(c) "Computer network" means a set of related, remotely connected devices and communication facilities including at least one (1) computer system with the capability to transmit data through communication facilities.

(d) "Computer program" means an ordered set of data representing coded instructions or statements that when executed by a computer cause the computer to process data.

(e) "Computer software" means a set of computer programs, procedures and associated documentation concerned with operation of a computer system.

(f) "Computer system" means a set of functionally related, connected or unconnected, computer equipment, devices or computer software.

(g) "Computer services" means providing access to or service or data from a computer, a computer system or a computer network and includes the actual data processing.

(h) "Credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety.

(i) "Loss or damage" includes any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred or other consequential damages incurred because of interruption of service.

(j) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic or other impulses.

(k) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric or photo-optical system.

(l) "Electronic mail" means the transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder or other electronic means sent to a

person identified by a unique address or address number and received by that person.

(m) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(n) "Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card as defined in Section 97-19-9(b), Mississippi Code of 1972, or marketable security.

(o) "Financial transaction device" means any of the following:

(i) An electronic funds transfer card.

(ii) A credit card.

(iii) A debit card.

(iv) A point-of-sale card.

(v) Any instrument, device, card, plate, code, account number, personal identification number, or a record or copy of a code, account number, or personal identification number or other means of access to a credit account or deposit account, or a driver's license or state identification card used to access a proprietary account, other than access originated solely by a paper instrument, that can be used alone or in conjunction with another access device, for any of the following purposes.

1. Obtaining money, cash refund or credit account credit, goods, services or any other thing of value.

2. Certifying or guaranteeing to a person or business the availability to the device holder of funds on deposit to honor a draft or check payable to the order of that person or business.

3. Providing the device holder access to a deposit account for the purpose of making deposits, withdrawing funds, transferring funds between deposit accounts, obtaining information pertaining to a deposit account or making an electronic funds transfer.

(p) "Intellectual property" includes data, computer programs, computer software, trade secrets, copyrighted materials and confidential or proprietary information in any form or medium when such is stored in, produced by or intended for use or storage with or in a computer, a computer system or a computer network.

(q) "Internet" means that term as defined in Section 230 of Title II of the Communications Act of 1934, Chapter 652, 110 Stat. 137, 47 USCS 230.

(r) "Medical records" includes, but is not limited to, medical and mental health histories, reports, summaries, diagnoses and prognoses, treatment and medication information, notes, entries, and x-rays and other imaging records.

(s) "Personal identity information" means any of the following information of another person:

(i) A social security number.

(ii) A driver's license number or state personal identification card number.

(iii) Employment information.

(iv) Information regarding any financial account held by another person including, but not limited to, any of the following:

1. A savings or checking account number.
2. A financial transaction device account number.
3. A stock or other security certificate or account number.
4. A personal information number for an account described in items 1 through 4.

(t) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate or otherwise communicate information, whether truthful or untruthful, about the victim.

(u) "Property" means property as defined in Section 1-3-45, Mississippi Code of 1972, and shall specifically include, but not be limited to, financial instruments, electronically stored or produced data and computer programs, whether in machine readable or human readable form.

(v) "Proper means" includes:

(i) Discovery by independent invention;

(ii) Discovery by "reverse engineering"; that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must be by lawful means;

(iii) Discovery under license or authority of the owner;

(iv) Observation of the property in public use or on public display; or

(v) Discovery in published literature.

(w) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

(i) Following or appearing within sight of the victim.

(ii) Approaching or confronting the victim in a public place or on private property.

(iii) Appearing at the victim's workplace or residence.

(iv) Entering onto or remaining on property owned, leased or occupied by the victim.

(v) Contacting the victim by telephone.

(vi) Sending mail or electronic communications to the victim through the use of any medium, including the Internet or a computer, computer program, computer system or computer network.

(vii) Placing an object on, or delivering or having delivered an object to, property owned, leased or occupied by the victim.

(x) "Use" means to make use of, to convert to one's service, to avail oneself of or to employ. In the context of this act, "use" includes to instruct, communicate with, store data in or retrieve data from, or otherwise utilize the logical arithmetic or memory functions of a computer.

(y) "Victim" means the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family.

SOURCES: Laws, 1985, ch. 319, § 1; Laws, 2003, ch. 562, § 4, eff from and after July 1, 2003.

RESEARCH REFERENCES

ALR. Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Computer fraud. 70 A.L.R.5th 647.

Am Jur. 50 Am. Jur. 2d, Larceny § 67.

14 Am. Jur. Proof of Facts 2d 173, Admissibility of Computerized Business Records.

41 Am. Jur. Proof of Facts 2d 517, Abandonment of Trade Secret.

33 Am. Jur. Trials 1, Defense of Computer Crime.

CJS. 52B C.J.S. Larceny § 13.

§ 97-45-2. Identity theft; definitions; investigative authority of Attorney General; form of subpoena; enforcement and penal provisions; refusal to produce documents as requested by subpoena; confidentiality of information.

(1) For the purposes of this chapter, "identity theft" includes crimes chargeable under the following provisions of law:

(a) Section 97-9-79, which relates to false information.

(b) Section 97-19-83, which relates to fraud by mail or other means of communication.

(c) Section 97-19-85, which relates to the fraudulent use of identity social security number, credit card or debit card number or other identifying information.

(d) Section 97-45-19, which relates to obtaining personal identity information of another person without authorization.

(2)(a) In conducting identity theft investigations, the Attorney General shall have the authority to issue and serve subpoenas to any person in control of any designated documents for the production of such documents, including, but not limited to, writings, drawings, graphs, charts, photographs, phono-records and other data compilations from which information can be obtained, or translated through detection devices into reasonably usable form. Such subpoenas shall require the named person, his agent or attorney, to appear and deliver the designated documents to a location in the county of his residence unless the court for good cause shown directs that the subpoena be issued for the person to deliver such documents to a location outside of the county of his residence. Mere convenience of the Attorney General shall not be considered good cause. The Attorney General or his designee shall have the authority to inspect and copy such documents. Such subpoenas shall be issued only upon the ex parte and in camera application of the Attorney General to the circuit or chancery court of the county of residence of the person in control of the documents or the circuit or chancery

court of the county where the person in control of the documents may be found, and only upon a showing that the documents sought are relevant to a criminal investigation under this chapter or may lead to the discovery of such relevant evidence. Thereafter said court shall have jurisdiction to enforce or quash such subpoenas and to enter appropriate orders thereon, and nothing contained in this section shall affect the right of a person to assert a claim that the information sought is privileged by law.

(b) A subpoena issued pursuant to this subsection shall be in substantially the following form:

SUBPOENA TO PRODUCE DOCUMENTS

PURSUANT TO AN INVESTIGATION BY THE ATTORNEY GENERAL TO:

YOU ARE HEREBY COMMANDED to appear before the Attorney General of the State of Mississippi or his designated staff attorney at the place, date and time specified below in an investigation being conducted by the Attorney General pursuant to Section _____, Mississippi Code of 1972:

Place _____ Date and Time _____

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s) _____.

You are advised that the _____ Court of the _____ Judicial District of _____ County, Mississippi, has approved the ex parte and in camera application of the Attorney General to issue this subpoena, and jurisdiction to enforce and/or quash the subpoena and to enter appropriate orders thereon is statutorily vested in the said court; enforcement and penal provisions applicable to an Attorney General's investigation include those set forth in Section _____, Mississippi Code of 1972; and disclosure of testimony and/or records coming into possession of the Attorney General pursuant to this subpoena shall be limited by and subject to the provisions of said section (for informational purposes, these cited statutes are reproduced on the reverse side of this subpoena).

You may wish to consult an attorney in regard to this subpoena. You have certain state and federal constitutional rights, including your protection against self-incrimination and unreasonable search and seizure which this subpoena may affect.

ISSUED BY AND UNDER SEAL OF THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, this the _____ day of _____, 20____.

(SEAL)_____

(c) Following service of any subpoena, pursuant to the provisions of this subsection, a record of the return shall be made and kept by the Attorney General and subject only to such disclosure as may be authorized pursuant to the provisions of this section.

(3) Enforcement and penal provisions applicable to an investigation under this section shall include the following:

(a) If a person who has been served with a subpoena, which has been issued and served upon him in accordance with the provisions of this section, shall fail to deliver or have delivered the designated documents at the time and place required in the subpoena, on application of the Attorney General the circuit or chancery court having approved the issuance of the subpoena may issue an attachment for such person, returnable immediately, or at such time and place as the court may direct. Bond may be required and fine imposed and proceedings had thereon as in the case of a subpoenaed witness who fails to appear in circuit or chancery court.

(b) Every person who shall knowingly and willfully obstruct, interfere with or impede an investigation under this section by concealing or destroying any documents, papers or other tangible evidence which are relevant to an investigation under this section shall be guilty of a felony and, upon conviction, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(c) Every person who shall knowingly and willfully endeavor, by means of bribery, force or intimidation, to obstruct, delay or prevent the communication of information to any agent or employee of the Office of the Attorney General or who injures another person for the purpose of preventing the communication of such information or an account of the giving of such information relevant to an investigation under this section shall be guilty of a felony and, upon conviction, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(d) The provisions of paragraphs (a), (b) and (c) of this subsection shall not prohibit the enforcement of, or prosecution under, any other statutes of this state.

(4)(a) If any person shall refuse, or is likely to refuse, on the basis of his privilege against self-incrimination, to produce the designated documents as requested by a subpoena issued under this section or issued by a court, the Attorney General may request the court, ex parte and in camera, to issue an order requiring such person to produce the documents information which he refuses to give or provide on the basis of his privilege against self-incrimination. The Attorney General may request said order under this subsection when, in his judgment:

(i) The documents sought from such individual may be necessary to the public interest; and

(ii) Such individual has refused or is likely to refuse to produce the designated document on the basis of his privilege against self-incrimination.

Following such request, an order shall issue in accordance with this section requiring such person to produce the documents which he refuses to produce on the basis of his privilege against self-incrimination.

(b) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to produce documents, and the court issues to the witness

an order under paragraph (a) of this subsection, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination, but no documents or information compelled under the aforesaid order, or any information directly or indirectly derived from such documents may be used against the witness in any criminal proceeding, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(5) Documents in the possession of the Attorney General gathered pursuant to the provisions of this section and subpoenas issued by him shall be maintained in confidential files with access limited to prosecutorial and other law enforcement investigative personnel on a “need to know” basis and shall be exempt from the provisions of the Mississippi Public Records Act of 1983, except that upon the filing of an indictment or information, or upon the filing of an action for recovery of property, funds or fines, such documents shall be subject to such disclosure as may be required pursuant to the applicable statutes or court rules governing the trial of any such judicial proceeding.

(6) No person, including the Attorney General, a member of his staff, prosecuting attorney, law enforcement officer, witness, court reporter, attorney or other person, shall disclose to an unauthorized person documents, including subpoenas issued and served, gathered by the Attorney General pursuant to the provisions of this section, except that upon the filing of an indictment or information, or upon the filing of an action for recovery of property, funds or fines, or in other legal proceedings, such documents shall be subject to such disclosure as may be required pursuant to applicable statutes and court rules governing the trial of any such judicial proceeding. In event of an unauthorized disclosure of any such documents gathered by the Attorney General pursuant to the provisions of this section, the person making any such unauthorized disclosure shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or imprisonment of not more than six (6) months, or by both such fine and imprisonment.

(7) The powers of the Attorney General under this section shall not diminish the powers of local authorities to investigate or prosecute any type of identity theft crime or any other criminal conduct within their respective jurisdictions, and the provisions of this section shall be in addition to the powers and authority previously granted the Attorney General by common, constitutional, statutory or case law.

SOURCES: Laws, 2004, ch. 526, § 6, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the next-to-last sentence of (2)(a) by substituting “this chapter” for “this act.”

§ 97-45-3. Computer fraud; penalties.

(1) Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network or any part thereof with the intent to:

(a) Defraud;

(b) Obtain money, property or services by means of false or fraudulent conduct, practices or representations; or through the false or fraudulent alteration, deletion or insertion of programs or data; or

(c) Insert or attach or knowingly create the opportunity for an unknowing and unwanted insertion or attachment of a set of instructions or a computer program into a computer program, computer, computer system, or computer network, that is intended to acquire, alter, damage, delete, disrupt, or destroy property or otherwise use the services of a computer program, computer, computer system or computer network.

(2) Whoever commits the offense of computer fraud shall be punished, upon conviction, by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment. However, when the damage or loss or attempted damage or loss amounts to a value of Five Hundred Dollars (\$500.00) or more, the offender may be punished, upon conviction, by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

SOURCES: Laws, 1985, ch. 319, § 2; Laws, 2003, ch. 562, § 5, eff from and after July 1, 2003.

Cross References — White-collar crime investigations, see § 7-5-59.

RESEARCH REFERENCES

ALR. Computer programs as property subject to theft. 18 A.L.R.3d 1121.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

What is computer "trade secret" under state law. 53 A.L.R.4th 1046.

Propriety of civil or criminal forfeiture of computer hardware or software. 39 A.L.R.5th 87.

Computer fraud. 70 A.L.R.5th 647.

Am Jur. 32 Am. Jur. 2d, False Pretenses § 22.

50 Am. Jur. 2d, Larceny § 67.

14 Am. Jur. Proof of Facts 2d 173, Admissibility of Computerized Business Records.

33 Am. Jur. Trials 1, Defense of Computer Crime.

CJS. 35 C.J.S. False Pretenses § 30.

52B C.J.S. Larceny § 13.

§ 97-45-5. Offense against computer users; penalties.

(1) An offense against computer users is the intentional:

(a) Denial to an authorized user, without consent, of the full and effective use of or access to a computer, a computer system, a computer network or computer services; or

(b) Use or disclosure to another, without consent, of the numbers, codes, passwords or other means of access to a computer, a computer system, a computer network or computer services.

(2) Whoever commits an offense against computer users shall be punished, upon conviction, by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment. However, when the damage or loss amounts to a value of One Hundred Dollars (\$100.00) or more, the offender may be punished, upon conviction, by a fine of not more than Ten Thousand Dollars (\$10,000.00), or imprisonment for not more than five (5) years, or by both such fine and imprisonment.

SOURCES: Laws, 1985, ch. 319, § 3, eff from and after July 1, 1985.

RESEARCH REFERENCES

ALR. Computer programs as property subject to theft. 18 A.L.R.3d 1121.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

What is computer "trade secret" under state law. 53 A.L.R.4th 1046.

Am Jur. 50 Am. Jur. 2d, Larceny § 67.

14 Am. Jur. Proof of Facts 2d 173, Admissibility of Computerized Business Records.

33 Am. Jur. Trials 1, Defense of Computer Crime.

CJS. 52B C.J.S. Larceny § 13.

§ 97-45-7. Offense against computer equipment; penalties.

(1) An offense against computer equipment or supplies is the intentional modification or destruction, without consent, of computer equipment or supplies used or intended to be used in a computer, computer system or computer network.

(2) Whoever commits an offense against computer equipment or supplies shall be punished, upon conviction, by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six months or both such fine and imprisonment. However, when the damage or loss amounts to a value of One Hundred Dollars (\$100.00) or more, the offender may be punished, upon conviction, by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

SOURCES: Laws, 1985, ch. 319, § 4, eff from and after July 1, 1985.

RESEARCH REFERENCES

ALR. Computer programs as property subject to theft. 18 A.L.R.3d 1121.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

What is computer "trade secret" under state law. 53 A.L.R.4th 1046.

Am Jur. 18 Am. Jur. 2d, Conversion § 43.

50 Am. Jur. 2d, Larceny § 67.

14 Am. Jur. Proof of Facts 2d 173, Admissibility of Computerized Business Records.

33 Am. Jur. Trials 1, Defense of Computer Crime.

CJS. 52B C.J.S. Larceny § 13.

§ 97-45-9. Offense against intellectual property; penalties.

(1) An offense against intellectual property is the intentional:

(a) Destruction, insertion or modification, without consent, of intellectual property; or

(b) Disclosure, use, copying, taking or accessing, without consent, of intellectual property.

(2) Whoever commits an offense against intellectual property shall be punished, upon conviction, by a fine of not more than One Thousand Dollars (\$1,000.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment. However, when the damage or loss amounts to a value of One Hundred Dollars (\$100.00) or more, the offender may be punished, upon conviction, by a fine of not more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not more than five (5) years, or by both such fine and imprisonment.

(3) The provisions of this section shall not apply to the disclosure, use, copying, taking, or accessing by proper means as defined in this chapter.

SOURCES: Laws, 1985, ch. 319, § 5, eff from and after July 1, 1985.

RESEARCH REFERENCES

ALR. Computer programs as property subject to theft. 18 A.L.R.3d 1121.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Disclosure or use of computer application software as misappropriation of trade secret. 30 A.L.R.4th 1250.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

What is computer "trade secret" under state law. 53 A.L.R.4th 1046.

Copyright protection of computer programs. 180 A.L.R. Fed. 1.

Am Jur. 50 Am. Jur. 2d, Larceny § 67.

5A Am. Jur. Legal Forms 2d, Copyright and Literary and Artistic Property § 72:24 (notice of copyright — including computer storage and retrieval).

14 Am. Jur. Proof of Facts 2d 173, Admissibility of Computerized Business Records.

41 Am. Jur. Proof of Facts 2d 517, Abandonment of Trade Secret.

33 Am. Jur. Trials 1, Defense of Computer Crime.

CJS. 52B C.J.S. Larceny § 13.

§ 97-45-11. Venue.

For the purposes of venue under the provisions of this chapter, any violation of this chapter shall be considered to have been committed:

(a) In any county in which any act was performed in furtherance of any transaction violating this chapter; and

(b) In any county from which, to which or through which any access to a computer, computer system or computer network was made, whether by wire, electromagnetic waves, microwaves or any other means of communication.

SOURCES: Laws, 1985, ch. 319, § 6, eff from and after July 1, 1985.

RESEARCH REFERENCES

ALR. Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 A.L.R.3d 988.

Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

Criminal liability for misappropriation of trade secret. 84 A.L.R.3d 967.

Venue in rape cases where crime is committed partly in one place and partly in another. 100 A.L.R.3d 1174.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems. 51 A.L.R.4th 971.

Am Jur. 21A Am. Jur. 2d, Criminal Law §§ 503 et seq.

§ 97-45-13. Effect on other offenses.

The criminal offenses created by this chapter shall not be deemed to supersede, or repeal, any other criminal offense.

SOURCES: Laws, 1985, ch. 319, § 7, eff from and after July 1, 1985.

§ 97-45-15. “Cyberstalking”; penalties.

(1) It is unlawful for a person to:

(a) Use in electronic mail or electronic communication any words or language threatening to inflict bodily harm to any person or to that person’s child, sibling, spouse or dependent, or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person.

(b) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of threatening, terrifying or harassing any person.

(c) Electronically mail or electronically communicate to another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of the person electronically mailed or of any member of the person’s family or household with the intent to threaten, terrify or harass.

(d) Knowingly permit an electronic communication device under the person’s control to be used for any purpose prohibited by this section.

(2) Whoever commits the offense of cyberstalking shall be punished, upon conviction:

(a) Except as provided herein, the person is guilty of a felony punishable by imprisonment for not more than two (2) years or a fine of not more than Five Thousand Dollars (\$5,000.00), or both.

(b) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than five (5) years or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both:

(i) The offense is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.

(ii) The offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release or a condition of release on bond pending appeal.

(iii) The offense results in a credible threat being communicated to the victim, a member of the victim's family, or another individual living in the same household as the victim.

(iv) The person has been previously convicted of violating this section or a substantially similar law of another state, a political subdivision of another state, or of the United States.

(3) This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest or assembly.

SOURCES: Laws, 2003, ch. 562, § 6, eff from and after July 1, 2003.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

"SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable."

Cross References — Exploitation of children, generally, including by means of computer, see §§ 97-5-31 et seq.

§ 97-45-17. Posting of messages through electronic media for purpose of causing injury to any person; penalties.

(1) A person shall not post a message for the purpose of causing injury to any person through the use of any medium of communication, including the Internet or a computer, computer program, computer system or computer network, or other electronic medium of communication without the victim's consent, for the purpose of causing injury to any person.

(2) A person who violates this section, upon conviction, shall be guilty of a felony punishable by imprisonment for not more than five (5) years or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Laws, 2003, ch. 562, § 7, eff from and after July 1, 2003.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

"SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable."

§ 97-45-19. Identity theft.

(1) A person shall not obtain or attempt to obtain personal identity information of another person with the intent to unlawfully use that information for any of the following purposes without that person's authorization:

(a) To obtain financial credit.

(b) To purchase or otherwise obtain or lease any real or personal property.

(c) To obtain employment.

(d) To obtain access to medical records or information contained in medical records.

(e) To commit any illegal act.

(2)(a) A person who violates this section is guilty of a felony punishable by imprisonment for not less than two (2) nor more than fifteen (15) years or a fine of not more than Ten Thousand Dollars (\$10,000.00), or both.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (2), if the violation involves an amount of less than Two Hundred Fifty Dollars (\$250.00), a person who violates this section may be found guilty of a misdemeanor punishable by imprisonment in the county jail for a term of not more than six (6) months, or by a fine of not more than One Thousand Dollars (\$1,000.00), or both, in the discretion of the court.

(c) For purposes of determining the amount of the violation, the value of all goods, property, services and other things of value obtained or attempted to be obtained by the use of an individual's identity information shall be aggregated.

(3) This section does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law committed by that person using information obtained in violation of this section.

(4) This section does not apply to a person who obtains or attempts to obtain personal identity information of another person pursuant to the discovery process of a civil action, an administrative proceeding or an arbitration proceeding.

(5) Upon the request of a person whose identifying information was appropriated, the Attorney General may provide assistance to the victim in obtaining information to correct inaccuracies or errors in the person's credit report or other identifying information; however, no legal representation shall be afforded such person by the Office of the Attorney General.

(6) A person convicted under this section or under Section 97-19-85 shall be ordered to pay restitution as provided in Section 99-37-1 et seq., and any legal interest in addition to any other fine or imprisonment which may be imposed.

SOURCES: Laws, 2003, ch. 562, § 8; Laws, 2004, ch. 526, § 1, eff from and after July 1, 2004.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

“SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable.”

Amendment Notes — The 2004 amendment rewrote (2); and added (5) and (6).

§ 97-45-21. Jurisdiction for bringing criminal action.

(1) For purposes of bringing a criminal action under this chapter, a person who causes, by any means, the access of a computer, computer system or computer network in one jurisdiction from another jurisdiction is deemed to have personally accessed the computer, computer system or computer network in each jurisdiction.

(2) For offenses under Section 97-45-19 or Section 97-19-85 which occur in multiple jurisdictions but which do not involve a computer, computer system or computer network, jurisdiction is deemed to be proper in each jurisdiction where any element of the offense occurred.

SOURCES: Laws, 2003, ch. 562, § 9; Laws, 2004, ch. 526, § 2, eff from and after July 1, 2004.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

“SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable.”

Amendment Notes — The 2004 amendment added (2).

§ 97-45-23. Investigations and prosecutions.

Prosecutions for violations under Title 97, Chapter 45, or Section 97-5-33, may be instituted by the Attorney General, his designee or the district attorney of the district in which the violation occurred, and shall be conducted in the name of the State of Mississippi. In the prosecution of any criminal proceeding in accordance with this subsection by the Attorney General, his designee, and in any proceeding before a grand jury in connection therewith, the Attorney General, or his designee, shall exercise all the powers and perform all the duties which the district attorney would otherwise be authorized or required to exercise or perform. The Attorney General, or his designee, shall have the authority to issue and serve subpoenas in the investigation of any matter which may violate Title 97, Chapter 45, or Section 97-5-33.

SOURCES: Laws, 2003, ch. 562, § 10, eff from and after July 1, 2003.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

“SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable.”

§ 97-45-25. Additional penalties for violations under this chapter.

In a proceeding for violations under Title 97, Chapter 45, Section 97-5-33 or Section 97-19-85, the court, in addition to the criminal penalties imposed under this chapter, shall assess against the defendant convicted of such violation double those reasonable costs that are expended by the Office of Attorney General, the district attorney's office, the sheriff's office or police department involved in the investigation of such case, including, but not limited to, the cost of investigators, software and equipment utilized in the investigation, together with costs associated with process service, court reporters and expert witnesses. The Attorney General or district attorney may institute and maintain proceedings in his name for enforcement of payment in the circuit court of the county of residence of the defendant and, if the defendant is a nonresident, such proceedings shall be in the Circuit Court of the First Judicial District of Hinds County, Mississippi. The Attorney General or district attorney shall distribute the property or interest assessed under this section as follows:

(a) Fifty percent (50%) shall be distributed to the unit of state or local government whose officers or employees conducted the investigation into computer fraud, identity theft or child exploitation which resulted in the arrest or arrests and prosecution. Amounts distributed to units of local government shall be used for training or enforcement purposes relating to detection, investigation or prosecution of computer and financial crimes, including computer fraud or child exploitation.

(b) Where the prosecution was maintained by the district attorney, fifty percent (50%) shall be distributed to the county in which the prosecution was instituted by the district attorney and appropriated to the district attorney for use in training or enforcement purposes relating to detection, investigation or prosecution of computer and financial crimes, including computer fraud or child exploitation. Where a prosecution was maintained by the Attorney General, fifty percent (50%) of the proceeds shall be paid or distributed into the Attorney General's Cyber Crime Central or the Attorney General's special fund to be used for consumer fraud education and investigative and enforcement operations of the Office of Consumer Protection. Where the Attorney General and the district attorney have participated jointly in any part of the proceedings, twenty-five percent (25%) of the property forfeited shall be paid to the county in which the prosecution occurred, and twenty-five percent (25%) shall be paid to the Attorney General's Cyber Crime Central or the Attorney General's special fund to be used for the purposes as stated in this paragraph.

SOURCES: Laws, 2003, ch. 562, § 11; Laws, 2004, ch. 526, § 3, eff from and after July 1, 2004.

Editor's Note — Laws, 2003, ch. 562, § 12, provides as follows:

“SECTION 12. If any provision of this act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this act, and to this end the provisions of this act are declared severable.”

Amendment Notes — The 2004 amendment substituted “Title 97, Chapter 45, Section 97-5-33 or Section 97-19-85” for “Title 97, Chapter 45, or section 97-5-33” in the first sentence of the first paragraph; inserted “identity theft” following “computer fraud” in (a); and in (b), added “or the Attorney General’s special fund to be used for consumer fraud education and investigative and enforcement operations of the Office of Consumer Protection” at the end of the second sentence, and inserted “or the Attorney General’s special fund” in the last sentence.

§ 97-45-27. Identity theft; victim authorized to expunge record of false charges accrued on account of activities of the perpetrator.

Any person whose name or other identification has been used without his consent or authorization by another person, with the use resulting in charges, an arrest record, or a conviction putatively on the record of the person whose name or other identification was appropriated, the person whose name or other identification has been used without his consent or authorization may file a petition for expunction of such charges or arrest record or conviction, or any of them, with any court which has jurisdiction over the matter.

SOURCES: Laws, 2004, ch. 526, § 4, eff from and after July 1, 2004.

§ 97-45-29. Identity theft; Attorney General authorized to issue “Identity Theft Passports” verifying that expunction order has been entered or police report has been filed; access to identity theft information.

(1) A person who has petitioned the court pursuant to Section 97-45-27 to expunge any charges, arrest record or conviction falsely entered against the person as a result of the appropriation of his name or other identifying information may submit to the Attorney General a certified copy of a court order obtained. The Office of the Attorney General may issue an “Identity Theft Passport” verifying that such order has been entered.

(2) Any person who has filed a police report alleging that the person’s name or other identification has been used without the person’s consent or authorization by another person may submit a copy of the police report to the Attorney General. The Office of the Attorney General may issue an “Identity Theft Passport” stating that such police report has been submitted.

(3) The Office of the Attorney General may provide access to identity theft information to law enforcement agencies and individuals who have submitted a police report or court order pursuant to this chapter and any other person or entity as appropriate.

SOURCES: Laws, 2004, ch. 526, § 5, eff from and after July 1, 2004.

§ 97-45-31. Using scanning device or reencoder to capture encoded information from magnetic strip on credit, debit or other payment card; definitions; penalty.

(1) For the purposes of this section, the following terms shall have the meanings ascribed to them unless the context clearly requires otherwise:

(a) “Cardholder” means any person:

(i) Named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer; or

(ii) In possession of a credit card with the consent of the person to whom the credit card was issued.

(b) “Credit card” means:

(i) Any instrument or device, whether known as a credit card, charge card, credit plate, courtesy card, identification card or any other name that is issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in consideration of an undertaking or guaranty by the issuer of the payment of a check drawn by the cardholder, on a promise to pay in part or in full therefor at a future time, whether or not all or any part of the indebtedness that is represented by the promise to make deferred payment is secured or unsecured.

(ii) A debit card, electronic benefit transfer card or other access instrument or device, other than a check that is signed by the holder or other authorized signatory on the deposit account, that draws funds from a deposit account in order to obtain money, goods, services or anything else of value.

(iii) A stored value card, smart card or other instrument or device that enables a person to obtain goods, services or anything else of value through the use of value stored on the card instrument or device.

(iv) The number that is assigned the card, instrument or device, even if the physical card, instrument or device is not used or presented.

(c) “Issuer” means any business organization, state agency or financial institution, or its duly authorized agent, that issues a credit card.

(d) “Merchant” means a person who is authorized under a written contract with a participating party to furnish money, goods, services or anything else of value on presentation of a credit card by a cardholder.

(e) “Reencoder” means an electronic device that places encoded information from the magnetic strip or stripe of a credit card onto the magnetic strip or stripe of a different credit card.

(f) “Scanning device” means a scanner, reader or other electronic device that is used to access, read, scan, obtain, memorize or store, temporarily or permanently, information that is encoded on a magnetic strip or stripe of a credit card.

(2)(a) It is unlawful for a person to use a scanning device or reencoder without the permission of the cardholder of the credit card from which the information is being scanned or reencoded with the intent to defraud the cardholder, the issuer or a merchant.

(b) A person who violates this section commits a felony punishable, upon conviction thereof, by imprisonment not to exceed five (5) years, a fine not to exceed Ten Thousand Dollars (\$10,000.00), or both.

SOURCES: Laws, 2005, ch. 511, § 4, eff from and after July 1, 2005.

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